



Virginia
Regulatory
Town Hall

Exempt Action Final Regulation Agency Background Document

Agency Name:	State Water Control Board
VAC Chapter Number:	9 VAC 25-750-10 et seq.
Regulation Title:	General VPDES Permit Regulation For Discharges of Storm Water From Small Municipal Separate Storm Sewer Systems
Action Title:	Adopt New Regulation
Date:	October 11, 2002

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provide a brief summary of the proposed new regulation, amendments to an existing regulation, or the regulation being repealed.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.

The EPA Phase 2 storm water regulations require small municipal separate storm sewer systems (small MS4s) in urbanized areas to apply for VPDES permit coverage by March 10, 2003. Small MS4s include systems owned or operated by municipalities, federal facilities (such

as military bases), state facilities (such as VDOT, prisons, large hospitals, etc.), and universities. This general permit regulation establishes standard language for control of storm water discharges from small MS4s through the development, implementation and enforcement of a Storm Water Management Program (SWMP) to reduce the impacts of the storm water discharges on the receiving streams to the maximum extent practicable. The permittee must address each of the following minimum control measures in the SWMP: (1) public education and outreach on storm water impacts, (2) public involvement/ participation, (3) illicit discharge detection and elimination, (4) construction site storm water runoff control, (5) post-construction storm water management in new development and redevelopment, and (6) pollution prevention/good housekeeping for municipal operations. The permittee must evaluate program compliance, the appropriateness of the identified BMPs, progress towards achieving the identified measurable goals, and requires the permittee to submit annual reports to DEQ by the first, second and fourth anniversaries of the date of coverage under the permit.

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 October 3, 2002, the State Water Control Board adopted the General VPDES Permit Regulation for Discharges of Storm Water From Small Municipal Separate Storm Sewer Systems. 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 Small Municipal Separate Storm Sewer Systems, 9 VAC 25-750-10 et seq.

The public comment period for the draft regulation ran from May 6, 2002, through July 8, 2002. Public hearings were held in Roanoke on June 11, 2002, and in Richmond on June 13, 2002. These hearings served for both the small MS4 general permit and the construction storm water general permit regulations. After the staff presentation on the regulation, there were no other speakers at the Roanoke hearing, and only one speaker at the Richmond hearing addressed his comments to the small MS4 general permit. There were 12 non-staff people present at the Roanoke hearing, and 22 present at the Richmond hearing. Seven letters providing written comments on this draft regulation were received during the comment period. This memo summarizes these written comments and provides responses.

1. Include reporting the number, location, type, drainage area, pounds of Phosphorous removed, etc. for BMPs as a regulatory requirement for MS4 permits. Also, please include a total disturbed acreage figure and a total number of regulated land disturbing activities figure as a regulatory requirement for MS4 permits. This will assist CBLAD, DCR and DEQ's ability to coordinate reporting requirements in accordance with requests from the Chesapeake Bay Program and the Commission on the Future of Virginia's Environment.

Response: The BMP tracking request is similar to a request we received from EPA's Chesapeake Bay Program Office to track BMPs in all MS4 permits (both Phase 1 and Phase 2). After discussing this with the commenter, he agreed that the EPA requested data would satisfy his needs. We will add BMP tracking to the permit in the form that EPA specified. We will also add a tracking requirement to the permit for regulated land disturbing activities.

2. The general permit should incorporate and explicitly reference the Virginia Erosion and Sediment Control (ESC) Law and Regulations. The proposed regulations do not contain any reference to the existing statewide, mandatory ESC program that will, in all likelihood, be used by 100% of the permitted localities, in whole or in part, to satisfy Minimum Control Measure 4 (construction site erosion and sediment control) of the permit requirements. The lack of a requirement to maintain consistency with the DCR's ESC Law and Regulations can create a potential conflict between the VPDES permit requirements and the DCR program. The VPDES permit requires reductions of the discharge of pollutants to the "Maximum Extent Practicable" (MEP). The public will certainly perceive a conflict in the Commonwealth's environmental policy if DEQ determines that a program DCR finds inconsistent is acceptable for permitting based on the MEP criterion.

