



HOUSE BILL 579: Amend Certain DEQ/EPA Agreements/Proceedings.

2023-2024 General Assembly

Committee:	House Environment. If favorable, re-refer to Regulatory Reform. If favorable, re-refer to Rules, Calendar, and Operations of the House	Date:	April 25, 2023
Introduced by:	Reps. Brody, Saine, Zenger, N. Jackson	Prepared by:	Jennifer McGinnis
Analysis of:	First Edition		Committee Counsel

OVERVIEW: *House Bill 579 would:*

- *Amend various permitting requirements under the Sedimentation Pollution Control Act (SPCA).*
- *Establish new requirements applicable to memorandums of agreements between the United States Environmental Protection Agency (USEPA) and the Department of Environmental Quality (DEQ), which govern the State's administration and enforcement of federally required environmental programs.*
- *Require General Assembly approval for agency rulemaking to incorporate by reference federal environmental regulations.*
- *Revise appointments to the Sedimentation Control Commission (Commission).*
- *Establish the Environmental Policy Council to:*
 - *Review:*
 - *The efficacy of State and local programs regulating environmental and natural resource matters in North Carolina, and costs associated with those programs.*
 - *Current federal laws and regulations for the protection of the environment or natural resources, and how those requirements are implemented by State and local entities.*
 - *Proposed changes to federal laws and regulations for the protection of the environment or natural resources, and potential impacts from those proposed changes.*
 - *Make recommendations for legislative action on a continuing basis on these matters, and specifically legislative action to approve or disapprove the authority of any State agency, board, or commission to adopt rules that incorporate proposed changes to federal laws and regulations for the protection of the environment or natural resources by reference.*
- *Make other changes to the administration of environmental programs in the State.*

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CURRENT LAW/BACKGROUND:

The federal Clean Water Act requires National Pollutant Discharge Elimination System (NPDES) permits for discharges from construction sites disturbing at least one acre but less than five acres, including sites that are part of a larger common plan of development or sale that will ultimately disturb at least one acre but less than five acres (see [40 CFR 122.26](#) implementing [Section 402 of the Clean Water Act \(CWA\)](#)).

The USEPA issues a [NPDES Construction General Permit for Stormwater Discharges from Construction Activities \(federal CGP\)](#), however, DEQ has been delegated authority from USEPA to administer the NPDES program (including the stormwater construction program) within North Carolina. The State implements the federal stormwater construction requirements through the [Sedimentation Pollution Control Act of 1973 \(SPCA or the Act\)](#), and [rules adopted thereunder](#), and has issued its own NPDES General Permit for stormwater from construction sites ([NCG01](#)). Pursuant to the SPCA, no person may initiate any land-disturbing activity that uncovers more than one acre without having an erosion and sedimentation control plan approved by the Commission, and a NCG01¹. The SPCA, however, authorizes local governments, upon approval of the Commission to implement and administer the Act's requirements within their jurisdictions (approved local programs).

DEQ's authority to administer and enforce the NPDES program in North Carolina is granted and maintained pursuant to a Memorandum of Agreement (MOA) with USEPA, which is available [here](#). The MOA establishes detailed requirements for the State's delegated authority. The MOA provides:

"Prior to taking any action to propose or effect any amendment, rescission, or repeal of any statute, rule, or directive which has been approved by EPA in connection with the State NPDES program; any action to modify program approval documents (e.g., MOA, Program Description or Attorney General's Independent Counsel's Statement); or any action to transfer all or any part of the approved State NPDES program to another State agency or instrument, the State shall notify the Regional Administrator and shall transmit the text of any such change to the EPA Region 4 NPDES and Biosolids Permits Section for review and approval pursuant to 40 C.F.R. § 123.62(b). The State shall keep EPA fully informed of any proposed modification or court action which acts to amend, rescind or repeal any part of its authority to administer the NPDES program. **EPA acknowledges that the State has no veto authority over acts of the State legislature and, therefore, reserves the right to initiate procedures for withdrawal of the State NPDES program approval in the event that the State legislature enacts any legislation or issues any directive which substantially impairs the State ability to administer the NPDES program or to otherwise maintain compliance with NPDES program requirements.**" (emphasis added)

Also see [40 C.F.R.123.63 Criteria for withdrawal of State programs](#), and [40 C.F.R. 123.64 Procedures for withdrawal of State programs](#).

Withdrawal of a State program by USEPA would result in USEPA's administration and enforcement of the program, to include issuance of permits prepared by USEPA.

