



Fast Track Proposed Regulation Agency Background Document

Agency name	Virginia Soil and Water Conservation Board
Virginia Administrative Code (VAC) citation	4 VAC 50-60
Regulation title	Virginia Stormwater Management Program (VSMP) Permit Regulations
Action title	Amendment to the Virginia Stormwater Management Program (VSMP) Permit Regulations (4VAC50-60-54 E) to clarify that all approved Total Maximum Daily Loads (TMDLs) with a specific waste load allocation (WLA) for a pollutant assigned to stormwater discharges from a construction activity are subject to the identification and implementation of additional control measures when found to be necessary.
Date this document prepared	September 7, 2012

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 14 (2010) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

Brief summary

Please provide a brief summary (no more than 2 short paragraphs) of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed. Alert the reader to all substantive matters or changes.

This regulatory action amends the Virginia Stormwater Management Program (VSMP) Permit Regulations (4VAC50-60-54 E) to clarify that “all approved” Total Maximum Daily Loads (TMDLs) with a specific waste load allocation (WLA) for a pollutant assigned to stormwater discharges from a construction activity are subject to the identification and implementation of additional control measures when found to be necessary.

Prior to this regulatory action, the language of this section only applied to Total Maximum Daily Loads (TMDLs) “approved by the State Water Control Board” that contain a specific Waste Load Allocation (WLA) for a given pollutant assigned to stormwater discharges from a construction activity. Recently, several TMDLs have been approved by the federal government, rather than approved by the State Water Control Board at this time. In order to address this procedural change and to recognize federally approved TMDLs where a specific WLA for a pollutant has been established and is assigned to stormwater discharges from a construction activity, where legally appropriate to do such, the language of this section is being expanded to speak to “an approved” TMDL regardless of the approving entity. This is necessary to remain compliant with the issuance of Construction General Permit project coverages under the auspices of the federal Clean Water Act. This action is clarifying in nature and was agreed upon by interested parties prior to submittal to the Board for final action.

Statement of final agency action

Please provide a statement of the final action taken by the agency including (1) the date the action was taken, (2) the name of the agency taking the action, and (3) the title of the regulation.

On September 8, 2011, the Virginia Soil and Water Conservation Board approved this final regulatory action related to the Board’s Virginia Stormwater Management Program (VSMP) Permit Regulations and authorized the Director of the Department of Conservation and Recreation and the Departmental Regulatory Coordinator to submit as a fast-track action the Board’s final amendment to section 4VAC50-60-54 E of the Board’s Virginia Stormwater Management Program (VSMP) Permit Regulations (as the regulations were amended and would be effective on September 13, 2011) to the Virginia Town Hall and upon approval by the Administration to the Registrar of Virginia.

The Board accordingly adopted the following final regulatory language:

4VAC50-60-54. Stormwater pollution prevention plan requirements.

E. In addition to the requirements of subsections A through D of this section, if a specific WLA for a pollutant has been established in a an approved TMDL and is assigned to stormwater discharges from a construction activity, additional control measures must be identified and implemented by the operator so that discharges are consistent with the assumptions and requirements of the WLA in a State Water Control Board approved TMDL.

The Board further instructed the Department to follow and conduct these actions in accordance with: the fast-track processes within the Administrative Process Act, the Virginia Register Act, the Board’s Regulatory Public Participation Procedures, the Governor’s Executive Order 14 (2010) on the “Development and Review of Regulations Proposed by State Agencies”, and other applicable technical rulemaking protocols.

Legal basis

Please identify the state and/or federal legal authority to promulgate this proposed regulation, including (1) the most relevant citations to the Code of Virginia or General Assembly chapter number(s), if applicable, and (2) promulgating entity, i.e., agency, board, or person. Your citation should include a specific provision authorizing the promulgating entity to regulate this specific subject or program, as well as a reference to the agency/board/person's overall regulatory authority.

The Virginia Stormwater Management Program is administered pursuant to the federal Clean Water Act and the Virginia Stormwater Management Act and attendant regulations.

The Virginia Soil and Water Conservation Board's state authority to promulgate regulations related to stormwater management, and more specifically in this situation related to the control of stormwater discharges from construction activities affecting waters where TMDLs exist, is found in the Virginia Stormwater Management Act in § 10.1-603.2:1 as follows:

§ 10.1-603.2:1. Powers and duties of the Virginia Soil and Water Conservation Board.

