



## Exempt Action Final Regulation Agency Background Document

<b>Agency name</b>	State Water Control Board
<b>Virginia Administrative Code (VAC) citation</b>	9 VAC 25-660
<b>Regulation title</b>	Virginia Water Protection General Permit WP1 for Impacts Less Than One-Half Acre
<b>Action title</b>	Revisions and Renewal of 9 VAC 25-660
<b>Final agency action date</b>	June 1, 2006
<b>Document preparation date</b>	May 4, 2006

When a regulatory action is exempt from executive branch review pursuant to § 2.2-4002 or § 2.2-4006 of the Virginia Administrative Process Act (APA), the agency is encouraged to provide information to the public on the Regulatory Town Hall using this form.

Note: While posting this form on the Town Hall is optional, the agency must comply with requirements of the Virginia Register Act, the *Virginia Register Form, Style, and Procedure Manual*, and Executive Orders 21 (02) and 58 (99).

### Summary

*Please provide a brief summary of all regulatory changes, including the rationale behind such changes. Alert the reader to all substantive matters or changes. If applicable, generally describe the existing regulation.*

Virginia Water Protection (VWP) General Permit WP1 will expire on October 1, 2006. The proposed revisions include minor changes to improve the processing and coordination of authorizations, both for the public, DEQ, and other agencies. These VWP general permit regulations generally reduce the permitting burden to the public and minimizes the amount of agency duplication in processing permit authorizations and it is in the interest of all to continue to provide this level of service through the renewal of this general permit.

The substance of the revisions included the addition, clarification, and deletion of definitions; minor grammatical changes; formatting, consolidating and reordering of text to improve readability; clarification of existing requirements; requiring a complete application and compensatory mitigation for impacts to wetlands, open waters and streams which are protected by deed restrictions or similar protective covenants; extending the life of the general permit regulations to 10 years instead of the current 5 years; reiteration of provisions in the main VWP regulation for purposes of emphasis; and amending the thresholds of coverage for wetlands and open waters and stream impacts, which were previously combined together as "surface waters." The proposed revisions to General Permit WP1 govern the

permanent and temporary impacts to less than ½-acre of nontidal wetlands or open water, and up to 300 linear feet of nontidal stream bed.

### 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.*

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On June 1, 2006, the State Water Control Board voted unanimously to allow the Virginia Department of Environmental Quality to finalize the proposed revisions to 9 VAC 25-660 - Virginia Water Protection General WP1 Permit for Impacts Less than One-Half of an Acre.

### Family impact

*Assess the impact of this regulatory action on the institution of the family and family stability.*

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The proposed general permit will have no impact on the institution of the family and family stability.

**Summary Of Public Comments and DEQ Responses**

**Proposed Revisions to Virginia Water Protection General**

**Permit WP1**

**9 VAC 25-660**

The public comment period for the proposed regulation action noted above was from January 9, 2006 through March 10, 2006.

One public hearing was held at the DEQ Piedmont Regional Office in Glen Allen, Virginia on Monday, February 6, 2006. Mr. E. Bryson Powell with the State Water Control Board officiated. Five members of the public and three DEQ staff attended the hearing, and one citizen provided oral comments.

A total of twelve written comments, including email and facsimile correspondence, were received by the comment period deadline. Written comments were received from government agencies, representatives of various business and trade advocacy organizations, and citizens.

All of the written and oral (audio tape) comments will be kept in the public record for this proposed rulemaking. The public comments presented below have been summarized and grouped by the topic for brevity and includes the proposed regulation citation, if applicable. A list of acronyms and abbreviations used in this summary is provided at the end.

