

**GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2003**

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SENATE BILL 1210*

Short Title: Phase II Stormwater Management-1. (Public)

Sponsors: Senators Clodfelter, Albertson, Dorsett, Kinnaird; Hartsell, Hunt, Lucas, and Moore.

Referred to: Agriculture/Environment/Natural Resources.

May 20, 2004

A BILL TO BE ENTITLED

1 AN ACT TO PROVIDE FOR IMPLEMENTATION OF FEDERAL PHASE II
2 STORMWATER MANAGEMENT REQUIREMENTS, AS RECOMMENDED BY
3 THE ENVIRONMENTAL REVIEW COMMISSION.
4

5 The General Assembly of North Carolina enacts:

6 **SECTION 1.** Phase II Stormwater Permit Application and Standards. – An
7 application for a Phase II National Pollutant Discharge Elimination System (NPDES)
8 permit for stormwater management submitted by an owner or operator of a small
9 municipal separate storm sewer system (MS4) located in whole or in part within an
10 urbanized area as designated by the 1990 or 2000 census by the Bureau of the Census
11 shall be deemed timely received if the application was submitted to the Department in
12 accordance with the application schedule set out in Section 6 of the temporary rule
13 adopted by the Environmental Management Commission on 10 October 2002. To
14 obtain a Phase II National Pollutant Discharge Elimination System (NPDES) permit for
15 stormwater management under this Section, an applicant shall develop, implement, and
16 enforce a stormwater management plan approved by the Department that satisfies the
17 six minimum control measures required by 40 Code of Federal Regulations § 122.34(b)
18 (1 July 2003 Edition). The evaluation of the postconstruction stormwater management
19 measures required by 40 Code of Federal Regulations § 122.34(b)(5) (1 July 2003
20 Edition) shall be conducted as provided in Section 10 of the temporary rule adopted by
21 the Environmental Management Commission on 10 October 2002. A municipality with
22 a population of less than 1,000, including a municipality designated by the 1990 or 2000
23 census, is not required to obtain a Phase II National Pollutant Discharge Elimination
24 System (NPDES) permit for stormwater management unless the municipality is shown
25 to be contributing to an impairment of State waters, as determined under the
26 requirements of § 33 U.S.C. 1313(d).

27 **SECTION 2.** New Development. – New development or redevelopment in
28 any area designated as an urbanized area under the 1990 or 2000 census by the Bureau

1 of the Census or designated under procedures established in Section 7 of this act, and
2 located in a local planning jurisdiction that does not administer either a Phase I or Phase
3 II National Pollutant Discharge Elimination System (NPDES) permit for stormwater
4 management or a local stormwater management program approved pursuant to Section
5 5 of this act shall comply with the standards set out in Section 10 of the temporary rule
6 adopted by the Environmental Management Commission on 10 October 2002. The
7 Department shall administer and enforce these standards in these areas. A public entity
8 may request that the Department delegate administration and enforcement of the
9 stormwater management program to the public entity as provided in Section 5 of this
10 act.

11 **SECTION 3.** Coordination of Phase II and other Stormwater Management
12 Programs. – In any circumstance where any stormwater control requirement under a
13 Phase II National Pollutant Discharge Elimination System (NPDES) permit for
14 stormwater management conflicts or overlaps with any stormwater control requirement
15 under any other water quality program, the more stringent requirement shall apply. The
16 Secretary of Environment and Natural Resources or the Secretary's designee shall
17 resolve any dispute as to whether there is a conflict or overlap between or among
18 stormwater management requirements and shall determine which requirement shall be
19 deemed the most stringent.

20 **SECTION 4.** General Permit. – After the Department has issued a Phase II
21 National Pollutant Discharge Elimination System (NPDES) general permit for
22 stormwater management, a public entity that has applied for a permit under Section 1 of
23 this act may submit a notice of intent to be covered under the general permit to the
24 Department. The Department shall treat an application for a permit under Section 1 of
25 this act as an application for an individual permit unless the applicant submits a notice
26 of intent to be covered under a general permit under this Section.

