



Memorandum

Date: April 4, 2016

To: Phase I and II MS4s

From: Bob Martineau, Commissioner

Re: Senate Bill 1830/House Bill 1892

A handwritten signature in blue ink, appearing to read "Bob Martineau", is written over the "From:" line.

We are writing to you in regards to Senate Bill 1830/House Bill 1892 that is currently poised to pass in the Tennessee General Assembly. We have received many questions from MS4 jurisdictions about the impact of this bill. The Tennessee Department of Environment and Conservation is opposed to the legislation, and we want to make sure local entities understand how it may affect them before it goes for final vote this Thursday, April 7. If the bill passes as written, it will take effect immediately and may have a chilling effect on the ability of MS4 jurisdictions to issue development permits and open jurisdictions up to legal challenges. If you have reviewed the legislation and also have concerns, we encourage you to alert your state representative and ask them to oppose the bill. TDEC is happy to answer any questions your state representative may have.

There is a lot of uncertainty as to how the legislation will affect local jurisdictions. It impacts both Phase I and Phase II MS4 communities. The 93 Phase II communities will see the effects more quickly because the new Phase II MS4 General Permit is scheduled to be finalized this summer.

The bill prohibits local post construction stormwater control measures that exceed federal requirements unless these are adopted by resolution or ordinance, with 30 days prior notice to the local legislative body. The bill provides no protection for MS4 jurisdictions that have adopted post construction stormwater measures that arguably may exceed federal law by a legal mechanism other than ordinance or resolution. The bill grandfathers pre-existing post-construction ordinances/resolutions, but only until your MS4 jurisdiction seeks coverage under a new NPDES permit.

The bill would require all Phase II jurisdictions to codify any existing post-construction stormwater requirements that exceed federal law by ordinance or resolution by the time you seek coverage under the new permit.

The draft Phase II General Permit requires a notice of intent to seek coverage within 90 days of issuance. We anticipate issuing the new permit by July 1, 2016, so ordinances and resolutions would need to be in place by the end of September 2016 under the bill. The two additional years TDEC offered in the draft permit did not envision local governments having to immediately comply with SB1830/HB1892 in order to maintain their post construction controls, and will therefore have to be revisited if the bill becomes law.

Phase II jurisdictions may opt to have an individual permit, but must apply for that permit by the NOI submittal deadline. Because this involves seeking coverage under a new permit, the ordinance or resolution would need to have been adopted prior to submitting this application (i.e., by the end of September 2016) in order to be in the best position to survive a legal challenge based on SB1830/HB1892 if they become law.

TDEC expects Phase I jurisdictions to comply with their current permits. The provisions of the bill go into effect when Phase I jurisdictions apply for a new permit after the effective date of the legislation and when the permit is modified or reissued. The Division of Water Resources will begin redrafting Phase I individual permits once the General Permit is finalized, in chronological order of expiration date or for those not expired, after submission of the application.

While the legislation is somewhat unclear, one possible interpretation is that it requires local government entities to create a list of control measures related to post construction stormwater that go beyond the minimum requirements of federal law. Federal law requires permittees to implement post construction stormwater controls to reduce the discharge of pollutants to the "maximum extent practicable." In the general permit currently on public notice, TDEC has attempted to define what maximum extent practicable means in a way that recognizes the need for flexibility in implementing post construction stormwater controls. If the final permit is appealed, it will create additional uncertainty for local jurisdictions.

Since the trigger for these local government actions is, "when a local government entity seeks coverage under any future version of the NPDES permit..." these local government actions seem to be required anytime TDEC reissues a permit that imposes more stringent post-construction stormwater requirements. NPDES permits are typically on a five-year permit cycle.

Senate Bill 1830 has passed. House Bill 1892 is up for final vote Thursday, April 7. The House sponsor has indicated in committee that he plans to conform to the Senate version, which puts additional requirements on local governments. A copy of the Senate bill is included for your review.

We wish we could be more specific as to the broad implications and consequences of the legislation. We commit to remaining in contact with your local stormwater managers as to what may be required as we know more. Feel free to contact Tisha Calabrese Benton at (615) 532-0789 or tisha.calabrese@tn.gov with your feedback and questions.

Senate Energy, Agriculture and Natural Resources Committee 1

Amendment No. 1 to SB1830

**Southerland
Signature of Sponsor**

AMEND Senate Bill No. 1830

House Bill No. 1892*

by deleting all of the language after the enacting clause and substituting the following:

SECTION 1. Tennessee Code Annotated, Section 69-3-108, is amended by adding the following as new, appropriately designated subsections: .

(s) Any national pollutant discharge elimination system (NPDES) permit issued pursuant to this section to a local governmental entity administering a municipal separate storm sewer system shall not impose post-construction stormwater requirements, except to the extent necessary to comply with the minimum requirements of federal law. Any such NPDES permit that includes numeric or narrative effluent limitations to manage post-construction stormwater shall allow the local governmental entity administering a municipal separate storm sewer system discretion in selecting measures to meet any such effluent limitations.

(t) This state shall not require any local governmental entity that administers a municipal separate storm sewer system under a national pollutant discharge elimination system (NPDES) permit issued pursuant to this section to impose control measures for post-construction stormwater that exceed the minimum requirements of federal law. Any local governmental entity that adopts control measures that exceed the minimum requirements of federal law must do so by ordinance or resolution, as appropriate, by the local legislative body upon a majority vote. This subsection (t) shall not apply to any ordinance or resolution in effect on the effective date of this act, but shall not preclude a local governmental entity that administers a municipal separate storm sewer system from making changes consistent with subsection (s) and this subsection (t). When a

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local governmental entity seeks coverage under any future version of the NPDES permit after the effective date of this act, such ordinance or resolution shall comply with subsection (s) and this subsection (t). The local government entity shall provide in writing the control measures that exceed federal minimum requirements to the local legislative body at least thirty (30) days in advance of a vote in order to provide for a public comment period.

SECTION 2. If any provision of this act or its application to any person or circumstance is held invalid, then the invalidity shall not affect other provisions or applications of the act that can be given effect without the invalid provision or application, and to that end the provisions of this act shall be severable.

SECTION 3. This act shall take effect upon becoming a law, the public welfare requiring it.