

HOUSE BILL REPORT

ESHB 1689

As Passed House:

March 19, 2003

Title: An act relating to implementing the federal permit requirements for municipal separate storm sewer system permits.

Brief Description: Implementing the federal permit requirements for municipal separate storm sewer system permits.

Sponsors: By House Committee on Agriculture & Natural Resources (originally sponsored by Representatives Linville, Schoesler, Cooper, Chandler, Holmquist and Hatfield).

Brief History:

Committee Activity:

Agriculture & Natural Resources: 2/18/03, 3/4/03 [DPS].

Floor Activity:

Passed House: 3/19/03, 98-0.

Brief Summary of Engrossed Substitute Bill

- Requires the Department of Ecology to establish a western Washington permit development advisory group to assist in drafting Phase II municipal storm sewer permits for western Washington and to use the existing storm water advisory group in eastern Washington for drafting Phase II permits for eastern Washington.
- Includes a list of issues the advisory groups must consider and on which they must make recommendations.
- Adds municipal storm sewer permit standards.
- Specifies legislative findings and intent regarding the development and implementation of Phase II permits.

HOUSE COMMITTEE ON AGRICULTURE & NATURAL RESOURCES

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 11 members: Representatives Linville, Chair; Rockefeller, Vice Chair; Schoesler, Ranking Minority Member; Chandler, Eickmeyer, Grant, Hunt, McDermott, Orcutt, Quall and Sump.

Minority Report: Do not pass. Signed by 2 members: Representatives Holmquist, Assistant Ranking Minority Member; and Kristiansen, Assistant Ranking Minority Member.

Staff: Caroleen Dineen (786-7156).

Background:

A combination of federal, state, and local laws govern storm water management in Washington. The water quality implications of storm water runoff are addressed in the federal Clean Water Act. State water pollution control statutes also regulate water quality aspects of storm water management. Local governments have responsibility under federal and state law to manage storm water and authority under state law to construct and operate storm water management systems.

Federal Water Pollution Control Law

The federal Clean Water Act (CWA) sets a national goal to restore and maintain the chemical, physical, and biological integrity of the nation's waters and eliminate pollutant discharges into navigable waters. "Pollutant" is defined to include a variety of materials that may be discharged into water through human activities, construction or industrial processes, or other methods. The CWA requires states to adopt water quality standards to protect fish, other aquatic life, and humans.

The CWA also establishes the National Pollutant Discharge Elimination System (NPDES) permit program to regulate wastewater discharges from point sources to surface waters. "Point sources" are defined generally as discernable, discrete, and confined conveyances from which pollutant discharges can or do occur. The United States Environmental Protection Agency (EPA) may delegate authority to states to issue NPDES permits and has delegated this authority to the Washington Department of Ecology (DOE).

NPDES permits are required for anyone who discharges wastewater to surface waters or who has a significant potential to impact surface waters. These permits place limits on the quantity and concentrations of contaminants that may be discharged and may require wastewater treatment or impose operating or other conditions. NPDES permits are valid for five years but may be renewed.

The federal CWA and implementing EPA storm water regulations established two phases for NPDES permits to control storm water discharges from various entities. Phase I permits were issued to cover storm water discharges from certain industries, construction sites involving five or more acres, and municipalities operating municipal separate storm sewer systems (MS4s) with a population greater than 100,000. Public entities covered under Phase I include King County, Pierce County, Snohomish County, Clark County, City of Seattle, City of Tacoma, and the Washington Department of Transportation

facilities in the named jurisdictions. Phase II NPDES permits will be required for construction sites disturbing between one and five acres. Phase II permits also are required for municipalities operating MS4s that do not meet the Phase I criteria, are located in "census defined urbanized areas," and meet certain criteria.

Under the federal regulations, Phase II communities are required to apply for a storm water permit by March 2003. The DOE has informed potential Phase II jurisdictions it will not have a NPDES permit for MS4s (MS4 permit) available by the March 2003 deadline. However, the DOE has developed a MS4 permit application for Phase II jurisdictions.

State Water Pollution Control Law

Washington's pollution disclosure statutes require all pollution dischargers to use all known, available, and reasonable methods of wastewater treatment before discharge to prevent pollution. In addition to NPDES permit responsibilities, the DOE administers a state program for discharge of pollutants to state waters for discharges of waste materials from a commercial or industrial operation to ground or to publicly-owned treatment plants. State permits are also required for municipalities that discharge to ground.

The DOE issues both individual permits (covering single, specific activities or facilities) and general permits (covering a category of similar dischargers) in the state and NPDES permit programs. Annual permit fees must be established to fully recover but not exceed expenses of the program, including permit processing, monitoring, compliance, evaluation, inspection, and overhead costs.