27 **SECTION 5.** Delegation. – A public entity that does not administer a Phase
28 II National Pollutant Discharge Elimination System (NPDES) permit for stormwater
29 management throughout the entirety of its planning jurisdiction and whose planning
30 jurisdiction includes an area designated as an urbanized area under the 1990 or 2000
31 census by the Bureau of the Census or a local government designated pursuant to
32 Section 7 of this act may submit a stormwater management program for its jurisdiction
33 or a portion of its jurisdiction to the Department for approval. To this end public
34 entities are authorized to adopt ordinances and regulations necessary to establish and
35 enforce stormwater management programs. Public entities are authorized to create or
36 designate agencies or subdivisions to administer and enforce the programs. An
37 ordinance or regulation adopted by a public entity shall at least meet and may exceed
38 the minimum requirements of this act and the six minimum control measures required
39 by 40 Code of Federal Regulations § 122.34(b) (1 July 2003 Edition). Two or more
40 public entities are authorized to establish a joint program and to enter into any
41 agreements that are necessary for the proper administration and enforcement of the
42 program. The resolutions establishing any joint program must be duly recorded in the
43 minutes of the governing body of each public entity participating in the program, and a
44 certified copy of each resolution must be filed with the Department. The Department

1 shall review each program submitted and within 90 days of receipt thereof shall notify
2 the public entity submitting the program that it has been approved, approved with
3 modifications, or disapproved. The Department shall only approve a program upon
4 determining that its standards equal or exceed those of this act and the six minimum
5 control measures required by 40 Code of Federal Regulations § 122.34(b) (1 July 2003
6 Edition). If the Department determines that any public entity is failing to administer or
7 enforce an approved stormwater management program, it shall notify the public entity
8 in writing and shall specify the deficiencies of administration and enforcement. If the
9 public entity has not taken corrective action within 30 days of receipt of notification
10 from the Department, the Department shall assume administration and enforcement of
11 the program until such time as the public entity indicates its willingness and ability to
12 resume administration and enforcement of the program.

13 **SECTION 6.** Phase II Stormwater Implementation Deadlines. –

- 14 (1) For a Phase II National Pollutant Discharge Elimination System
15 (NPDES) permit for stormwater management application submitted by
16 an owner or operator of a small municipal separate storm sewer system
17 (MS4) located in whole or in part within an urbanized area as
18 designated by the 1990 census by the Bureau of the Census, the
19 Department shall send a draft permit decision to public notice by 1
20 November 2004.
- 21 (2) For a Phase II National Pollutant Discharge Elimination System
22 (NPDES) permit for stormwater management application submitted by
23 an owner or operator of a small municipal separate storm sewer system
24 (MS4) located in whole or in part within an urbanized area as
25 designated by the 2000 census by the Bureau of the Census, the
26 Department shall send a draft permit decision to public notice by 1
27 May 2005.
- 28 (3) A public entity shall adopt postconstruction stormwater management
29 measures that become effective within 24 months after the date on
30 which a Phase II National Pollutant Discharge Elimination System
31 (NPDES) permit for stormwater management is issued.

32 **SECTION 7.** Designation. – A public entity may be designated as a
33 regulated entity through federal designation, through a State designation process, or
34 under a total maximum daily load (TMDL) implementation plan as follows:

- 35 (1) Federal Designation. – A public entity that owns or operates a small
36 municipal separate storm sewer system (MS4) may be designated as a
37 regulated entity pursuant to 40 Code of Federal Regulation § 122.32 (1
38 July Edition).
- 39 (2) State Designation Process. – The Department shall designate a public
40 entity as a regulated entity as provided in this subdivision.
- 41 a. General Criteria. – The Department shall designate a public
42 entity as a regulated entity based on the public entity's potential
43 to adversely impact water quality. An adverse impact on water
44 quality includes any activity that has a significant adverse

