

Stormwater Rules Get Another Facelift

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On February 15, 2016, the North Carolina Environmental Management Commission ("EMC") published proposed changes to various stormwater rules. The public hearing process is currently underway, and the public has through April 18, 2016, to comment on the proposed rules. After hearing and comments, the stormwater rules are slated to become effective on September 1, 2016.

The proposed rules are the EMC's effort to comply with the requirements the North Carolina General Assembly imposed in the 2013 Regulatory Reform Act. The Regulatory Reform Act requires the North Carolina Department of Environmental Quality ("DEQ"), along with other State agencies, to review its existing rules at least once every 10 years in accordance with a rules review and re-adoption process. The EMC, the rule-making body within DEQ, is charged with reviewing and drafting the stormwater rules. On February 15th, in response to the statutory review requirement, the EMC proposed a readoption of some rules with no or minimal changes, proposed new rules and the repeal of certain other rules, and proposed substantive changes to other rules. Some of the more significant proposals are:

- 2H .1002 - Definitions: Despite the removal of some definitions deemed unnecessary, the total number of defined terms has nearly doubled. Many terms originate from related statutes, regulations, and DEQ's Best Management Practices ("BMP") Manual that for years has been the technical source for engineered Stormwater Control Measures, now a defined term itself.
- 2H .1003 - Requirements that Apply to All Subject Projects: This rule has been rewritten and includes technical project density calculations and design requirements for low and high density projects utilizing newly defined Minimum Design Criteria ("MDC").
- 2H .1019 - Coastal Counties: This rule addresses stormwater management in the 20 coastal counties through programs including SA Waters, Freshwater ORW, and Other Coastal Waters. Former Section 2H .1005 is slated for repeal, but its requirements will be moved to this new section which also will include updated technical standards for avoiding discharges of stormwater into waters classified as SA. In this proposed rule, high density projects discharging to SA waters will be subject to a reduced design storm and new requirements for treating and discharging stormwater.
- 2H .1017 - NPDES MS4 and Urbanizing Areas - Post-Construction Stormwater Management: This rule applies to development that disturbs one acre or more of land and is subject to a local National Pollution Discharge Elimination System ("NPDES") post-construction stormwater program. It allows projects subject to newer stormwater program rules, such as the Jordan and Falls Reservoir Water Supply, Coastal, Goose Creek Watershed, and Universal stormwater management programs, to satisfy post-construction stormwater requirements. Certain requirements, such as fecal coliform reduction and vegetated setbacks, will apply to more areas than only those draining to SA waters. Also, there are certain limited exclusions and exceptions for projects meeting variance-like requirements.

- 2H .1021 – Non-Coastal County HQW and ORW: This new rule will combine the requirements from current rules 2H.1006 and .1007, both of which are slated for repeal. It will provide an option for single-family residences to qualify as low-density under certain conditions and will add a requirement for 30-foot vegetated setbacks.
- 2H .1031 – New Stormwater Technologies (NEST) Program: This new rule will provide applicants a new process to gain approval of stormwater management design and technologies not otherwise covered by the stormwater rules. Such a process was not previously available, thereby limiting approved technologies to those contained in the BMP Manual. Under this new rule, the process will allow approval without site-specific monitoring requirements.
- 2H .1043 and .1044 – Fast Track Permitting Process: Together, these new rules will create a two-step fast-track permitting process: submission of an application for the initial Authorization to Construct; submission of an "As-Built Package" (a detailed description of what was actually built); site inspection by DEQ; and, the issuance of a final permit, possibly with special conditions.
- 2H .1050 through .1062 – MDC for all Stormwater Control Measures: These new rules will compile all minimum design criteria approved by DEQ, including infiltration systems, bioretention cells, wet ponds, stormwater wetlands, permeable pavement, sand filters, rainwater harvesting, green roofs, level spreader-filter strips, disconnected impervious surfaces, treatment swales, dry ponds, and those MDC historically addressed in rule 2H .1008.

While some changes to the stormwater rules are innocuous, the overall scope of changes will have a large impact on development activities. Project success in the future will require timely conversations with consultants and counsel with a keen awareness of the current status of the rule changes and their likely implementation timeline.

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