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**Agriculture & Natural  
Resources Committee**

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**HB 1689**

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

**Sponsors:** Representatives Linville, Schoesler, Cooper, Chandler, Holmquist and Hatfield.

**Brief Summary of Bill**

- Requires municipalities operating municipal separate storm sewer systems (MS4s) to employ best management practices to the maximum extent practicable and specifies these municipalities will be in compliance with water quality standards if they do so.
- Includes requirements for municipalities to submit MS4 permit applications as required by federal law and maintain permit program documents.
- Requires the DOE to develop separate MS4 permits for eastern and western Washington and to work on strategies that: (1) meet federal requirements; and (2) promote urban densification strategies in comprehensive plans and development regulations.
- Prohibits the DOE from requiring any municipality seeking a MS4 permit to: (1) engage in programmatic activity or establish any facilities or systems not required by the federal Clean Water Act; (2) perform or include land use plans or studies as a permit requirement; or (3) obtain a state waste discharge permit for any facility permitted with a MS4 permit.
- Allows the DOE to issue MS4 permits on a watershed basis in certain situations.
- Requires the DOE fee schedule for MS4 permits to be based on a municipality's size and ability to pay.
- Prohibits filing of a state law claim for damages against the state or any municipality for performing MS4 permit responsibilities.

**Hearing Date:** 2/18/03

**Staff:** Caroleen Dineen (786-7156).

## **Background:**

A combination of federal, state, and local laws govern stormwater management in Washington. At the federal level, the water quality implications of stormwater runoff are addressed in the federal Clean Water Act (33 U.S.C. 1251 et. seq). The state's Water Pollution Control Act (chapter 90.48 RCW) also regulates water quality aspects of stormwater management. Local regulations addressing stormwater management arise from local governments' responsibilities under federal and state law to manage stormwater and from local governments' authority under state law to construct and operate storm water management systems.

### ***Federal Water Pollution Control Law***

#### Federal Law Requirements

The modern framework for federal water pollution control regulation was enacted in 1972 as federal law amendments now referred to as the Clean Water Act (CWA). The CWA sets a national goal to restore and maintain the chemical, physical, and biological integrity of the nation's waters and to eliminate discharge of pollutants into navigable waters. The CWA also set technology-based effluent limitations for discharges to navigable waters and authorized federal grants to finance sewage treatment systems improvements.

The CWA defines "pollutant" to include a variety of materials that may be discharged into water through human activities, construction or industrial processes, or other methods. Stormwater is identified as a point source of pollution in the CWA.

The CWA also requires states to adopt standards to protect fish and other aquatic life as well as humans using water for recreation, drinking water, and fish. Water quality standards are rules specifying the desired water quality to be achieved or maintained and protecting existing water quality from degradation. Standards consist of designated uses of the water specific to each waterbody; criteria necessary to protect designated uses; and the Antidegradation Policy, establishing procedures to follow when considering regulating an activity that might affect a particular water body. States may adopt policies allowing adjustment of designated uses or criteria on a site-specific basis.

#### NPDES Permits

The CWA establishes the National Pollutant Discharge Elimination System (NPDES) permit system 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. NPDES permits are required for anyone who discharges wastewater to surface waters or who has a significant potential to impact surface waters.

A NPDES permit places limits on the quantity and concentrations of contaminants that may be discharged. NPDES permits may require wastewater treatment or impose operating or other conditions, including monitoring, reporting, and spill prevention planning. NPDES permits are valid for five years but may be renewed.

The United States Environmental Protection Agency (EPA) implements the CWA. The EPA may delegate authority to states to issue NPDES permits and administers the NPDES program in nondelegated states. The Washington Department of Ecology (DOE) has been delegated NPDES permit authority by the EPA.

### Stormwater “ Phase II NPDES Permits

The federal CWA and implementing EPA stormwater regulations established two phases for NPDES permits to control stormwater discharges from various entities. Phase I permits were issued to cover stormwater 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 State 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 stormwater permit by March 2003. The DOE has informed potential Phase II jurisdictions that 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 communities to submit by the deadline.

### ***State Water Pollution Control Law***

Washington's Pollution Disclosure Act of 1971 requires all pollution dischargers to use all known, available, and reasonable methods of waste water treatment before discharge to prevent pollution. In addition to its NPDES permit responsibilities, the DOE administers a state program for discharge of pollutants to state waters. State permits are required for anyone who discharges 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. Activities covered by permits include construction activities, industrial operations, and stormwater discharges. In response to a recent federal appellate court decision, the DOE also adopted NPDES permits for application of aquatic pesticides.

The DOE establishes annual fees to collect expenses for issuing and administering state and NPDES discharge permits. Fees must be based on factors relating to the complexity of permit issuance and compliance. Fees must be established to fully recover but not exceed expenses of the program. Fees are to cover permit processing, monitoring, compliance, evaluation, inspection, and program overhead costs. Fees may be based on pollutant loading

and toxicity and may be designed to encourage recycling and reduction of pollutant quantity.

### ***Local Stormwater Programs***

Local governments may be subject to stormwater management regulations through both the federal NPDES permit program and state pollution discharge permits. Local governments also are regulators of stormwater management within their jurisdictions through their local stormwater programs. During environmental review of development proposals, local governments may address stormwater impacts under the State Environmental Policy Act and through stormwater regulations applicable to development projects.