- 1 habitat or biological impact or that violates water quality
2 standards, including, but not limited to, impairment of
3 designated uses.
- 4 b. Designation Schedule. – The Department shall implement the
5 designation process in accordance with the schedule for review
6 and revision of basinwide water quality management plans as
7 provided in G.S. 143-215.8B(c).
- 8 c. Identification of Candidate Regulated Entities. – The
9 Department shall identify public entities as candidates for
10 designation as a regulated entity based on the following criteria:
- 11 1. Municipalities. – A municipality shall be identified as a
12 candidate for designation as a regulated entity if its total
13 population is greater than 10,000 and its population
14 density is at least 1,000 people per square mile.
- 15 2. Counties. – A county shall be identified as a candidate
16 for designation as a regulated entity if the county
17 municipal and nonmunicipal total population is greater
18 than 45,000 persons.
- 19 3. Other public entities. – A public entity shall be identified
20 as a candidate for designation as a regulated entity if it is
21 a municipality located within a designated county or is
22 an owner or operator of a municipal separate storm
23 sewer system (MS4).
- 24 d. Notice and Comment on Candidacy. – The Department shall
25 notify each public entity identified as a candidate for
26 designation as a regulated entity. After notification of the public
27 entities, the Department shall publish a list of public entities
28 within a river basin identified as candidates for designation as
29 regulated entities. The Department shall accept public comment
30 on the proposed designation of a public entity as a regulated
31 entity for a period of not less than 30 days.
- 32 e. Designation of Regulated Entities. – After review of the
33 designation criteria and review of public comments received,
34 the Department shall make a determination on designation for
35 each of the candidates. The Department shall designate a
36 candidate public entity as a regulated public entity if the
37 Department determines that the public entity either:
- 38 1. Discharges or has the potential to discharge stormwater
39 to sensitive receiving waters in an area with: (i) an actual
40 population growth rate that exceeds 1.3 times the State
41 population growth rate for the previous 10 years; (ii) a
42 projected population growth rate that exceeds 1.3 times
43 the projected State population growth rate for the next 10
44 years; or (iii) an actual population increase that exceeds

1 fifteen percent (15%) of its previous population for the
2 previous two years.

3 2. Provides a significant contribution of pollutants to
4 sensitive receiving waters, taking into account the
5 effectiveness of other applicable water quality protection
6 programs. To determine the effectiveness of other
7 applicable water quality protection programs, the
8 Department shall consider the water quality of the
9 receiving waters and whether the waters support the uses
10 set out in subsections (c), (d), and (e) of 15A NCAC 2B
11 .0101 (Procedures for Assignment of Water Quality
12 Standards – General Procedures) and the specific
13 classification of the waters set out in 15A NCAC 2B
14 .0300, et seq. (Assignment of Stream Classifications).

15 f. Notice of Designation. – The Department shall provide written
16 notice to each public entity of its designation determination. For
17 a public entity designated as a regulated entity, the notice shall
18 state the basis for the designation and the date on which the
19 Phase II National Pollutant Discharge Elimination System
20 (NPDES) permit for stormwater management must be
21 submitted to the Department.

22 (3) Designation Under a Total Maximum Daily Load (TMDL)
23 Implementation Plan. – The Department shall designate an owner or
24 operator of a small municipal separate storm sewer system (MS4) as a
25 regulated entity if the municipal separate storm sewer system (MS4) is
26 specifically listed by name as a source of pollutants for urban
27 stormwater in a total maximum daily load (TMDL) implementation
28 plan developed in accordance with subsections (d) and (e) of 33 U.S.C.
29 § 1313.

30 **SECTION 8.** Petition Process. – A petition may be submitted to the Department to
31 request that an owner or operator of a municipal separate storm sewer system (MS4) or
32 a person who discharges stormwater be required to obtain a Phase II National Pollutant
33 Discharge Elimination System (NPDES) permit for stormwater management as follows:

34 (1) Connected Discharge Petition. – An owner or operator of a permitted
35 municipal separate storm sewer system (MS4) may submit a petition to
36 the Department to request that a person who discharges into the
37 permitted municipal separate storm sewer system (MS4) be required to
38 obtain a separate Phase II National Pollutant Discharge Elimination
39 System (NPDES) permit for stormwater management. The Department
40 shall grant the petition and require the person to obtain a separate
41 Phase II National Pollutant Discharge Elimination System (NPDES)
42 permit for stormwater management if the petitioner shows that the
43 person's discharge flows or will flow into the permitted municipal
44 separate storm sewer system (MS4).