Response: The Virginia ESC Law and Regulations are administered by the Department of Conservation and Recreation (DCR). DEQ has no control over what DCR does with their regulations, so it is inappropriate to incorporate their regulation into this general permit regulation. As long as the DCR program meets the requirements of Minimum Control Measure 4, small MS4s may use that program to satisfy the control measure. If DCR changes their ESC

program requirements such that they no longer satisfy the control measure requirements, then the small MS4 will have to modify their storm water management program to develop a program to meet the permit requirement. DEQ will specifically reference the DCR ESC program as an example in the guidance that we publish with the regulation.

As for the consistency issue, localities are required to have an ESC program that is consistent with DCR's ESC Law and Regulations. If the locality wants to use the program to satisfy the permit control measure, they must tell us if their program is consistent with DCR's requirements. If it is not fully consistent, they must be working towards achieving full consistency, and must report on their progress in the Annual Reports required by the permit.

3. A determination of "consistency" with the Virginia Stormwater Management (SWM) Law and Regulations should be required as a condition to satisfy Minimum Control Measure 5 (post-construction stormwater management). The proposed permit language does not provide definitive standards for what localities must do, and further could result in programs which are not consistent with the Virginia Stormwater Management Law and Regulations.

Response: The SWM Law and Regulations are also administered by DCR. This program is not mandatory for localities, and only a few have actually adopted the program so far. The permit language for Minimum Control Measure 5 details specific things the small MS4 must do to satisfy the requirement. If the locality wants to use the SWM program to satisfy the permit control measure, their SWM program must be fully approved by DCR, or they must be working towards becoming fully approved, and must report on their progress in the Annual Reports required by the permit.

4. These issues related to Chesapeake 2000 (C2K) implementation might be addressed by the MS4 permits: (1) establishing links between the permits and any TMDLs for impaired waters in the area; (2) demonstrating how the permits/regulatory program will help reduce the toxic chemicals of concern in the Elizabeth River, Virginia's *Toxic Region of Concern*; and, (3) demonstrating how the stormwater permits will help reduce chemicals of concern that are causing fish consumption advisories in Virginia.

Response: (1) The permit already contains a special condition that addresses TMDLs that impact the small MS4. (2) There are no Phase 2 MS4s discharging to the Elizabeth River, therefore this suggestion would serve no purpose for this permit. (3) It is unclear how this suggestion would be addressed in this permit. While fish consumption advisories are for specific areas and specific water quality parameters, the chemicals of concern may or may not be in the storm water discharges from the small MS4s. Only an extensive monitoring program can tell you if the chemicals of concern are in the discharges, and if the controls are removing the chemicals, and to what extent. That type of monitoring is beyond the scope and intent of this permit, and is better left to programs specifically designed to address the problem of fish consumption advisories (e.g., the TMDL program).

5. Regarding the extent of applicability of the permit requirements, it may not make sense to limit the requirements under the permit to discrete areas of coverage within a

given locality based on the design of the stormwater infrastructure. The water from areas upland of storm sewers have just as much potential to contaminate or cause water quality violations in the Chesapeake Bay, its tributaries, or other waters of the United States. We recommend that the permit coverage be extended to the entire jurisdiction of the designated localities, or at least entire affected watersheds, irrespective of the ownership or extent of the storm sewer system.

Response: The federal Phase 2 storm water regulations require small MS4s in "urbanized areas" (as determined by the latest decennial census) to be permitted. These MS4s include systems owned by localities, federal, state (including VDOT), and universities. EPA studies found that these systems, and small construction sites, have the greatest impact on storm water discharge water quality out of all the currently unregulated storm water discharges. We do not believe that extending coverage to the entire jurisdiction, or to the entire affected watershed, would improve water quality perceptively, and it would be an unnecessary economic burden on the affected localities. The regulation will not be changed.