Local governments also operate stormwater control utilities, for which they may impose rates and charges on utility customers. Generally, authority to operate these systems includes the power to construct, acquire, maintain and operate sites and facilities for stormwater drainage. Local governments authorized to operate these systems also may establish rates and charges designed to cover the costs of providing these services and maintaining and operating these facilities.

According to state law, rates and charges must be uniform for the same class of customers or service and facility. However, local governments may consider a variety of factors when developing stormwater rates and charges, including: (1) services furnished; (2) benefits received; (3) land's character, use, or water runoff characteristics; (4) land user's nonprofit public benefit status; (5) land user's income level; or (6) other matters that present a reasonable difference as a ground for distinction.

### **Summary of Bill:**

Requirements for municipalities operating municipal separate storm sewer systems (MS4s) are specified. Provisions are also added to address criteria, fees, and conditions for Department of Ecology (DOE) permits for MS4s issued according to the DOE's delegated authority under the federal Clean Water Act (CWA). A MS4 is defined for purposes of state water pollution control law as a conveyance or conveyance system that is:

- owned or operated by a public body created under state law that has jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes;
- designed or used for collecting or conveying storm water;
- not a combined sewer; and
- not a part of a publicly owned treatment works as defined under federal CWA regulations.

For purposes of this definition, the term public body applies to the state or a city, town, borough, county, parish, district, association, special district, tribe or tribal organization, approved management agency under the federal Clean Water Act (CWA), or other public body created under state law.

### ***Requirements for Municipalities***

Municipalities owning or operating MS4s must employ best management practices to the

maximum extent practicable and will be considered in compliance with water quality standards if they do so. "Best management practices" is defined as schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce pollution of waters of the United States. The term also includes treatment requirements, operating procedures, and practices to control runoff, spills, leaks, sludge or waste disposal, or raw material drainage. "Maximum extent practicable" is defined as technically sound and financially responsible nonnumeric criteria applicable to all MS4 discharges through the implementation of best management practices.

Municipalities owning or operating a MS4 must submit National Pollutant Discharge Elimination System (NPDES) permit applications to the DOE (MS4 permits) if they are required by the federal CWA to do so. Municipalities applying for MS4 permits must maintain complete program documents. The DOE is authorized to inspect and copy a municipality's documents related to its MS4. In addition, municipalities receiving MS4 permits must submit performance reports as required by DOE rule.

### ***Conditions for Issuing Permits***

Conditions are specified for issuance of MS4 permits. The DOE must develop separate MS4 permits for eastern and western Washington, with each permit recognizing the hydrographic and geological diversity of the area covered. The DOE also must work with permitted municipalities and the Department of Community, Trade, and Economic Development to identify strategies that: (1) meet federal requirements; and (2) further infill or urban densification strategies identified in comprehensive plans and development regulations.

When it establishes criteria for MS4 permits, the DOE is prohibited from requiring any municipality to engage in programmatic activity or establish any facilities or systems not required by the federal CWA. In addition, the DOE may not require municipalities to perform or include land use plans or studies as a permit requirement. Further, the DOE may not require a municipality that has a MS4 permit to obtain a state waste discharge permit for storm water discharge.

### **Issuance of Permits by Watershed**

General MS4 permits may be issued by the DOE on a watershed basis. The DOE must consider the following factors when determining whether to issue a general MS4 permit for all MS4s in a watershed:

- physical interconnections between various MS4s;
- location of potentially covered MS4 discharges relative to discharges from previously permitted MS4s;
- quantity and nature of pollutants discharged in waters located within the watershed; and
- nature of the receiving waters.

Municipalities may agree to submit a single general MS4 permit application if they own or operate a MS4 within a watershed, including adjacent or interconnected MS4s. The DOE must treat municipalities jointly applying for a single permit as coapplicants under these circumstances. Each municipality, however, is responsible only for the MS4 within its

municipal boundaries. Further, the authorization to apply as coapplicants does not prevent individual municipalities from applying for separate coverage under a general MS4 permit for waste disposal.

#### Fees for MS Permits

The DOE must establish by rule a fee schedule for MS4 permits based on a municipality's size and ability to pay.

#### Damages Claims and Statutory Interpretation

No state law claim for damages may be filed against the state or any municipality for performing these permit responsibilities. These new statutory provisions may not be construed as creating any new cause of action against the state or any municipality.

The new statutory provisions govern MS4s in the event of conflict among statutory provisions. The provisions of the Administrative Procedure Act apply to all rulemaking and adjudicative proceedings related to these provisions.

#### Legislative Findings and Intent

Legislative findings specify that MS4 permits, while providing environmental and public health benefits, burden municipalities, businesses, and citizens with costs and liabilities. Legislative findings also identify factors that distinguish MS4s from other storm sewer systems, including complexity, dispersion of infrastructure, location and maintenance of numerous inlets and outfalls, and intermittent and unpredictable large volumes of stormwater.

Legislative recognition of the difficulties of predicting, sampling, identifying, and controlling stormwater pollutants discharged through MS4s is stated. Legislative intent is specified to establish criteria for development of MS4s under the NPDES permit requirements of the federal CWA.

**Appropriation:** None.

**Fiscal Note:** Requested on February 13, 2002.

**Effective Date:** The bill takes effect ninety days after adjournment of session in which bill is passed.