1 (2) Adverse Impact Petition. – Any person may submit a petition to the
2 Department to request that an owner or operator of a municipal
3 separate storm sewer system (MS4) or a person who discharges
4 stormwater be required to obtain a Phase II National Pollutant
5 Discharge Elimination System (NPDES) permit for stormwater
6 management.

7 a. Petition Review. – The Department shall grant the petition and
8 require the owner or operator of the municipal separate storm
9 sewer system (MS4) or the person who discharges stormwater
10 to obtain a Phase II National Pollutant Discharge Elimination
11 System (NPDES) permit for stormwater management if the
12 petitioner shows any of the following:

13 1. The municipal separate storm sewer system (MS4) or the
14 discharge discharges or has the potential to discharge
15 stormwater to sensitive receiving waters in an area with:
16 (i) an actual population growth rate that exceeds 1.3
17 times the State population growth rate for the previous
18 10 years; (ii) a projected population growth rate that
19 exceeds 1.3 times the projected State population growth
20 rate for the next 10 years; or (iii) an actual population
21 increase that exceeds fifteen percent (15%) of its
22 previous population for the previous two years.

23 2. The municipal separate storm sewer system (MS4) or the
24 discharge provides a significant contribution of
25 pollutants to sensitive receiving waters.

26 3. The municipal separate storm sewer system (MS4) or the
27 discharge is specifically listed by name as a source of
28 pollutants for urban stormwater in a total maximum daily
29 load (TMDL) implementation plan developed in
30 accordance with subsections (d) and (e) of 33 U.S.C. §
31 1313.

32 b. Types of Evidence for Required Showing. – Petitioners may
33 make the required showing by providing to the Department the
34 following information:

35 1. Monitoring data that includes, at a minimum,
36 representative sampling of the municipal separate storm
37 sewer system (MS4) or discharge and information
38 describing how the sampling is representative. The
39 petitioner must notify the owner or operator of the
40 municipal separate storm sewer system (MS4) or the
41 person who discharges stormwater of its intent to
42 conduct monitoring activities prior to conducting those
43 activities.

- 1 2. Scientific or technical literature that supports the
2 sampling methods.
- 3 3. Study and technical information on land uses in the
4 drainage area and the characteristics of stormwater
5 runoff from these land uses.
- 6 4. A map that delineates the drainage area of the petitioned
7 entity; the location of sampling stations; the location of
8 the stormwater outfalls in the adjacent area of the
9 sampling locations; general features, including but not
10 limited to, surface waters, major roads, and political
11 boundaries; and areas of concern regarding water
12 quality.
- 13 5. For stormwater discharges to impaired waters,
14 documentation that the receiving waters are impaired or
15 degraded and monitoring data that demonstrates that the
16 municipal separate storm sewer system (MS4) or
17 discharge contributes pollutants for which the waters are
18 impaired or degraded.
- 19 6. For stormwater discharges to nonimpaired waters,
20 monitoring data that demonstrates that the owner or
21 operator of the municipal separate storm sewer system
22 (MS4) or the person who discharges stormwater is a
23 significant contributor of pollutants to the receiving
24 waters.
- 25 c. Water Quality Protection Program Offset. – If the petitioner
26 makes the required showing, the Department shall review the
27 effectiveness of any existing water quality protection programs
28 that may offset the need to obtain a Phase II National Pollutant
29 Discharge Elimination System (NPDES) permit for stormwater
30 management. To determine the effectiveness of other applicable
31 water quality protection programs, the Department shall
32 consider the water quality of the receiving waters and whether
33 the waters support the uses set out in subsections (c), (d), and
34 (e) of 15A NCAC 2B .0101 (Procedures for Assignment of
35 Water Quality Standards – General Procedures) and the specific
36 classification of the waters set out in 15A NCAC 2B .0300, et
37 seq. (Assignment of Stream Classifications).
- 38 (3) Petition Administration. – The Department shall process petitions in
39 the following manner:
 - 40 a. The Department shall only accept petitions submitted on
41 Department forms.
 - 42 b. A separate petition must be filed for each municipal separate
43 storm sewer system (MS4) or discharge.