6. Are homeowners associations or local school systems required to obtain a general permit under the Phase II Storm Water Regulations? Whether homeowners associations and local school systems are regulated will greatly influence the local storm water management programs that local governments will develop to meet the General Permit requirements.

Response: MS4s (BMPs) owned by homeowners associations will not be routinely permitted under the program. However, if the BMPs are causing adverse water quality impacts, DEQ will evaluate them and may designate them for permitting. This designation would be a case decision by the Board. MS4s owned by local school systems would be regulated under the program, either as part of the program for the locality that they are in, or separately if they are an autonomous governmental entity.

7. What is the relationship between local governments and the Virginia Department of Transportation under the MS4 General Permit Program? A substantial portion of the regulated MS4 in the Phase II communities is owned by VDOT. This fact makes it important that DEQ specify how permit liabilities for implementing the six minimum management measures for the regulated MS4 will be proportionately distributed between local governments and VDOT.

Response: VDOT is specifically named in the regulation as one of the small MS4s that will be permitted for their operations within each "urbanized area" within the State. VDOT will need to coordinate their storm water management program with other regulated small MS4s in the urbanized areas to ensure that storm water discharges to and from their system are controlled to the maximum extent practicable.

8. To be consistent with the definition for "municipal separate storm sewer," the definition for "municipality" should be modified as follows: "...a city, town, county, district, association, or other public body created by or under state law and having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes..."

Response: For consistency and to avoid confusion, DEQ uses definitions from the Code of Federal Regulations, when available, in the VPDES permit program. We do not change federal definitions, other than minor grammatical corrections or minor editorial changes to clarify the definitions. The definition of "municipality" is a federal definition; "storm water" will not be added to the definition because it is already included under "other wastes".

9. The public involvement/participation minimum management measure (Part II.B.2) states that a small MS4 must, "At a minimum, comply with state, tribal, and local public notice requirements when implementing a public involvement/participation program." However, our understanding of this minimum management measure, as specified in the federal Phase II Storm Water Regulations, is that it applies to implementing the entire storm water management program, as required by the General Permit, not just in implementing the public involvement/participation component of the program. We recommend that Part 11.B.2 be revised to read: *"At a minimum, comply with applicable state, tribal, and local public notice requirements when implementing public involvement/participation the storm water management program.*"

Response: Agreed. The permit will be changed as suggested.

10. Part II.B.4.a references the fact that the Board can "waive requirements for storm water discharges associated with small construction activity in accordance with the definition in 9 VAC 25-31-10..." However, it is unclear what definition the reader is being directed to. To eliminate any confusion, we recommend changing the sentence to: *"If the board waives storm water requirements for storm water discharges associated with small construction activity small construction activity in accordance with the definition for "storm water discharges associated with small construction activity" in 9 VAC 25-31-10...*"

Response: The definition referred to is for "small construction activity", which is defined in 9 VAC 25-31-10 (the Construction Storm Water General Permit). The construction general permit allows waivers from the permitting requirements under certain circumstances. We believe the sentence wording in the permit is clear as it is written, and no change is necessary.

11. Part II.B.4.b(3) states that small MS4s may satisfy the construction site waste control requirements by having "procedures to ensure that construction site operators have secured a VPDES construction permit." However, in Part II.D of the Small Construction General Permit Regulations a permit applicant must have a locally approved erosion and sediment control plan prior to being granted a permit. This potentially creates a "Catch 22" type of situation where a local government will be requesting proof of a VPDES permit in order to grant plan approval, but the applicant will not be able to provide it because he cannot get a VPDES permit until the local government approves his/her plan. We recommend that the language in Part II.B.4.b(3) be revised as follows: *"...or procedures to ensure that construction site operators ~~have secured~~ will secure a VPDES construction permit."*

Response: We agree that this could be a problem. The wording will be changed to "...operators have secured or will secure a VPDES construction permit."

