



Virginia
Regulatory
Town Hall

Exempt Action Final Regulation Agency Background Document

Agency Name:	State Water Control Board
VAC Chapter Number:	9 VAC 25-180-10 et seq.
Regulation Title:	General VPDES Permit Regulation For Discharges of Storm Water From Construction Activities
Action Title:	Amend Existing Regulation
Date:	March 30, 2004

Where a regulation is exempt in part or in whole from the requirements of the Administrative Process Act (§ 9-6.14:1 et seq. of the Code of Virginia) (APA), the agency may provide information pertaining to the action to be included on the Regulatory Town Hall. The agency must still comply the requirements of the Virginia Register Act (§ 9-6.18 et seq. of the Code of Virginia) and file the final regulation with the Registrar in a style and format conforming with the *Virginia Register Form, Style and Procedure Manual*. The agency must also comply with Executive Order Fifty-Eight (99) which requires an assessment of the regulation's impact on the institution of the family and family stability.

Note agency actions exempt pursuant to § 9-6.14:4.1(B) do not require filing with the Registrar a Notice of Intended Regulatory Action, or at the proposed stage. When the regulation is promulgated and submitted to the Registrar, the agency need only provide a statement citing the specific Virginia Code section referencing the exemption and an authority certification letter from the Attorney General's Office. No specific format is required.

This form should be used for actions **exempt from the Administrative Process Act pursuant to § 9-6.14:4.1(C)** at the final stage. Note that agency actions exempt pursuant to § 9-6.14:4.1(C) of the APA do not require filing with the Registrar a Notice of Intended Regulatory Action, and at the proposed stage.

Summary

Please provide a brief summary of the proposed new regulation, amendments to an existing regulation, or the regulation being repealed. There is no need to state each provision or amendment or restate the purpose and intent of the regulation, instead give a summary of the regulatory action and alert the reader to all substantive matters or changes. If applicable, generally describe the existing regulation.

This regulation will reissue the existing general permit for construction activity storm water discharges that will expire on June 30, 2004. The permit is modeled after the July 2003 US EPA

construction storm water general permit, with certain provisions modified to make it conform to similar requirements in the DCR Virginia Erosion and Sediment Control Regulation. The substantive changes between the proposed and final regulation are as follows:

(1) Added a requirement to the Registration Statement that the applicant include a list of the permanent BMPs (both structural and non-structural) that will be installed at the site.

(2) Modified the "Water Quality Protection" special condition by removing the reference to "significant downstream impacts", and replacing it with "downstream pollution (as defined in § 62.1-44.3 of the Code of Virginia)", and added the following action that the Board may take: "may require the permittee to include and implement appropriate controls in the SWPPP to correct the problem".

(3) Modified the inspection section to require inspections to be conducted within 48 hours of the end of any runoff producing storm event (instead of a 0.5-inch rainfall event), and removed the requirement to measure the rainfall on site using a rain gauge.

Statement of Final Agency Action

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

On March 23, 2004, the State Water Control Board adopted the amendment to the General VPDES Permit Regulation for Discharges of Storm Water From Construction Activities. The Board also asserted that they will receive, consider and respond to petitions by any person at any time with respect to reconsideration or revision of the regulation.

Family Impact Statement

Please provide an analysis of the regulatory action that assesses the impact on the institution of the family and family stability including the extent to which 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.

The regulation amendment will have no direct impact on the institution of the family or family stability.

Summary of Comments and Responses for the VPDES General Permit Regulation for Discharges of Storm Water From Construction Activities, 9 VAC 25-180-10 et seq.

The public comment period for the draft regulation ran from December 1, 2003, through January 30, 2004. A public hearing was held in Richmond on January 13, 2004. The hearing served for both the industrial activity storm water general permit and the construction storm water general permit regulations. After the staff presentation on the regulations, there were no other speakers at the hearing. There were 10 non-staff people present at the hearing. Six letters providing written comments on these draft regulations were received during the comment period. This memo summarizes these written comments and provides responses.

1. Our County has been a participant in the TMDL planning process. It is our understanding that non-point source abatement with regard to TMDLs is voluntary. We would like to maintain that provision through State and Federal law and regulations. We are concerned that since the TMDL abatements are voluntary, this proposal would regulate them instead. We request that the amendment not seek to enforce compliance with a TMDL goal, since those are voluntary for non-point sources. We would appreciate consideration of that concern in the development of this amendment.