In addition to other powers and duties conferred upon the Board, it shall permit, regulate, and control stormwater runoff in the Commonwealth. **The Board may** issue, deny, revoke, terminate, or amend state stormwater individual permits or coverage issued under state general permits; **adopt regulations**; approve and periodically review Virginia stormwater management programs and management programs developed in conjunction with a state municipal separate storm sewer permit; enforce the provisions of this article; **and otherwise act to ensure the general health, safety and welfare of the citizens of the Commonwealth as well as protect the quality and quantity of state waters from the potential harm of unmanaged stormwater**. The Board may:

2. Delegate to the Department any of the powers and duties vested in it by this article **except the adoption and promulgation of regulations**. Delegation shall not remove from the Board authority to enforce the provisions of this article.

6. In accordance with procedures of the Administrative Process Act (§ 2.2-4000 et seq.), **adopt rules governing: (i) hearings; (ii) the filing of reports; (iii) the issuance of permits and special orders; and (iv) all other matters relating to procedure; and to amend or cancel any rule adopted**.

From the federal perspective, the goal of the Clean Water Act (CWA) is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" (33 U.S.C § 1251(a)). Section 402 of the Clean Water Act (33 USC § 1251 et seq.) allows the federal Environmental Protection Agency (EPA) to authorize states to administer the National Pollutant Discharge Elimination System (NPDES) permit program and prohibits the discharge of pollutants into waters of the United States without a NPDES permit. The Commonwealth of Virginia received such authorization in 1975 under the terms of a Memorandum of Understanding with the U.S. EPA. The Virginia Soil and Water Conservation Board was delegated responsibility for administering the Construction General Permit program by Chapter 372 of the 2004 Virginia Acts of Assembly (HB 1177) with approval by the EPA effective January 29, 2005.

As authorized by Section 303(d) of the Clean Water Act, states are required to develop lists of impaired waters. A state's 303(d) impaired waters list is comprised of all waters where the state

has identified that required pollution controls are not sufficient to attain or maintain applicable water quality standards. The law requires that states establish a prioritized schedule for waters on the lists, and develop Total Maximum Daily Loads (TMDLs) for the identified waters based on the severity of the pollution and the sensitivity of the uses to be made of the waters, among other factors (40 C.F.R. §130.7(b)(4)). Under § 303, the EPA has authority to approve state “total maximum daily load” (TMDL) limits on additions of any pollutant to a body of water in that jurisdiction. If the state does not publish any TMDL limits, the EPA may publish them.

The most common pollutants coming from stormwater sources include sediment, pathogens, nutrients, and metals. Impaired waters need a TMDL, which identifies the total pollutant loading that a waterbody can receive and still meet water quality standards, and specifies a pollutant allocation to specific point and nonpoint sources. The TMDL is implemented via the NPDES stormwater permitting system and the NPDES permit conditions must be consistent with the assumptions and requirements of available waste load allocations (WLAs). [40 C.F.R. § 122.44(d)(1)(vii)(B)].

On September 8, 2011, the Virginia Soil and Water Conservation Board approved this final regulatory action related to the Board’s Virginia Stormwater Management Program (VSMP) Permit Regulations and authorized the Director of the Department of Conservation and Recreation and the Departmental Regulatory Coordinator to submit as a fast-track action the Board’s final amendment to section 4VAC50-60-54 E of the Board’s Virginia Stormwater Management Program (VSMP) Permit Regulations (as the regulations were amended and would be effective on September 13, 2011) to the Virginia Town Hall and upon approval by the Administration to the Registrar of Virginia.

Purpose

Please explain the need for the new or amended regulation. Describe the rationale or justification of the proposed regulatory action. Detail the specific reasons the regulation is essential to protect the health, safety or welfare of citizens. Discuss the goals of the proposal and the problems the proposal is intended to solve.

This regulatory action is needed to clarify that all approved Total Maximum Daily Loads (TMDLs) with a specific waste load allocation (WLA) assigned to stormwater discharges from a construction activity are subject to the identification and implementation of additional control measures when found to be necessary in order to meet federal and state requirements and protect water quality.

Prior to this regulatory action, the language of this section only applied to Total Maximum Daily Loads (TMDLs) “approved by the State Water Control Board” that contain a specific Waste Load Allocation (WLA) for a given pollutant assigned to stormwater discharges from a construction activity. Recently, several TMDLs have been approved by the federal government, rather than approved by the State Water Control Board at this time. In order to address this procedural change and to recognize federally approved TMDLs, where legally appropriate to do such, the language of this section is being expanded to speak to “an approved” TMDL regardless

of the approving entity. This is necessary to remain compliant with the issuance of Construction General Permit project coverages under the auspices of the federal Clean Water Act.