¹ Prior to 2019, DEQ granted "automatic coverage" under the NCG01 upon approval of an erosion and sedimentation control plan. USEPA notified the State, however, that automatic coverage of the federally required permit was not permissible, thus submittal of a plan, and application for an NCG01 is now required for regulated land-disturbing activities.

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Other potentially applicable law:

Constitution of the United States

- The [Supremacy Clause of the Constitution of the United States \(Article VI, Clause 2\)](#), which provides:

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

North Carolina State Constitution

- Article I, Section 6 of the [State's Constitution](#), which provides:

Sec. 6. Separation of powers.

The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other.

- Article II, Section 1, of the State's Constitution, which provides:

Section 1. Legislative power.

The legislative power of the State shall be vested in the General Assembly, which shall consist of a Senate and a House of Representatives.

- Article III, Section 1 of the State's Constitution, which provides:

Section 1. Executive power.

The executive power of the State shall be vested in the Governor.

- Article III, Section 5, Clauses 4 and 8, of the State's Constitution (Executive), which provides:

Sec. 5. Duties of Governor.

(4) Execution of laws. The Governor shall take care that the laws be faithfully executed.

...

(8) Appointments. The Governor shall nominate and by and with the advice and consent of a majority of the Senators appoint all officers whose appointments are not otherwise provided for.

- [McCrorry v. Berger, 368 N.C. 633, 781 S.E. 2d 248 \(2016\)](#)

In this case, the Court considered a challenge to legislation that gave the General Assembly a majority of the members of the Coal Ash Commission, Oil & Gas Commission, and Mining Commission relative to the Governor. The Court held that the challenged appointment provisions violated the separation of powers clause, and stated:

“When the General Assembly appoints executive officers that the Governor has little power to remove, it can appoint them essentially without the Governor’s influence. That leaves the Governor with little control over the views and priorities of the officers that the General Assembly appoints. When those officers form a majority on a commission that has the final say on how to execute the laws, the General Assembly, not the Governor, can exert most of the control over the executive policy that is implemented in any area of the law that the commission regulates. As a result, the Governor cannot take care that the laws are faithfully executed in that area. The separation of powers clause plainly and clearly does not allow the General Assembly to take this much control over the execution of the laws from the Governor and lodge it with itself.”

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Given the holding of McCrorry v. Berger, Section 5 of the bill (revisions to the Sedimentation Control Commission) may pose constitutional concerns.

The provision included in Section 4 of this bill governing DEQ activities in the event of USEPA's withdrawal of delegation authority for the State to administer and enforce requirements of the federal Clean Water Act (and perhaps other provisions), may pose constitutional concerns in light of the federal Supremacy Clause, and/or the Separation of Powers Clause under the State's Constitution. This provision, and others in the bill, may also pose a risk of USEPA withdrawal of delegation authority for the State to administer and enforce requirements of the federal Clean Water Act.

BILL ANALYSIS:

ELIMINATE PERMITTING REDUNDANCIES WHEN NCG01 REQUIRED

Section 1 of the bill would amend the SPCA to:

- Prohibit State or local requirements for ground cover necessary to terminate coverage under an erosion and sedimentation control plan, from exceeding the requirements for final vegetative or non-vegetative stabilization set forth in the federal GCP.
- Provide that if a person initiating land disturbing activity obtains coverage under the State's NCG01 permit, requirements for an erosion control plan would be satisfied through application for and receipt of the NCG01, and no additional or different requirements may be imposed for the submission or approval of an erosion and sedimentation control plan beyond that required for the NCG01 permit, whether the permit is issued by the Department or by a local government.

This section would be effective when it becomes law, and apply to applications for permits for land-disturbing activities submitted on or after that date.

Section 2 would require the Commission to adopt rules embodying standards, policies, and procedures for permitting of grading to be adopted by approved local programs. The section specifies that a separate permit may not be required for grading, however, where the grading is to be conducted as part of land-disturbing activity that is required to obtain coverage under an NCG01 or have an approved erosion and sedimentation control plan. In addition, where a grading permit is required as part of land-disturbing activity that is not required to obtain coverage under the NCG01 or have an approved erosion and sedimentation control plan, the section would prohibit the imposition of a fee in association with the grading permit.