Response: Discharges from construction sites are point source discharges under the CWA. The construction general permit regulates these discharges, and allows the use of BMPs to satisfy the permit requirements. If a TMDL is developed for an impaired stream, and sediment is identified as a pollutant of concern, then any construction storm water discharges to this stream must comply with the TMDL requirements as developed in the TMDL implementation plan. To allow these dischargers to be covered under the construction general permit (as opposed to an individual construction permit), we have added a TMDL special condition to the general permit that states that the permittee must comply with the TMDL requirements for any sediment impaired stream they discharge to. Construction sites that properly install and maintain ESC BMPs according to local and State (DCR) requirements will probably meet the TMDL implementation requirements in most cases. The purpose of including the TMDL special condition is not to regulate non-point source TMDL abatements (non-point source discharges are not covered by this permit), but to allow dischargers impacted by sediment TMDLs to be covered under this general permit, instead of making them get a much more expensive individual permit (which would probably impose essentially the same permit requirements).

2. Construction activities too often result in erosion, discharge of pollutants, and loss of riparian habitat and biological integrity. We support and encourage actions to abate all of these problems, and we applaud your efforts in this regard. We observe that the Virginia 2002 305(b) Water Quality Assessment Report lists only 8.45 miles of surface waters impaired by siltation and only 16.24 miles impaired due to habitat alteration.

Response: Thank you. The purpose of the program is to control the discharge of pollutants from construction sites to the maximum extent practicable, and to meet water quality standards.

3. It is our observation and experience that construction activity and aquatic resource protection are compatible if and when proper mitigation measures are implemented. We hope that through this rulemaking and/or inspections, awareness, training, and enforcement, DEQ can control the impact of construction storm water runoff.

Response: DEQ uses all of the above methods to control the discharge of pollutants from construction sites to the maximum extent practicable.

4. To prevent additional stream segments in Virginia from becoming impaired due to siltation, turbidity, and suspended solids, (a) we encourage the Department to require that "bad actors" be subjected to increased requirements, scrutiny, and/or enforcement action, or be denied use of this general permit and (b) we could support a modest fee increase for this permit, if the Department could specifically use such fees to increase awareness, inspections, and enforcement.

Response: The implementation of the permitting and enforcement aspects of this permit are outside of this rulemaking, and are handled through DEQ policy and guidance. "Bad actors" are subjected to increased scrutiny, and may be denied coverage under this general permit. In those cases, an individual permit (probably with increased requirements) would be issued. As far as the fee is concerned, that is also outside of this rulemaking.

5. We support the routine inspection program requirements, inclusion of noncompliance reporting requirements, and also the recognition and addition of requirements for 303(d) stream segments where TMDL allocations have been established for sediment or a parameter that addresses sediment. We would also support special diligence with regard to conditions under this permit where waters have been listed as impaired for such parameters even where TMDL allocations have not yet been established.

Response: The special diligence for impaired waters where TMDL allocations have not yet been established would be part of the DEQ implementation guidance for this general permit, which is outside of this rulemaking process. We appreciate the suggestion and will consider including it in the guidance.

6. We encourage effectively stringent enforcement measures to deal with substantively improper, incomplete, or inaccurate inspection forms (where forms are found to be inadequate to determine if effective preventive controls were or are in place and are being maintained to protect surface waters from construction runoff or there is evidence of inaccurate modification or deliberate error in the forms).

Response: Again, the enforcement of this general permit is outside of this rulemaking process.

7. We encourage the adoption of policies and provisions throughout regulatory and resource management programs to ensure maximum practicable maintenance, protection, and/or establishment of riparian/buffer/streamside management zones. We also would encourage practicable measures to afford recognition and protection of wetlands and threatened or endangered species from construction stormwater discharges.

Response: The establishment of riparian/buffer/streamside management zones is beyond the scope and purpose of this general permit. The maintenance, protection and establishment of these zones would be better handled through a separate rulemaking or through state policy. Regarding the protection of wetlands and threatened/endangered species, if these are potentially impacted negatively by construction storm water discharges, general permit coverage may be denied and an individual permit required with site specific permit requirements.