Local Storm Water Programs

Local governments may be subject to storm water management regulations through both the federal NPDES permit program and state pollution discharge permits. Local governments also regulate storm water management within their jurisdictions through local storm water programs. Further, local governments operate storm water control utilities, for which they may impose rates and charges on utility customers.

Summary of Engrossed Substitute Bill:

MS4 Permit Standards

Standards are specified for municipal separate storm sewer system (MS4) permits developed by the Department of Ecology (DOE) pursuant to the federal National Pollutant Discharge Elimination System (NPDES) permit program (MS4 permits). MS4 permits must require the development, implementation, and enforcement of storm water management programs to reduce pollutant discharge to the maximum extent practicable,

protect water quality, and satisfy the appropriate water quality requirements of the federal and state water pollution control laws. MS4 permits must include the minimum control measures specified in federal regulations.

For MS4 permits the reduction of pollutants to the maximum extent practicable (MEP) shall be equivalent to the "all known available and reasonable methods of prevention control and treatment" (AKART) standard in state law. In interpreting these standards, the DOE must consider factors such as site practicability analysis, innovations, incentives for alternative storm water management strategies, and retrofit strategies. The DOE also must consider whether the probable benefits are greater than the probable costs in a manner similar to the requirement for significant legislative rules.

Narrative effluent limitations requiring the implementation of best management practices are generally the most appropriate form of effluent limitations for purposes of MS4 permits when designed to satisfy the federal minimum control measures.

Permit Development

The DOE is encouraged to consider MS4 permit development on a watershed basis. When determining whether to issue a general MS4 permit by watershed, the DOE must consider the:

physical interconnections between and among MS4s; location of discharges from municipalities required to obtain Phase II permits relative to discharges from municipalities permitted and operating under Phase I; potential for integrating municipalities permitted and operating under Phases I and II; and relationships between and among municipalities and the potential to encourage and facilitate cooperative and cost-efficient programs for storm water management.

Local governments are encouraged to cooperate, share resources, and coordinate to develop and implement permit programs and activities. This provision should not be construed as a requirement for local governments or as an alteration to or exemption of statutory public works provisions.

MS4 Permit Development Advisory Groups

Provisions are included to establish two advisory groups to address MS4 permit development. These provisions expire June 30, 2006.

Western Washington Advisory Group

The Department of Ecology (DOE) must establish a western Washington permit development advisory group to address certain issues and assist it in developing a Phase II MS4 permit or permits for western Washington. This group may include up to 18

members, including representatives of the Department of Transportation, Puget Sound Action Team, counties and cities subject to MS4 permit requirements under Phase I and Phase II of the NPDES permit program, general contractors, ports, realtors, residential contractors, business, shellfish growers, agricultural and timber organizations, and environmental organizations. The DOE is required to invite and encourage members of the Legislature with interest in storm water management as well as representatives of appropriate federal agencies and tribes located in western Washington to participate in the advisory group.

The western Washington advisory group must work within a facilitated process to consider issues, develop recommendations, and assist and advise the DOE in developing draft MS4 permits. Provisions are specified regarding group appointments, first meeting, and establishment of an executive committee to select a facilitator who can begin working with the group by June 1, 2003.

Eastern Washington Advisory Group

The DOE must use its existing eastern Washington storm water management manual advisory group to address certain issues and assist it in developing a Phase II MS4 permit or permits for eastern Washington. The DOE is required to invite and encourage representatives of the Department of Transportation, Department of Fish and Wildlife, business associations, general and residential contractors, environmental organizations, appropriate federal agencies and tribes located in eastern Washington to participate in the advisory group.

Advisory Groups' Responsibilities

No later than March 1, 2004, the advisory groups must address a list of issues and make recommendations to the DOE. Issues include the:

- types of discharges being regulated;
- areas being regulated;
- issuance of permits on a watershed basis;
- coordination of Phase I and Phase II permit requirements;
- application of permits to ground water discharges;
- level of effort required to satisfy federal minimum control measures according to Phase II MS4 permit requirements;
- protection of shellfish areas;
- use of land use planning and existing plans and regulations as a best management practice for storm water management and to protect water quality; and
- potential funding sources for implementing permit requirements.

The advisory groups must advise and assist the DOE to develop a menu of best management practices as required by the federal CWA. These groups also must consider

whether the elements of the permits are required by federal law, state law, or by both federal and state law and determine the costs and benefits associated with permit elements not required under federal law. In addition, these groups must coordinate efforts with the Transportation Permit Efficiency and Accountability Committee and build upon the 2000 report of the DOE's Storm Water Advisory Committee. Further, these groups must determine whether the probable benefits of the MS4 permits are greater than the probable costs in a manner similar to the requirement for significant legislative rules.