Through this regulatory action, the Board is ensuring that pursuant to its regulatory powers in § 10.1-603.2:1 that it is administering regulations that appropriately “act to ensure the general health, safety and welfare of the citizens of the Commonwealth as well as protect the quality and quantity of state waters from the potential harm of unmanaged stormwater” by clarifying through this regulatory action that all “approved” TMDLs are considered during permit issuance.

Rationale for using fast track process

Please explain the rationale for using the fast track process in promulgating this regulation. Why do you expect this rulemaking to be noncontroversial?

Please note: If an objection to the use of the fast-track process is received within the 30-day public comment period from 10 or more persons, any member of the applicable standing committee of either house of the General Assembly or of the Joint Commission on Administrative Rules, the agency shall (i) file notice of the objections with the Registrar of Regulations for publication in the Virginia Register, and (ii) proceed with the normal promulgation process with the initial publication of the fast-track regulation serving as the Notice of Intended Regulatory Action.

As this action is clarifying in nature and was agreed upon by interested parties prior to submittal to the Board for final action, it is anticipated that this is a noncontroversial action.

Substance

Please briefly identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. (Provide more detail about these changes in the “Detail of changes” section.) Please be sure to define any acronyms.

As noted previously, this regulatory action amends the Virginia Stormwater Management Program (VSMP) Permit Regulations (4VAC50-60-54 E) to clarify that “all approved” Total Maximum Daily Loads (TMDLs) with a specific waste load allocation (WLA) assigned to stormwater discharges from a construction activity are subject to the identification and implementation of additional control measures when found to be necessary.

Prior to this regulatory action, the language of this section only applied to Total Maximum Daily Loads (TMDLs) “approved by the State Water Control Board” that contain a specific Waste Load Allocation (WLA) for a given pollutant assigned to stormwater discharges from a construction activity. Recently, several TMDLs have been approved by the federal government, rather than approved by the State Water Control Board at this time. In order to address this procedural change and to recognize federally approved TMDLs, where legally appropriate to do such, the language of this section is being expanded to speak to “an approved” TMDL regardless of the approving entity. This action is viewed as being clarifying in nature and supportive of existing federal requirements.

Issues

Please identify the issues associated with the proposed regulatory action, including:

- 1) the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions;*
- 2) the primary advantages and disadvantages to the agency or the Commonwealth; and*
- 3) other pertinent matters of interest to the regulated community, government officials, and the public.*

If there are no disadvantages to the public or the Commonwealth, please indicate.

The language change proposed by this regulatory action should have no additional impact upon citizens of the Commonwealth beyond those already in existence pursuant to the approved TMDLs. The regulatory action should be recognized as being clarifying in nature. Therefore this action should not result in any new advantages or disadvantages to the public, agencies of the Commonwealth, the regulated community, local governments, or the general public.

Requirements more restrictive than federal

Please identify and describe any requirement of the proposal which is more restrictive than applicable federal requirements. Include a rationale for the need for the more restrictive requirements. If there are no applicable federal requirements or no requirements that exceed applicable federal requirements, include a statement to that effect.

This regulatory action merely brings the regulatory language into compliance with the Commonwealth’s understanding of the appropriate recognition of “approved” TMDLs within its permitting programs. Nothing in this regulatory action exceeds applicable federal requirements.

Localities particularly affected

Please identify any locality particularly affected by the proposed regulation. Locality particularly affected means any locality which bears any identified disproportionate material impact which would not be experienced by other localities.

As this language has been determined to be clarifying in nature and does not represent new requirements, this regulatory action should have no additional impact on localities, disproportionate or otherwise.

Regulatory flexibility analysis

Please describe the agency’s analysis of alternative regulatory methods, consistent with health, safety, environmental, and economic welfare, that will accomplish the objectives of applicable law while minimizing the adverse impact on small business. Alternative regulatory methods include, at a minimum:

- 1) the establishment of less stringent compliance or reporting requirements;*
- 2) the establishment of less stringent schedules or deadlines for compliance or reporting requirements;*
- 3) the consolidation or simplification of compliance or reporting requirements;*
- 4) the establishment of performance standards for*

small businesses to replace design or operational standards required in the proposed regulation; and 5) the exemption of small businesses from all or any part of the requirements contained in the proposed regulation.