8. 9 VAC 25-180-10. Definitions. "Final Stabilization" - We believe that "uniform" should be replaced with "wide spread" or another appropriate descriptor of aerial coverage, in the definition of final stabilization since various types of perennial vegetation or cover may be used (i.e., the vegetation types are not uniform). Also, some coverage less than 100 percent, e.g., 90 percent, should be considered sufficient to inhibit erosion. For transmission line rights-of-way, there may be activities by the land owner or by third parties that prevent establishment of permanent vegetation on 100 percent of the disturbed area. Some common examples include recreational vehicle use and livestock use. We suggest insertion of the following sentence: "Portions of linear projects where actions by a land owner or a third party prevent establishment of permanent vegetation are to be stabilized to the extent possible but are not included in the area requiring final stabilization under the permit."

Response: All land-disturbing activities undertaken on private and public lands in Virginia must meet the 19 "minimum standards" for erosion and sediment control in Section 4 VAC 50-30-40 of the DCR's Erosion and Sediment Control Regulations. The first part of the general permit definition of Final Stabilization is from DCR's minimum standard # 3. The final 2 parts are from EPA's definition of final stabilization. To be consistent with DCR and EPA definitions, the permit will remain as written.

9. General Permit, Part II, D. 2.a.(2)(a) Sediment Basins. Insert "disturbed" so the first sentence reads, "For common drainage locations that serve an area with 3 or more disturbed acres at a time, a temporary (or permanent) sediment basin providing 3,618 cubic feet of storage per acre drained, or equivalent control measures, shall be provided where attainable until final stabilization of the site."

Response: The change has been made.

10. 9 VAC 25-180-70. General Permit, Part II, D. 4.a. Inspections. During non-work days, it is very difficult (especially during periods of isolated thunderstorms) to determine whether an 0.5-inch rain event has occurred at remote construction sites where no one is available to monitor rainfall, and particularly for linear projects to get someone to many or all locations. Such cumbersome after-the-fact inspection does little to prevent stormwater pollution. Instead we believe that sound plans coupled with regularly scheduled inspections and enforcement are the most effective means of preventing storm water pollutants from entering the environment. We believe performing, documenting, and certifying regularly scheduled quality inspections are a more efficient and effective means for controlling storm water pollution than requiring inspections within 48 hours after

significant rainfall. For all stormwater regulations we review, we have encouraged, and likewise encourage Virginia, to emphasize the use of documentable certified scheduled inspections and substantively accurate records as the primary means of achieving compliance. Therefore, we recommend that Virginia retain the periodic inspection requirements, including inspection of discharge locations (or downstream where appropriate), but remove the rainfall monitoring and rainfall event inspection requirements for remote sites from the permit. At an absolute minimum, the requirements for rainfall event monitoring and inspections during weekends and holidays should be removed from the permit or specifically waived. We support the representative inspection requirements as they are written for utility line installation, pipeline construction, and other examples of linear construction activities where access by inspection personnel may be limited, or might compromise stabilized areas, or increase the potential for erosion.

Response: The inspection requirement in the permit was a combination of EPA's Construction General Permit requirement, and DCR's Erosion and Sediment Control Regulation requirement. We agree that it is very difficult to determine whether an 0.5-inch rain event has occurred at remote construction sites, and on weekends/non-work days. Since the rainfall event inspection requirement for all sites is in both EPA's and DCR's requirements, we believe that this should remain in the permit. However, to simplify the process and to be consistent with the DCR regulation requirements, the section has been changed to read: "Inspections shall be conducted at least once every 14 calendar days and within 48 hours of the end of a any runoff producing storm event ~~that is 0.5 inches or greater.~~" In addition, the requirement to measure the rainfall using an appropriate rain gage has been deleted.