- 1 c. The Department shall evaluate only complete petitions. The
2 Department shall make a determination on the completeness of
3 a petition within 90 days of receipt of the petition or it shall be
4 deemed complete. If the Department requests additional
5 information, the petitioner may submit additional information
6 and the Department will determine, within 90 days of receipt of
7 the additional information, whether the information completes
8 the petition.
- 9 d. The petitioner shall provide a copy of the petition and a copy of
10 any subsequent additional information submitted to the
11 Department to the chief administrative officer of the municipal
12 separate storm sewer system (MS4) or the person in control of
13 the discharge within 48 hours of each submittal.
- 14 e. The Department shall post all petitions on the Division Web site
15 and maintain copies available for inspection at the Division's
16 office. The Department shall accept and consider public
17 comment for at least 30 days from the date of posting.
- 18 f. The Department may hold a public hearing on a petition and
19 shall hold a public hearing on a petition if it receives a written
20 request for a public hearing within the public comment period
21 and the Department determines that there is a significant public
22 interest in holding a public hearing. The Department's
23 determination to hold a public hearing shall be made no less
24 than 15 days after the close of the public comment period. The
25 Department shall schedule the hearing to be held within 45 days
26 of the close of the initial public comment period and shall
27 accept and consider additional public comment through the date
28 of the hearing.
- 29 g. An additional petition for the same municipal separate storm
30 sewer system (MS4) or discharge received during the public
31 comment period shall be considered as comment on the original
32 petition. An additional petition for the same municipal separate
33 storm sewer system (MS4) or discharge received after the
34 public comment period ends and before the final determination
35 is made shall be considered incomplete and held pending a final
36 determination on the original petition.
- 37 1. If the Department determines that the owner or operator
38 of the municipal separate storm sewer system (MS4) or
39 the person who discharges stormwater is required to
40 obtain a Phase II National Pollutant Discharge
41 Elimination System (NPDES) permit for stormwater
42 management, any petitions for that municipal separate
43 storm sewer system (MS4) or discharge that were held
44 shall be considered in the development of the Phase II

1 National Pollutant Discharge Elimination System
2 (NPDES) permit for stormwater management.

- 3 2. If the Department determines that the owner or operator
4 of the municipal separate storm sewer system (MS4) or
5 the person who discharges stormwater is not required to
6 obtain a Phase II National Pollutant Discharge
7 Elimination System (NPDES) permit for stormwater
8 management, an additional petition for the municipal
9 separate storm sewer system (MS4) or discharge must
10 present new information or demonstrate that conditions
11 have changed in order to be considered. If new
12 information is not provided, the petition shall be returned
13 as substantially incomplete.

- 14 h. The Department shall evaluate a petition within 180 days of the
15 date on which it is determined to be complete. If the
16 Department determines that the owner or operator of the
17 municipal separate storm sewer system (MS4) or the person
18 who discharges stormwater is required to obtain a Phase II
19 National Pollutant Discharge Elimination System (NPDES)
20 permit for stormwater management, the Department shall notify
21 the owner or operator of the municipal separate storm sewer
22 system (MS4) or the person who discharges stormwater within
23 30 days of the requirement to obtain the permit. The owner or
24 operator of the municipal separate storm sewer system (MS4) or
25 the person who discharges stormwater must submit its
26 application for a Phase II National Pollutant Discharge
27 Elimination System (NPDES) permit for stormwater
28 management within 18 months of the date of notification.

29 **SECTION 9.** Model Ordinance. – Pursuant to G.S. 143-214.7(c), the
30 Environmental Management Commission shall develop a model ordinance in
31 cooperation with local governments and other interested parties that shall allow the use
32 of both structural and nonstructural best management practices adequate to meet the
33 standards. The design manual and model ordinance shall be completed by 1 October
34 2005.

35 **SECTION 10.** Design Manual. – Consistent with G.S. 150B-2(8a)h., the
36 Division, in consultation with the Division of Land Resources, Division of Soil and
37 Water Conservation, and North Carolina State University, shall develop a design
38 manual to provide assistance in determining which controls are best suited to the unique
39 characteristics of the permittee.