## 9 VAC 25-660

### 1. *Kimberly Vanness Larkin, Northern Virginia Building Industry Association (NVBIA):*

- a. -10 Definitions:
  - recommends keeping the definition of conversion
  - modify definition of isolated wetland of minimal ecological value to clarify that the surface water connection may be seasonal, such as in flood plains
  - revise definition of riprap to include “placed for the purpose of preventing erosion”
  - recommend revising definition of stream bed, as current version excludes waters of US that are placed in roadside/agric ditches; as written, contradicts Corps impact determination; two separate impact calculations would be required; ditched waters should have same status as IWOMEV and treated same way
  - disagree with definition of temporary impacts with addition of ‘conditions’, as such can require detailed and lengthy monitoring; applies throughout reg text
- b. -20 Purpose: revise paragraph A to add ‘and’ after the word permanently and also before the word or; add ‘and’ after wetlands and before or in same sentence; change throughout reg text.
- c. -30 Authorization: add ‘and’ after permanently and before or, otherwise this will apply to temporary or permanent impacts, not both; revise and/or language; disagree with reduction of intermittent impacts; appears to duplicate SPGP; may cause delays; recommend keeping original thresholds and language.
- d. -40 Exceptions: and/or language does not match -660-30; revised and/or language throughout regulation; add ‘new’ before stormwater management in F1; F10 is too broad and at minimum recommend deleting ‘other land use protective easement’.
- e. -50 Notification: add ‘and’ after acre instead of ‘or’.
- f. -60 Application: do not agree with wording change in B15, as it does not take into account other A&M measures reviewed; Ches Bay Act is not under jurisdiction of SWCB; delete requirement for RPA boundary on wetland delineation in B17, as it is not required for a jurisdictional determination; do not agree with addition of B20, as easement is hard to know about unless its recorded with property title; change ‘request’ to ‘required’ in E to prevent requests from becoming required information when not required by regulation; disagree with requirement of fee for administratively withdrawn projects in E and at minimum, applicant should be offered option of withdrawing application and resubmitting with no fee.
- g. -70 Compensation: insert ‘be’ after may, as it is missing from A.

- h. -80 Notice of planned change: revise and/or language in paragraph B; in B, don't think new permit and fee should be required if go over 1/10 acre, as would delay permit process; if project qualifies for another GP, should be able to continue with processing under same permit number and pay fee for just increases in impacts; remove paragraph I because DEQ does not have jurisdiction over fish and wildlife resources, or at minimum revise to remove agency objections to upland activities.
- i. -100 VWP general permit:
- revise and/or language in paragraph IA1
  - IC5 does not allow for the clearing required for E&S controls, so add 'primary site' before clearing, or add 'clearing for placement of E&S controls should be minimized to the max. extent practicable'
  - add 'existing' before compensatory in IC10
  - do not include 'other interested and affected agencies' in IC15, as this should only apply to agencies with regulatory authority/jurisdiction
  - remove IC17, as complying with DCR standards should be enough, or if keeping it, start with wording 'Untreated stormwater ...', so that permittee is not responsible for stormwater runoff generated offsite and out of their control
  - disagree with adding 'minimum' to IIA, as whole point of GP is to minimize time and standardize requirements for minimal impacts

*DEQ Response:*

- The definition of Conversion is inclusive of other types of impacts such as those resulting from impounding water. The definition will be stricken from Section 10 of each regulation, as proposed, and incorporated into in Section 70 J, as proposed. No changes are being made to the proposed regulation.
- The definition of Isolated Wetland of Minimal Ecological Value in Section 10 is included in this regulation to correct it being inadvertently omitted from the regulation during the interim revisions effective January 2005. The definition is consistent with the VWP Permit Program Regulation 9 VAC 25-210. No changes are being made to the proposed regulation.
- The definition of Riprap in Section 10 is being added to WP1 and WP2 to be consistent with its inclusion in WP3 and WP4. The definition includes all purposes for riprap in surface waters. No changes are being made to the proposed regulation.
- The definition of Stream Bed in Section 10 of each regulation will be clarified as to not exclude channelized surface waters.
- The definition of Temporary Impacts in Section 10 of each regulation states that conditions, contours, or elevations must be restored, provided that functions and values are restored. For example, it is not acceptable to replace forest functions and values with emergent functions and values. However, since the functions and values of a mature forest cannot be replaced *immediately*, the acceptable compensation plan will replace the functions and values associated with a forested system, even if planting of immature trees and woody material may be necessary at first. Therefore, no change is being made to the proposed regulation.