It is believed that this language change merely represents a proper reflection of current federal law and how the Commonwealth must administer its National Pollutant Discharge Elimination System (NPDES) Construction permit program. As such, no alternatives to this regulatory action are presented and the change being made falls with the Virginia Soil and Water Conservation Board’s legal requirements to “ensure the general health, safety and welfare of the citizens of the Commonwealth as well as protect the quality and quantity of state waters from the potential harm of unmanaged stormwater”.

Economic impact

Please identify the anticipated economic impact of the proposed new regulations or amendments to the existing regulation. When describing a particular economic impact, please specify which new requirement or change in requirement creates the anticipated economic impact.

NOTE: As will be the case for all categories noted below, it is not anticipated that the amendments advanced through this regulatory action will result in any fiscal impacts as this language change merely represents a proper reflection of current federal law and how the Commonwealth already administers its National Pollutant Discharge Elimination System (NPDES) Construction permit program.

Projected cost to the state to implement and enforce the proposed regulation, including (a) fund source / fund detail, and (b) a delineation of one-time versus on-going expenditures	See preceding NOTE.
Projected cost of the <i>new regulations or changes to existing regulations</i> on localities.	See preceding NOTE.
Description of the individuals, businesses or other entities likely to be affected by the <i>new regulations or changes to existing regulations</i>.	See preceding NOTE.
Agency’s best estimate of the number of such entities that will be affected. Please include an estimate of the number of small businesses affected. Small business means a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million.	See preceding NOTE.
All projected costs of the <i>new regulations or changes to existing regulations</i> for affected individuals, businesses, or other entities. Please be specific and include all costs. Be sure to include the projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses.	See preceding NOTE.

<p>Specify any costs related to the development of real estate for commercial or residential purposes that are a consequence of the proposed regulatory changes or new regulations.</p>	
<p>Beneficial impact the regulation is designed to produce.</p>	<p>This regulatory action will clarify that the Commonwealth is implementing its stormwater management program in compliance with federal and state law and is properly and appropriately ensuring the general health, safety and welfare of the citizens of the Commonwealth as well as protecting the quality and quantity of state waters from the potential harm of unmanaged stormwater.</p>

Alternatives

Please describe any viable alternatives to the proposal considered and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the action. Also, include discussion of less intrusive or less costly alternatives for small businesses, as defined in §2.2-4007.1 of the Code of Virginia, of achieving the purpose of the regulation.

As mentioned previously, it is believed that this language change merely represents a proper reflection of current federal law and how the Commonwealth must administer its National Pollutant Discharge Elimination System (NPDES) Construction permit program. As such, no alternatives to this regulatory action have been considered and the change being made falls within the Virginia Soil and Water Conservation Board’s legal requirements to “ensure the general health, safety and welfare of the citizens of the Commonwealth as well as protect the quality and quantity of state waters from the potential harm of unmanaged stormwater” through the recognition of “approved” federal TMDLs.

Family impact

Please assess the impact of the proposed regulatory action on the institution of the family and family stability including to what extent the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one’s spouse, and one’s children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.

It is not anticipated that this regulation will have a direct impact on the institution of the family or family stability. However, improvement of water quality does have positive public health and safety benefits that have an indirect impact on families.

Detail of changes

Please list all changes that are being proposed and the consequences of the proposed changes. If the proposed regulation is a new chapter, describe the intent of the language and the expected impact. Please describe the difference between existing regulation(s) and/or agency practice(s) and what is being proposed in this regulatory action.

*If the proposed regulation is intended to replace an emergency regulation, please list separately (1) all differences between the **pre-emergency** regulation and this proposed regulation, and (2) only changes made since the publication of the emergency regulation.*

For changes to existing regulation(s), use this chart:

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change, intent, rationale, and likely impact of proposed requirements
4VAC50-60-54		Prior to this regulatory action, the language of this section (subsection E) only applied to Total Maximum Daily Loads (TMDLs) “approved by the State Water Control Board” that contain a specific Waste Load Allocation (WLA) for a given pollutant assigned to stormwater discharges from a construction activity.	<p>Recently, several TMDLs have been approved by the federal government, rather than approved by the State Water Control Board at this time. In order to address this procedural change and to recognize federally approved TMDLs, where legally appropriate to do such, the language of this section is being expanded to speak to “an approved” TMDL regardless of the approving entity.</p> <p>This action is necessary to remain compliant with the issuance of Construction General Permit project coverages under the auspices of the federal Clean Water Act. This action is clarifying in nature.</p>