11. 9 VAC 25-180-70. General Permit, Part III, A, B, and C. Monitoring, Records, and Reporting Monitoring Results. Although we recognize that Part III of this general permit is included as "CONDITIONS APPLICABLE TO ALL VPDES PERMITS", the description of records and sampling requirements in the general conditions appears in conflict with the inspection requirements in Part II, D.4.a and the report requirements in Part II, D. 4.e. If no sampling is required, we suggest this section be deleted or revised to conform with the section on inspection requirements. Another suggested fix would be to reword Part III.A.1 to read "Samples and measurements taken, if required under this permit, shall be representative of the monitored activity" and insert the words "If required under this permit," at the beginning of Part III.A.2. If sampling and reporting are to be conducted under this permit, conditions that would require sampling and reporting should be included.

Response: Monitoring and inspections are two separate and distinct activities. No monitoring (i.e., collection of discharge samples) is required by this permit. To clarify this, the following statement has been added to the beginning of Part III (Conditions Applicable to All VPDES Permits): "NOTE: Monitoring is not required for this permit. If you choose to monitor your storm water discharges or BMPs, you must comply with the requirements of subsections A, B, and C, as appropriate."

12. 9 VAC 25-180-70 General Permit, Part III, C. Reporting Monitoring Results. This section requires that monitoring results be entered on a Discharge Monitoring Report or

other approved form and submitted not later than the 10th of the month. This section also appears to conflict with the inspection requirements in Part II, D.4.a. The discussion on page 38 only mentions inspection reports be retained as part of the storm water pollution plan. No specific form is indicated. (See previous comment.)

Response: Since no monitoring is required by this permit, the permittee is not required to do anything under this section. The section will remain as written.

13. Special Condition for Water Quality Protection. The special condition for water quality protection set forth in the permit (Part I.H) does not afford "fair notice" prior to enforcement. To ensure that the special condition is interpreted and applied in a manner that comports with minimum constitutional safeguards, we urge DEQ to revise it as follows:

**(a) Eliminate reference to "significant downstream impacts" (subjective and undefined); and
(b) Substitute "appropriate enforcement action and/or require the permittee to obtain an individual permit" with "require the permittee to develop a supplemental BMP action plan describing SWPPP modifications that address the identified water quality concerns, require the permittee to submit valid and verifiable data and information that are representative of ambient conditions and indicate that the receiving water is attaining standards and/or require the permittee to submit an individual permit application. ..."**

Response: See the response to comment # 2. The changes that were made to the Industrial General Permit special condition have also been made to the Construction General Permit special condition.

14. We request that 9 VAC 25-180-60.B. "Registration Statement" be amended to require additional information for the tracking and reporting of BMPs used to control stormwater discharges from construction activities. This BMP tracking and reporting will provide needed information on the location and type of urban BMPs installed which is critical for quantifying our NPS efforts and which will provide data useful for calculating sediment and nutrient reductions to the waters of the Commonwealth. Within the Chesapeake Bay, this is critical to track future accomplishments in carrying out the Tributary Strategies. The information which needs to be reported on the registration statement would be similar to that required in 9 VAC 25-750-50, Part II.B.5.b.4 for localities reporting annual urban BMP data for the MS4 program. This includes the type of BMP installed, the geographic location (Hydrologic Unit Code), the waterbody the BMP is discharging into and the number of acres treated by the BMP. We request that this section be amended to include these data submittal requirements. In addition to the requested amendment, an appropriate process needs to be established for collecting, transferring and storing the requested data and similar data on urban BMPs within the Natural Resources Secretariat. To facilitate the reporting, collection, transfer and data storage process, a joint meeting between DEQ, CBLAD and DCR should be held. This cooperation will insure that the informational data needed by each department is met and the burden placed on localities not be duplicated by each agency.

Response: This information has been requested by several state agencies as well as by EPA's Chesapeake Bay Office. The Registration Statement section has been modified to require the permittee to report the requested BMP tracking information. The process for collecting, transferring and storing the requested data is outside the scope of this regulatory process. We will coordinate with DCR and CBLAD (and EPA) to ensure that the data that is needed by each agency will be made available.

List of persons submitting comments on the VPDES General Permit Regulation for Discharges of Storm Water From Construction Activities (9 VAC 25-180-10 et seq.)

Name of Commenter	Representing	Comment Number
Bonnie Johnson	Franklin County	1
John W. Shipp, Jr.	Tennessee Valley Authority	2 - 12
Robert J. Robertson	Virginia Manufacturers Association	13
Jack E. Frye	Department of Conservation and Recreation	14