

CSRWG 16 June 2008
Wright

From: Clark Wright [mailto:icw@dhwlegal.com]
Sent: Thu 6/12/2008 4:27 PM
To: tom.reeder@ncmail.net; George Givens (Research)
Cc: Langdon, John; Inscoc, Dave CEDC
Subject: Comments on 6/6/08 draft

Hello Tom – thanks much for your hard work on improving the coastal stormwater rules that are the subject of the current 605 stakeholder process. In response to DWQ's last draft, and in anticipation of the draft that I understand will be circulated to the stakeholder group tomorrow afternoon, on behalf of Carteret EDC (and others) I wanted to provide the following specific comments and requested revisions for DENR/DWQ's consideration. **If the following final revisions are made, Carteret EDC is prepared to support the resulting compromise bill.**

But first, I and my client feel compelled to make an important, overall observation. We believe that essentially all members of the regulated community agree with the comments delivered by Dr. Nancy White, at the request of Senator Albertson, during the June 9, 2008 stakeholder meeting. Dr. White's comments, while quietly delivered [and apparently also delivered too late in the game to change the fundamental "political science" posture of the proposed rules] have great merit in terms of where we are and what we need to be looking at in the years to come. We sincerely hope that the EMC and DWQ staff will participate in the innovative stormwater group within the CWMTF, not only to help identify grants and techniques that can best target existing pollution problems, but also with an eye towards improving the coastal stormwater regulatory process in the years ahead. We remain completely convinced that there are much better ways to get more bang for our taxpayer buck when it comes to protecting and improving coastal water quality – and we believe many members of the regulated community will continue to press their legislators to support the pending disapproval bills, either as is or coupled to a required study process over the next several years that is tied to the ongoing CWMTF innovative stormwater process.

Below I have summarized remaining issues that must be addressed in the stakeholder process in order for me and my clients to be able to indicate approval for compromise legislation that will disapprove the EMC-enacted rules and replace them with the stakeholder compromise:

1) Page 2 of the DWQ 6/6/08 draft – the limit/extent of SA waters must be more clearly defined. There are two issues here. First, what are the landward boundaries of the SA waters themselves (and would it not be more accurate to define these waters as salt water as in the Phase II rules). Second, make it clearer that any freshwater tributary to an SA water is NOT itself an SA water. The regulated community is concerned that case-by-case staff determinations of how far site-specific SA designations travel upstream has great potential to lead to uneven determinations being made on the critical issue of whether and where these rules apply (or not). See the recent comments by Larry Baldwin for more on this issue. Alternatively, with all the GIS mapping tools we have available today, SA water maps could be generated for all 20 coastal counties defining the landward extent of SA waters jurisdiction for purposes of these rules - and if the effective date of January 1, 2009 specified in DWQ's June 6, 2008 draft does not allow enough time to get this accomplished, then that is a very legitimate basis for extending the effective date forward until such maps can be prepared.

2) The vegetated buffer requirement must be 30 feet; that is what is in Phase II and that certainly provides adequate protection given that the rules essentially are defining low density subdivisions out of existence, and high density projects require extensive treatment before any runoff reaches

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the buffer. In addition, all projects – large and small - have to meet 50 feet if located in the Neuse or Tar-Pam basins.

3) Retention ponds must remain in the menu of available stormwater treatment solutions; there is no scientific evidence I know of that has concluded that retention ponds adversely impact coastal water quality more so than other stormwater treatment and control systems. It is critical to the regulated community that this tool remain available for stormwater treatment and control within all parts of these rules.

4) Change “may” to “shall” on page 2, line 14 of your 6/6 draft; change “possible” to “practicable” on page 2, line 17; ditto for page 4, line 32 and page 5, line 2.

5) On pages 4-5, subparagraph (b)(6) should be changed to a minimum of one foot of separation for infiltration systems and it should either be made more clear that there is no separation requirement at all for innovative or flexible measures, including rain barrels, cisterns, rain gardens, porous pavement, etc. or that the separation requirement is no more than one foot.

6) On page 5, lines 17-18 – add at the end of the sentence defining permeable pavement the words “or other materials with similar infiltration performance characteristics.” [delete the “and” after “pavers,”]

7) Add rain barrels back in on page 6, lines 10 and 11; there certainly can be various forms of “rain barrels” and the more flexibility, the better. The fact that standard 55-gallon rain barrels may not be sufficient to handle runoff needs does not mean that larger barrels, or custom-built barrels, or barrels used in conjunction with other means should be excluded as an option.

8) On page 7, line 11, change “impervious” to “built upon” and add the words “by more than 15% by volume” after the word “increase.”

9) Also on page 7, leave the effective date as it is – namely, January 1, 2009, and indicate to George Givens that DWQ supports this date as a reasonable and appropriate means of addressing the strongly stated concerns of the regulated community regarding the impact of the rules on many who reasonably relied on existing low density requirements when purchasing, financing and engaging in initial development and permitting work.

10) Add a sentence stating that all permits issued under these rules will contain upset and bypass provisions that clarify the obvious – namely, that once the design standards that are specified in the rules and related issued permits are exceeded, then runoff reaching coastal waters (again, beyond design volumes) is not unlawful.

11) Add a provision in the exclusions section that specifically provides that any activity authorized under a CAMA Permit (including a Minor Development CAMA Permit) issued prior to the effective date of the rules is governed by the coastal stormwater rules in effect as of the date of CAMA permit issuance, and make it clear that this exclusion extends through and including any extensions of the expiration date of that CAMA Permit. [Many CAMA permits have multi-year periods in which the development activity can be carried out, and the permit holder is entitled to rely on stormwater rules in effect at the time of CAMA permit issuance.] There are two, additional matters of concern to our clients and the larger regulated community. First, members of the regulated community unanimously believe that any legislative compromise should be enacted into session law as was done with the 2006 Phase II rules. While I appreciate George Given’s concerns regarding codified legislation and the issue of “permanency,” our

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clients (and the larger regulated community) believe strongly that there is value and protection in having the substantive matters agreed-upon in this stakeholder process codified into session law. We believe this reduces the potential for “agency creep” or “agency vest pocket policy” that deviates from the terms of the compromise, and to some extent may deter the EMC from trying to add to the legislative effort. With regard to the EMC and strong regulated community concerns that it has run amuck to some extent in this area, there needs to be a proviso in the session law implementing the stakeholder compromise that expressly states that the EMC cannot alter or impose more stringent requirements than those enacted into law – at least for some period of time – perhaps tied in some way to a mandate that the EMC, DWQ, DCM and DMF actively participate in the ongoing innovative stormwater review process under the CWMTF umbrella (per SB 1468, 2007). In all events, this is a critical and difficult issue that our clients and the broader regulated community feel very strongly about.

Thanks much for your hard work and attention to these important matters. Please do not hesitate to call me at any time with any questions or concerns. My cell phone number appears below.

Best regards,

Clark Wright

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