Reports to the Legislature

The DOE is required to submit a progress report to the appropriate committees of the Legislature regarding the work of the permit development advisory groups by December 1, 2003. The DOE also must submit a legislative report regarding the advisory groups' recommendations and a final report after permits are developed.

Legislative Findings and Intent

Legislative findings are added regarding:

- federal MS4 permit requirements under Phases I and II;
- fragmentation in federal, state, and local storm water management authority and the need to coordinate activities;
- environmental and health benefits of federal permit programs;
- local governments' efforts and costs related to implementing storm water permit programs;
- flexibility in storm water management and coordination of permit and storm water management programs to reduce costs and enhance program effectiveness;
- characteristics of and challenges associated with MS4s; and
- development of storm water management manuals for eastern and western Washington and the different storm water management issues in these areas of the state.

Legislative intent is specified to provide direction to the DOE and local governments regarding Phase II MS4 permit development. Legislative intent also is specified to: (1) direct the DOE to work within the existing eastern Washington stakeholder process to develop Phase II MS4 permits for eastern Washington; and (b) establish a stakeholder process for western Washington for Phase II MS4 permit development.

Appropriation: None.

Fiscal Note: Requested on February 13, 2003.

Effective Date: The bill contains an emergency clause and takes effect immediately.

Testimony For: Phase II of the NPDES permit program covers 13 counties and more than 90 cities. Many local governments have already developed programs or are in the process of developing programs. Local governments do not have discretionary resources to implement storm water programs. The Legislature needs to give direction on what the Phase II permit program will look like.

Numeric standards should really be addressed at the federal level. The bill recognizes the complexity of applying numeric standards to storm water. The permit programs should be focused on preventing harm. Incentives are the best approach for long-term success.

The bill directs the DOE to base the federal permit program on federal requirements. The permits developed by the DOE should track the federal minimum requirements as closely as possible to minimize the impacts on local government budgets and ratepayers to the extent possible. The bill allows smaller jurisdictions to come into compliance with permit requirements within five years.

(Pro with changes) The definitions of "maximum extent practicable" and "best management practices" create new ambiguities regarding financial responsibility. These definitions need to be revised. The bill should allow permits to be customized to address geographical differences, and the state should be allowed to have different conditions than federal law. The bill needs to address the DOE's storm water management manual; it is the simplest way for jurisdictions to meet the federal minimum requirements.

(Concerns) The DOE agrees with the basic direction that state programs meet federal requirements but has concerns about the bill. The bill should address performance expectations. The "maximum extent practicable" definition differs from federal requirements and is vague and unclear. The bill's treatment of Phase I and Phase II as the same may conflict with federal law. The bill locks in the application and program requirements in rule and raises concerns about the appeals process.

Testimony Against: The bill would end any meaningful regulation of municipal storm water. A recent newspaper article demonstrated that storm water is the most significant water quality problem in western Washington. A recent Ninth Circuit decision emphasizes that states need to review local programs to ensure compliance with federal standards.

The bill makes the federal minimum control measures a ceiling for Phase I and Phase II of the NPDES permit program, and the Federal Clean Water Act allows states to go beyond these minimums. The federal requirements are vague.

The bill also rolls back state water pollution control laws and allows the DOE to authorize discharges that violate water quality standards. Further, the bill prevents the DOE from requiring programmatic activity. The bill does not address integration of

requirements for Phase I and Phase II jurisdictions.

Best management practices are not de facto water quality standards. The bill replaces water quality standards with best management practices, which are not well defined. There is a lot of vague language in the bill.

The shellfish growing industry's biggest challenges relate to water quality. The best management practices approach in the bill will not protect shellfish growing areas. Numeric criteria must be applied. Many local governments are not stepping up to address storm water management. A voluntary approach will not work.

Phase II requirements need to be implemented. The bill should be narrowed to Phase II. The permit development should include a time line and funding from the Legislature.

Testified: (In support) Paul Parker, Washington State Association of Counties; Jeff Monson, Whatcom County; Daryl Grigsby, King County; Dave Williams, Association of Washington Cities; Dennis Ritter, City of Lacey; and Dick McKinley, City of Bellingham.

(Pro with changes) Bruce Wulkan, Puget Sound Action Team.

(Concerns) Megan White, Washington Department of Ecology; Willy O'Neil, Associated General Contractors; and Robin Downey, Pacific Coast Shellfish Growers Association.

(Opposed) Sue Joerger, Puget Soundkeeper Alliance; Carl Weimer, Re Sources; Bruce Wishart, People for Puget Sound; Tim Ramsaur, Pierce County; and Grant Nelson, Association of Washington Business.