Any approved local program would be required to, no later than October 1, 2023, submit to the Commission for its approval standards, policies, and procedures within its jurisdiction for permitting of grading in compliance with rules adopted by the Commission pursuant under this section. All grading permit standards, policies, and procedures of an approved local program in effect when the bill would become law would remain in effect until December 31, 2023, but thereafter would be void and unenforceable, until such time as the Commission has approved new or revised standards, policies, and procedures for permitting of grading to be adopted by approved local program and incorporated into the erosion and sedimentation control program for the jurisdiction.

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REQUIRED REVISIONS TO LOCAL SEDIMENTATION CONTROL PROGRAMS/STRINGENCY LIMITATIONS/AUTHORIZATION TO ISSUE NCG01

Section 3 would:

- Prohibit approved local program requirements from exceeding the requirements for stormwater discharges from construction activities set forth under the federal GCP and the SPCA.
- Require approved local programs to issue an NCG01, in lieu of a land disturbance permit or other permit or certification. A local program would be authorized to charge a fee of no more than \$200.00 for issuance of a NCG01, and would be prohibited from charging any other fee for permitting of the activity. 50% of the fees charged by a local program would be retained by the local program and 50% would be remitted to DEQ.
- Require the Commission to adopt temporary rules to require local programs to issue the NCG01 in lieu of land disturbance permits or other permits or certifications.
- Require any approved local program that desires to continue operating such a program to, no later than October 1, 2023, submit to the Commission for its approval a revised program for the Commission's approval that conforms to the requirements of this section. Until the Commission approves the revisions to the local program, and the Commission and/or DEQ has established processes to enable local programs to issue the NCG01, a local program would be deemed only to have approval to administer a limited program that includes only responsibility for the assessment and collection of fees and for the inspection of land-disturbing activities within its jurisdiction.

MEMORANDUM OF AGREEMENTS BETWEEN DEQ AND USEPA TO REQUIRE GENERAL ASSEMBLY APPROVAL/DEQ ADMINISTRATION OF ENVIRONMENTAL PROGRAMS IN EVENT OF WITHDRAWAL OF USEPA DELEGATION/DEQ RESERVATION OF RIGHT TO DEFINE VAGUE, AMBIGUOUS, OR UNDEFINED TERMS/REQUIRE GENERAL ASSEMBLY APPROVAL FOR RULEMAKING TO INCORPORATE FEDERAL ENVIRONMENTAL REGULATIONS BY REFERENCE

Section 4 would:

- Require that all MOAs between the USEPA and DEQ, the Environmental Management Commission, the Coastal Resources Commission, the Sedimentation Control Commission, and any other board or commission charged under the State's statutes with implementation of State or federal environmental law, be approved by the General Assembly by majority vote of the Senate and the House of Representatives, prior to execution of the MOA. The Governor would be required to transmit any proposed MOAs of this nature, or modifications to such agreements, to the presiding officers of the Senate and the House of Representatives for confirmation by joint resolution. Implementation of the terms of such agreements would be prohibited absent confirmation by the General Assembly.
- In the event that USEPA should act to withdraw authority it has delegated to the State to administer the Clean Water Act, require DEQ to continue administration of the terms of the most recent version of any applicable MOA, and to continue to timely issue any permits associated with the program if the General Assembly issues a determination through joint resolution that USEPA lacks funding or adequate personnel to effectively administer the program's requirements, and, as such, assumption of the program's requirements by USEPA would cause serious economic hardships upon people and business in North Carolina that are subject to federal environmental law. The Department must continue to administer the program in this manner until such time as a new agreement between the State and USEPA has been approved by the General Assembly through joint resolution, and subsequently executed by DEQ.

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- Prohibit DEQ or any of the environmental commissions from incorporating by reference any federal law or regulation for the protection of the environment or natural resources until the General Assembly has enacted legislation to specifically approve the agency's adoption of the rule. If an agency seeks to adopt a rule to incorporate a federal law or regulation for the protection of the environment or natural resources by reference, the agency must submit a petition to the General Assembly requesting approval for adoption of the rule and include the content of the federal law or regulation to be incorporated by reference.
- Provide that DEQ reserves the right to define vague, ambiguous, or undefined terms that may be included in any MOA with USEPA or federal environmental law as issues may arise resulting from application of such terms.
- Require DEQ to submit a quarterly report to the Environmental Policy Council (see Section 6 below) identifying all changes to federal law or regulations enacted or proposed during the previous quarter that would impact the administration of environmental regulatory programs in the State.