- The intent of Sections 20, 30, 40, 50, 80, and 100 is to allow authorization of a project that impacts less than one-half acre of wetlands, or less than one-half acre of open water, or any combination of wetlands and open water that is less than one-half acre, in addition to impacting less than 300 linear feet of stream bed. The impacts can be permanent, temporary, or a combination of both, provided that the one-half acre and 300 linear foot-limits are not exceeded. No change to the wording is proposed.
- The usage thresholds for each regulation will remain as proposed, based on a compromise between the various positions of the TAC members. No change is proposed.
- The intent of Section 40 is to prohibit the construction, redesign, expansion, or placement of a stormwater management facility in the specified waters, whether a new or an existing facility. Therefore, no change is proposed at this time.
- The proposed language in Section 40 is inclusive of the various types of protective instruments that are commonly used and does not exclude other instruments not listed in the regulation text. Therefore, no change is proposed.
- All four regulations include “and”, which provides for a more robust accounting of all avoidance and minimization measures taken. No change is proposed to Section 60 B 15.
- In accordance with the State Water Control Law, the State Water Control Board is authorized the power to establish policies and programs for effective area-wide or basin-wide water quality control and management (§ 62.1-44.15. Powers and duties. (13)). Additionally, Virginia Water Protection Permits may only be issued if after [the board] has determined that the proposed activity is consistent with the provisions of the Clean Water Act and the State Water Control Law and will protect instream beneficial uses (§ 62.1-44.15:5. Virginia Water Protection Permit (B)). Further, prior to the issuance of a Virginia Water Protection Permit, the Board shall consult with, and give full consideration to the written recommendations of, the following agencies: the Department of Game and Inland Fisheries, the Department of Conservation and Recreation, the Virginia Marine Resources Commission, the Department of Health, the Department of Agriculture and Consumer Services and any other interested and affected agencies (§ 62.1-44.15:5. Virginia Water Protection Permit (F)). In addition to the statute, the Virginia Permit Program Regulation 9 VAC 25-210 (50B1) prohibits the issuance of a VWP permit where the proposed activity or the terms or conditions of the VWP permit do not comply with state law or regulations, including but not limited to § 10.1-1408.5 of the Code of Virginia. Therefore, DEQ is within its authority to require that Resource Preservation Areas (RPA) be identified, as per the proposed Section 60, by applicants seeking coverage under a Virginia Water Protection permit. No change is proposed.
- The requirement in Section 60 for disclosure of surface waters in protected areas was the outcome of TAC discussions during the development of the proposed regulation language. DEQ needs to ensure that protected areas are not impacted without the proper revisions to such protective easements and without the necessary compensation. No change is proposed.
- Since DEQ requires a permit application fee to cover staff time and other agency resources, a fee for the second review of an application for the same project, especially after 180 days has passed, would cover the additional time for staff review. Likewise, if new impacts exceed the 1/10 acre or 300 linear feet, additional staff time is required to consider the effect of the impacts and proposed compensation. Therefore, no change is proposed to Sections 60 and 80 at this time.

- DEQ is authorized to protect surface water functions and values and receive compensation for lost functions and values. A Virginia Water Protection permit may not be issued if significant impacts occur to surface waters. Since functions and values include fish and wildlife habitat, no change is proposed to Section 80.
- To the best of our knowledge, DEQ has not cited permit violations for clearing associated with placement of E&S controls when related to project construction. If E&S controls are designed in accordance with the Virginia Erosion and Sediment Control Handbook, and that handbook includes a ‘clearing’ activity in order to install the control, then that particular clearing activity is authorized by the permit. Regardless, if clearing is not part of the handbook practice, the clearing would still be considered as a temporary impact that must be reported in the application and restored. Therefore, no change is proposed to Section 100.
- The intent of Section 100, Part I C 10 is to protect existing or proposed compensation sites, especially when existing wetlands or streams are present. Therefore, no change is proposed.
- DEQ intends to delete Section 100, Part I C 17 in order to clarify the regulation of stormwater management activities in upland areas versus surface waters.
- The inclusion of other affected agencies is authorized by the State Water Control Law (§ 62.1-44.15:5. Virginia Water Protection Permit (F)), and the TAC consensus was to include this language. Therefore, no change is proposed to Section 100.
- The TAC consensus was to revise the title of Section 100, Part II A. Therefore, no change is proposed to Section 100.

2. *Sam Hollins, Virginia Transportation and Construction Association (VCTA): -70*  
 Compensation: match ratio wording in E to other three general permits.

*DEQ Response:* The word “replacement” will be revised in WP1 to “compensation” in Section 70 H of WP1 so that all four regulations contain the same language. Each general permit regulation contains specific ratios based on the type of activities covered by the regulation and the required compensation, and therefore, no change to the ratio numbers will be made to each proposed regulation.

3. *Darlene Lamoureaux for Mike Hyslett:* if I understand the proposal correctly, this would exclude wetlands of less than one-half acre from the normal review process; if this is the case, I have concerns; concern is that it could result in loss of very valuable and increasingly rare wildlife habitats in VA; vernal pools are rarely larger than one-half acre and therefore might be subject to widespread loss if not protected by a minimum review process; please provide continued protection for these special places, at least through a minimum review process.