12. We recommend that the State Water Control Board work with the Soil and Water Conservation Board to amend the Virginia ESC Law and Regulations to include construction site waste control requirements that satisfy the Small Construction and MS4 General Permit Regulations.

Response: We will work with the Soil and Water Conservation Board and DCR to explore the possibility of modifying their regulation to incorporate these requirements. However, this will not modify the general permit.

13. Part II.E.2 specifies that annual reports are to be submitted by the first, second, and fourth anniversaries of the permit issuance date. We recommend that due dates for the annual reports be 90 days after the end of the corresponding local fiscal year rather than the permit issuance date. The local storm water programs for most communities are closely tied to the fiscal year timing and processing of local budgets. Basing the annual report due date on the fiscal year produces better and more accurate reports.

Response: We do not believe that basing the annual report due date on the MS4's fiscal year end date would allow us to timely and properly evaluate an MS4's progress in implementing their SWM Program, especially in the first year of the program. Fiscal year dates vary, with Virginia's being July 1st, and the federal being October 1st. Having the report due 90 days after that date would mean that some MS4s would not submit their reports until almost the second anniversary of the permit issuance. If major changes need to be made to a program, it would be better to require them closer to the 1st anniversary date than to the 2nd. The requirement will remain as written.

14. Change Part I.B.1 as follows: *"If a TMDL is approved for any waterbody into which the small MS4 discharges, the State Water Control Board ('the Board') ..."*

Response: The first use of the word "Board" in the Permit itself is in the opening paragraph. We will change that instance to read: "State Water Control Board (Board)"

15. Change Part I.B.2 as follows: *"Where a release containing a hazardous substance or oil in an amount equal to or in excess of a reportable quantity established under either 40 C.F.R. 110 (2001), 40 C.F.R. § 117 (2001) or 40 C.F.R. § 302 (2001) occurs during a 24 hour period, the permittee is required to notify the Virginia Department of Environmental Quality ('the Department') in accordance with the requirements of Part III G as soon as he or she has knowledge of the discharge. In addition, the Storm Water Management Program required under Part II of this permit must be reviewed to identify measures to prevent the reoccurrence of such releases and to respond to such releases, and the program must be modified where appropriate. This permit does not relieve the permittee of the reporting requirements of 40 C.F.R. § 110 (2001), 40 C.F.R. § 117 (2001) and 40 C.F.R. § 302 (2001) or Section 62.1-44.34:19 of the Code of Virginia."*

Response: The "40 CFR" references will be changed to read: "*40 CFR Part...*", to be consistent with previous uses of the 40 CFR references in the regulation. The suggested change for the "Department" will not be made since this permit is issued on DEQ letterhead.

16. Change Part II.D as follows: "*The permittee cannot contract away its responsibility to comply with its Permit, and remains responsible for compliance with the permit obligations if the other entity fails to implement the control measure (or component thereof).*"

Response: We believe the original wording was accurate and clear and no change will be made. The permittee is allowed to enter into contracts to assist him with his storm water management program, but ultimately remains responsible for satisfying his permit requirements.

17. Change Part II.F as follows: "*The permittee may propose alternative program modifications and time schedules to meet the objective of the requested modification, but the Department retains the authority to require any modifications it determines are necessary.*"

Response: We agree with the suggestion and will make the change.

