

# STORM-WATER RULES: STILL MUDDY REGULATORY WATERS?

The U.S. Environmental Protection Agency began the National Pollutant Discharge Elimination System in 1972 under the authority of the Clean Water Act. Until the late 1980s, EPA focused the program on regulating point-source discharges of pollutants — those in which a discrete point of discharge can be determined. In the late '80s, Congress amended the act to provide for regulation of nonpoint-source discharges of pollutants such as storm-water runoff. These regulations were to be rolled out in two phases.

## Phase I regulations

In the early '90s, EPA promulgated Phase I storm-water regulations, which applied the federal program to certain industrial activities, including construction disturbing more than five acres, and to "MS4s," as many refer to municipal separate-storm-sewer systems, serving more than 100,000 people. At the time, only six systems in North Carolina were affected.

## Phase II regulations

In 1999, EPA issued the Phase II regulations, which applied the program to smaller construction

**Beginning in July, there will be numerous new storm-water permitting rules in the state.**

sites — those disturbing more than one but less than five acres — and to smaller municipal separate-storm-sewer systems — those serving fewer than 100,000 people — that are within an urban area as determined by the most recent census. A number of North Carolina municipalities and counties operate systems that

fall under the EPA Phase II regulations. Those regulations require state governments to implement the program at the local level. The N.C. Environmental Management Commission initially issued temporary rules to implement Phase II in North Carolina, but the state's Rules Review Committee rejected those regulations in 2004. Subsequently, the General Assembly enacted guidelines in July 2004 for the commission's implementation of Phase II regulations in the state, then ultimately revoked those guidelines and issued its own regulations in July 2006.

The 2006 legislation, however, not only enacts Phase II as required by the EPA but also applies it to additional counties and municipalities. In addition, it applies further regulations to property in areas where storm-water discharge may affect "sensitive receiving waters" or "shellfish-resource waters." The General Assembly essentially created a dual federal-state system for Phase II permitting and regulation in the state whereby a particular property can be subject to Phase II regulations either by automatic designation under the EPA rules or by state designation under the 2006 legislation. Whether a county or municipality is subject to Phase II regulations by automatic designation or by state designation has an impact on the permitting process that a landowner must go through, including what entity is responsible for implementing the program and what is required in order to obtain a permit.

## Implementation of Phase II regulations

The N.C. Division of Water Quality began issuing Phase II permits to noncoastal counties and municipalities automatically designated by the EPA regulations about two years ago. These entities must run their own Phase II permitting programs, either by adopting a model ordinance or adopting other ordinances approved by the division. It anticipates that these

local Phase II programs will become operational between July and December 2007. Coastal counties and municipalities, however, only received their Phase II permits from the division in February. These counties and municipalities will not go "live" with their own Phase II programs for two years or so but, in the meantime, the division will administer the program for them.

For counties and municipalities that are not automatically designated for inclusion in Phase II by EPA regulations but are "state designated," the division will begin administering a state-run Phase II local permitting program in July. According to the division, this state-run local Phase II program should be fairly transparent to landowners and developers, as compliance with existing nutrient-sensitive-waters management regulations, water-supply watershed and other rules should also entail compliance with this state-run Phase II program. To further complicate matters, however, entities that are state-designated for Phase II coverage may request to be treated as an entity automatically designated by EPA and run their own local permitting programs rather than having the division administer it.

## Result of Phase II implementation for local governments, landowners and developers

The end result for counties, municipalities, developers and landowners in North Carolina is that beginning in July, there will be numerous new storm-water permitting requirements in large portions of the state. Furthermore, many places that have never had storm-water permitting regulations will now have such programs, which undoubtedly will create growing pains for government and residents alike. Compound this with the new regulations regarding shellfish and other sensitive waters and other division programs that may apply to a particular property and developers may understandably have difficulty determining what programs, authorities and regulations apply to any particular project. Moreover, with new permitting and enforcement requirements come new fees and more paperwork for developers.

There may be a silver lining around these impending storm clouds, however. The Division of Water Quality is working with the geographic-information-system division of the N.C. Department

of Environment and Natural Resources to create an online map service to clarify the regulatory hoops applicable to a particular property. This interactive Web site should allow a user to click on a specific parcel of land and learn which of the 21 Division of



**Steve Parascandola  
Matt Rhoad**



Steve Parascandola is a partner with Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan LLP in Raleigh. He has experience in environmental, health and safety law and litigation, including permitting, regulatory compliance and transactional matters. He has practiced in New York City and with the N.C. Department of Justice's Environmental Protection division. He earned a bachelor's from Eckerd College and a law degree from Stetson University. Matt Rhoad is a member of the firm's commercial real estate practice group and has experience in land use, commercial real estate, right-of-way and property acquisitions and construction. He earned a bachelor's from Wake Forest University and a law degree from UNC Chapel Hill.

Water Quality storm-water programs apply, as well as which authority needs to be contacted for permitting purposes. Given the morass of overlapping and intertwined programs, this tool is clearly welcomed and long overdue, and, if it performs as billed, should allow landowners and developers to determine what regulations apply, which authority is responsible for implementation and permitting under those regulations, and whom to contact.

Thus, while Phase II is designed to help prevent pollution and sedimentation in our rivers and streams, it may have unintentionally resulted in muddied regulatory waters for landowners, developers and many local governments. It is hoped that the passage of time and the online initiative will help clear those regulatory waters while also cleaning our streams and rivers.