40 **SECTION 11.** Definitions. – The following definitions apply to this act:

- 41 (1) The definitions set out in 40 Code of Federal Regulations § 122.2
42 (Definitions) and § 122.26(b) (Storm Water Discharges) (1 July 2003
43 Edition).
44 (2) The definitions set out in G.S. 143-212 and G.S. 143-213.

- 1 (3) The definitions set out in 15A NCAC 2H .0103 (Definitions of
2 Terms).
- 3 (4) "Built-upon area" means that portion of a development project that is
4 covered by impervious or partially impervious surface including, but
5 not limited to, buildings; pavement and gravel areas such as roads,
6 parking lots, and paths; and recreation facilities such as tennis courts.
7 "Built-upon area" does not include a wooden slatted deck or the water
8 area of a swimming pool.
- 9 (5) "Department" means the Department of Environment and Natural
10 Resources.
- 11 (6) "Division" means the Division of Water Quality in the Department.
- 12 (7) "Population density" means the population of an area divided by the
13 area's geographical measure in square miles, equal to persons per
14 square mile. For the purposes of this definition, the population shall
15 equal the sum of the permanent and seasonal populations as
16 determined by the Department or calculated by the Department from a
17 measure of housing unit density.
- 18 (8) "Public entity" means the United States; the State; or a city, village,
19 township, county, school district, public college or university, single
20 purpose governmental agency; or any other governing body that is
21 created by federal or State law.
- 22 (9) "Redevelopment" means any rebuilding activity other than a
23 rebuilding activity that results in no net increase in built-upon area and
24 provides equal or greater stormwater control than the previous
25 development.
- 26 (10) "Regulated entity" means any public entity that must obtain a Phase II
27 National Pollutant Discharge Elimination System (NPDES) permit for
28 stormwater management.
- 29 (11) "Sensitive receiving waters" means any of the following:
30 a. Waters that are classified as high quality, outstanding resource,
31 shellfish, trout, or nutrient sensitive waters in accordance with
32 subsections (d) and (e) of 15A NCAC 2B .0101 (Procedures for
33 Assignment of Water Quality Standards – General Procedures).
- 34 b. Waters that are occupied by or designated as critical habitat for
35 aquatic animal species that are listed as threatened or
36 endangered by the United States Fish and Wildlife Service or
37 the National Marine Fisheries Service under the provisions of
38 the Endangered Species Act of 1973 (Pub. L. No. 93-205; 87
39 Stat. 884; 16 U.S.C. §§, 1531 et seq.), as amended.
- 40 c. Waters for which the designated use, as described by the
41 classification system set out in subsections (c), (d), and (e) of
42 15A NCAC 2B .0101 (Procedures for Assignment of Water
43 Quality Standards – General Procedures), have been determined

1 to be impaired in accordance with the requirements of
2 subsection (d) of 33 U.S.C. § 1313.

3 (12) "Significant contributor of pollutants" means a municipal separate
4 storm sewer system (MS4) or a discharge that contributes to the
5 pollutant loading of a water body or that destabilizes the physical
6 structure of a water body such that the contribution to pollutant loading
7 or the destabilization may reasonably be expected to adversely affect
8 the quality and uses of the water body. Uses of a water body shall be
9 determined pursuant to 15A NCAC 2B .0211 through 15A NCAC 2B
10 .0222 (Classifications and Water Quality Standards Applicable to
11 Surface Waters and Wetlands of North Carolina) and 15A NCAC 2B
12 .0300, et seq. (Assignment of Stream Classifications).

13 (13) "Total maximum daily load (TMDL) implementation plan" means a
14 written, quantitative plan and analysis for attaining and maintaining
15 water quality standards in all seasons for a specific water body and
16 pollutant.

17 (14) "Total population" means the combined permanent and seasonal
18 population of an area as determined from the most recent data
19 available from local, State, or federal sources.

20 **SECTION 12.** Construction of Act. –

21 (1) Nothing in this act shall be construed to limit the authority of the
22 Environmental Management Commission or any unit of local
23 government to adopt stormwater management requirements that
24 exceed the requirements of this act.

25 (2) This act shall not be construed to affect pending litigation.

26 **SECTION 13.** Section 2 of this act becomes effective 1 July 2006. All other
27 sections of this act become effective when the act becomes law.