18. Change Part III (Conditions Applicable To All Permits) as follows:

Part III.B.2 - "*for a period of at least 3 years from the date of the sample, measurement, report or request for coverage, or for the term of this permit, whichever is longer.*"

Part III.C.2 - "*Monitoring results shall be reported on a Discharge Monitoring Report (DMR) or on forms provided, approved or specified by the Department, and signed by a responsible official in accordance with Part III K of this Permit.*"

Part III.G - "*...into or upon state waters in violation of Part III F of this Permit; or who discharges or causes or allows a discharge that may reasonably be expected to enter state waters in violation of Part III F of this Permit, shall notify the Department of the discharge immediately upon discovery of the discharge, ~~but in no case later than~~ within 24 hours...*"

Part III.G.1 - "*A description of the nature and location of the discharge, including but not limited to any pollutants contained in the discharge;*"

Part III.H - "*...shall promptly notify, ~~in no case later than~~ within 24 hours...*"

Part III.I.2.c - "*Upon its sole discretion, the ~~The~~ Board may waive the written report...*"

Part III.J.1.a - "*...a discharge of pollutants to water, the construction of which...*"

Part III.J.1.b - "*...the quantity of pollutants discharged to water.*"

Response: Part III of the permit is the section "Conditions Applicable To All Permits". The items in this section are taken directly from the VPDES Permit Regulation, 9 VAC 25-31-10 et seq., and are included in all VPDES permits. Since this "General Permit Regulation" is both a VPDES permit and a regulation, this section must be included. We do not modify this section, even for general permits, unless we modify the Permit Regulation. No changes will be made.

19. 9 VAC 25-750-10: In the definition of "BMPs," we recommend deleting the following sentence: "*BMPs also include treatment requirements, operating procedures, and practices to*

control plant site runoff, spillage or leaks, sludge or wastewater disposal, or drainage from raw material storage." This sentence appears to have been originally developed for regulation of industrial operations and possibly POTW's, and basically has no relevance to operation of a small MS4. In that sense, it is confusing and may be misinterpreted as implying regulatory obligations unrelated to operation of an MS4. The first sentence of the definition, which we recommend retaining, is sufficiently broad to encompass the range of BMPs associated with storm water management.

Response: As stated in Response #8, DEQ uses definitions from the Code of Federal Regulations, when available, in the VPDES permit program. We do not change federal definitions, other than minor grammatical corrections or minor editorial changes to clarify the definition. The definition of "BMP" is a federal definition; the definition will not be modified.

20. 9 VAC 25-750-10: The definition of "municipality" includes "associations" along with a number of "public" (i.e., governmental) bodies such as cities, towns, counties and districts. During the TAC process, it was observed that this term could arguably imply that a variety of associations (e.g., homeowners associations) are regulated under this program. We question whether that would be an appropriate reading of the definition as written, given its reference to "other public bod[ies]", which would appear to exclude non-public bodies such as homeowners associations.

Response: We agree with the comment. MS4s (BMPs) owned by homeowners associations will not be routinely permitted under the program. However, if the BMPs are causing adverse water quality impacts, DEQ will evaluate them and may designate them for permitting. This designation would be a case decision by the Board.

21. 9 VAC 25-750-10: The definition of "owner". refers to ownership of or responsibility for "sewage, industrial wastes, or other wastes," which is not a proper subject of this regulation. Meanwhile, the definition fails to reference ownership of a small MS4, which is the subject of this regulation. Accordingly, we suggest replacing the references to sewage and industrial wastes with a reference to storm water.

Response: The definition of "owner" is taken directly from the State Water Control Law, Section 62.1-44.3 - Definitions. The definition will not be modified.

22. 9 VAC 25-750-20: A.5.b refers to "DEQ-established" TMDLs. This should be changed to "Board- established" because the State Water Control Law vests the authority to establish TMDLs in the State Water Control Board.

Response: Agreed. The section, and section A.4.b, will be changed as suggested.

23. 9 VAC 25-750-30: Subsection A appears to make the authorization to discharge (i.e., coverage under the permit) contingent upon compliance with the General Permit. This suggests that non- compliance would automatically result in a loss of permit coverage. We suggest deleting the clause "complies with the requirements of 9 VAC 25-750-50." Doing so would in no way reduce the owner's obligation to comply, nor restrict the host of

tradition enforcement tools presently utilized by the agency and citizens to address permit non-compliance. However, it would leave permit coverage in place, just as is the case with other NPDES permits.