REVISE SEDIMENTATION CONTROL COMMISSION APPOINTMENTS

Section 5 would revise the appointments to the Commission. Under current law, the Governor appoints the 12 members of the Commission, in accordance with specific membership qualification criteria set forth in the statute. The bill would revise the specific membership qualification criteria for the 12 members to be appointed, and assign five of these appointments to the Governor (subject to confirmation by the General Assembly), six to the General Assembly (three upon recommendation of the Speaker, and three upon recommendation of the President Pro Tem). The Director of the North Carolina Water Resources Research Institute would serve ex officio and nonvoting.

Section 6 would establish the Environmental Policy Council. The purpose and power of the Council would be to review:

- The efficacy of State and local programs regulating environmental and natural resource matters in North Carolina, and costs associated with those programs.
- Current federal laws and regulations for the protection of the environment or natural resources, and how those requirements are implemented by State and local entities.
- Proposed changes to federal laws and regulations for the protection of the environment or natural resources, and potential impacts from those proposed changes.

The Council would be required to make recommendations for legislative action on a continuing basis on these matters, and specifically legislative action to approve or disapprove the authority of any State agency, board, or commission to adopt rules that incorporate proposed changes to federal laws and regulations for the protection of the environment or natural resources by reference.

The Council would consist of 17 members, three of whom would be appointed by the Governor, eight of whom would be appointed by the General Assembly (four upon recommendation of the Speaker, and four upon recommendation by the President Pro Tem). The General Assembly's appointments would include a co-chair of the House Environment Committee and a co-chair of the Senate Committee on Agriculture, Energy, and the Environment. The other appointees would be:

- The Secretary of Environmental Quality, or the Secretary's designee.
- The Chair of the Environmental Management Commission, or the Chair's designee.
- The Chair of the Sedimentation Control Commission, or the Chair's designee.
- The Chair of the Coastal Resources Commission, or the Chair's designee.

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DEQ TO INITIATE DISCUSSIONS WITH USEPA TO REVISE MEMORANDUM OF AGREEMENT(S) GOVERNING IMPLEMENTATION OF SEDIMENTATION REQUIREMENTS IN THE STATE

Section 7 would require DEQ, no later than July 1, 2023, to notify USEPA of its intent to initiate discussions to revise the NPDES MOA, and any other agreement with USEPA, that governs the SPCA, and the State's implementation of the NCG01 to streamline the regulatory requirements of the SPCA and NCG01 for the purpose of eliminating program redundancies to minimize (i) unnecessary costs to, and duplication of efforts by, persons initiating land-disturbing activities, (ii) unnecessary delays in project development, and (iii) inefficient use of DEQ personnel and staff of approved local programs. DEQ must report to the Environmental Policy Council on the status of their activities pursuant to this section quarterly, beginning August 1, 2024, until such time as the General Assembly repeals this reporting requirement.

DEQ TO REQUEST THAT USEPA CONSULT DEQ ON PROPOSED CHANGES TO ALL APPLICABLE FEDERAL REGULATIONS PRIOR TO NOTICE OF SAME IN THE FEDERAL REGISTER

Section 8 would require DEQ, no later than July 1, 2023, to request that USEPA consult with DEQ on any proposed changes to federal regulations that would impact the State's administration of federal environmental programs in North Carolina, prior to the USEPA's notice of such proposed changes in the Federal Register, so that the State may have opportunity for meaningful collaborative input on development of regulations that it may be charged with administering. DEQ must report to the Environmental Policy Council on the status of their activities pursuant to this section quarterly, beginning August 1, 2024, until such time as the General Assembly repeals this reporting requirement.

DEQ TO PROVIDE COPIES OF AGREEMENTS WITH USEPA, AND ASSOCIATED FUNDING INFORMATION

Section 9 would require DEQ, no later than July 1, 2023, to submit copies of any agreements executed between the DEQ and USEPA that govern the State's administration of programs under the Clean Water Act to the House Local Government – Land Use, Planning and Development Committee. In addition, the Department would be required to provide information to the Committee on:

- (1) Any federal funds received by the State in connection with the State's administration of such programs, and all federal requirements for receipt of such funds; and
- (2) The adequacy of funding from all sources to fully implement the requirements of such agreements.

SEVERABILITY CLAUSE

Section 10 would provide that if any section or provision of this bill is declared unconstitutional or invalid by the courts, it would not affect the validity of this legislation as a whole or any part other than the part declared to be unconstitutional or invalid.

EFFECTIVE DATE: Except as otherwise provided, this bill would be effective when it becomes law.