*DEQ Response:* DEQ will continue to regulate impacts to smaller wetlands except for those meeting the definition of “isolated wetlands of minimal ecological value”. The proposed regulation revisions will not exclude wetlands up to ½ acre from DEQ’s review and permit process. No change is proposed.

4. *John DeMary*: identifying vernal pools is critical for amphibian breeding (and most do not) approach half acre.

*DEQ Response*: DEQ will continue to regulate impacts to smaller wetlands except for those meeting the definition of “isolated wetlands of minimal ecological value”. The proposed regulation revisions will not exclude wetlands up to ½ acre from DEQ’s review and permit process. No change is proposed.

5. *Liam McGranaghan*: I have just heard about this regulation; as an educator, I’m appalled that anyone would think of changing the process that is not in place; these areas must be protected; they are vital to reproduction of amphibian species in VA; please keep the review process.

*DEQ Response*: DEQ will continue to regulate impacts to smaller wetlands except for those meeting the definition of “isolated wetlands of minimal ecological value”. The proposed regulation revisions will not exclude wetlands up to ½ acre from DEQ’s review and permit process. No change is proposed.

6. *Emilee Mizerak*: I attended a class field trip today, where the guide told my class that a new bill has been proposed that will make it legal to destroy any wetland less than an acre in size; please don’t allow this bill to be passed; I am greatly opposed to this especially since these wetlands are homes and breeding grounds to many different frogs and salamanders.

*DEQ Response*: DEQ will continue to regulate impacts to smaller wetlands except for those meeting the definition of “isolated wetlands of minimal ecological value”. The proposed regulation revisions will not exclude wetlands up to ½ acre from DEQ’s review and permit process. No change is proposed.

7. *anonymous (maf61@netscape.com)*: I am in total disagreement to the amendmet to 9 VAC 25-660; while on a field trip today we found many amphibians and witnessed frog breeding in vernal pools; people do not know or appreciate the need for these essential wetlands; I hope that you will rethink this before making any final decisions.

*DEQ Response*: DEQ will continue to regulate impacts to smaller wetlands except for those meeting the definition of “isolated wetlands of minimal ecological value”. The proposed regulation revisions will not exclude wetlands up to ½ acre from DEQ’s review and permit process. No change is proposed.



8. *Jay Diamant*: I just came back from a field trip where I saw over 400 tree frogs in four sites, none of which approached an acre and a half in size; I urge that 9 VAC 25-660 be kept as it is currently.

*DEQ Response*: DEQ will continue to regulate impacts to smaller wetlands except for those meeting the definition of “isolated wetlands of minimal ecological value”. The proposed regulation revisions will not exclude wetlands up to ½ acre from DEQ’s review and permit process. No change is proposed.

9. *Cajal Rutti*: I’m a student of Mr. McGranaghan’s class; we went on a field trip recently to Loudoun County; it is imperative that we protect wetlands and especially vernal pools for amphibians; I am vehemently opposed to any change in the existing regulation; none of the site I saw were near 1.5 acres in size; the proposed change in the regulation would drive many species of frogs to the brink of extinction.

*DEQ Response*: DEQ will continue to regulate impacts to smaller wetlands except for those meeting the definition of “isolated wetlands of minimal ecological value”. The proposed regulation revisions will not exclude wetlands up to ½ acre from DEQ’s review and permit process. No change is proposed.

## List of Acronyms and Abbreviations

A&M	Avoidance and minimization
BMP	Best Management Practice
DCR	Department of Conservation and Recreation
DEQ	Department of Environmental Quality
DGIF	Department of Game and Inland Fisheries
E&S	Erosion and sediment
GP	DEQ General Permit
IWOMEV	Isolated wetland of minimal ecological value
NWP	USACE Nationwide Permit
NVBIA	Northern Virginia Building Industry Association
RP	USACE Regional Permit
RPA	Resource Protection Area
RSA	Rapidan Service Authority
SICAM	Stream Incremental Compensation and Assessment Method
SPGP	State Program General Permit
SWCB	State Water Control Board
TAC	Technical Advisory Committee
T&E	Threatened and Endangered (Species)
USACE	U.S. Army Corps of Engineers
VAC	Virginia Administrative Code
VDACS	Virginia Department of Agricultural and Consumer Services
VDOT	Virginia Department of Transportation
VWP	Virginia Water Protection (referring to the Permit Program)
VWPP	Virginia Water Protection Permit
WP	Water Protection ( as in WP1 through WP4)