Response: Agreed. The section will be changed as suggested.

24. 9 VAC 25-750-30: In C.2, we support the concept of defining the scope of the authorization to discharge to include non-significant water and pollutant sources such as water line flushes, lawn watering, residential car washing, etc. The specific listing of non-significant sources would effectively prohibit other non-significant sources that are not identified, for example: washing sidewalks, washing driveways, and washing exteriors of houses. Under a strict reading of the present draft, the presence of these waters, which presumably have no more environmental significance than the specifically authorized items, would be unlawful and must cease. In addition, when read together, C, C.1 and C.2 do not make sense (grammatically) and thus need to be revised. We recommend addressing these points by revising C.2 as follows: *"2. The non-storm water discharges or flows consist of the following categories or similar discharges or flows that have not been determined by the permittee or the board as significant contributors of pollutants to the small MS4: water line flushing ..."*

The same comment and recommendation applies to the General Permit language in Section 50, specifically to Part II.B.3.c.

Response: The listing of "authorized" non-storm water discharges is directly from EPA. The list first appeared in the 1990 Phase 1 storm water regulations, and EPA used the same list in the 1999 Phase 2 storm water regulations. While there have been many suggestions to EPA to add to and modify the list over the years, EPA has chosen not to change the list. The list will remain as written.

We agree that the wording of C, C.1 and C.2, when read together, does not make sense grammatically. We will modify C.2 as follows: *"~~The following categories of n~~ Non-storm water discharges or flows ~~must be addressed only if they are~~ in the following categories have not been identified by the permittee...".*

The "non-storm water" list in the General Permit, Part II.B.3 will remain as written for the same reason as given above.

25. 9 VAC 25-750-40 B.5: This section contains a proposed requirement that measurable goals for BMPs include *"as appropriate, the months and years in which the required actions will be undertaken."* During the initial phase of establishing a storm water management program, it will be difficult if not impossible to specify the month during which a particular BMP will actually be implemented. We request that the reference to "months" be deleted, while retaining the references "years," "interim milestones," and "frequency of action."

Response: Agreed. The section will be modified as suggested.

26. 9 VAC 25-750-50, Part II.A and II.F: We strongly support the use of the narrative effluent limitations requiring implementation of BMPs to meet MEP and water quality objectives, as stated in proposed II.A. This language, coupled with the option for the agency to require appropriate program modifications as proposed under II.F, is consistent with EPA's requirements. It will also provide a framework that promotes timely implementation of BMPs.

The Board's proposal is consistent with EPA's presumption that a small MS4 program that implements the six minimum measures does not require more stringent limitations based on water quality standards, and that proper implementation of those measures will significantly improve water quality. In the event that available information indicates otherwise, EPA believes that small MS4s should modify their programs. This is basically the approach that DEQ used in the phase I storm water permits, and that which is now reflected in the proposed regulation at II.A and II.F. We support this approach.

We note that this subject has been discussed extensively within the TAC process. We incorporate by reference the concerns we have previously expressed and documented regarding alternative approaches, and urge DEQ to retain its proposed approach in the final regulation.

Response: The sections will remain as written.

27. 9 VAC 25-750-50, Part III, "Note": We agree that monitoring should not be required in small MS4 permits. Statewide monitoring requirements would be a costly addition to this program. The program should encourage timely implementation of BMPs and resist any suggestion to add costly analytical monitoring requirements, which incidentally would go above and beyond what EPA considers necessary for a successful program.

We are concerned with the implication that TMDLs may require monitoring. Section 303(d) of the Clean Water Act indicates that a TMDL simply defines the assimilative capacity of a water body. EPA has expanded the statutory definition to include allocations of that capacity to point and non-point sources of the relevant pollutant. EPA does not include monitoring as an element of a TMDL. It would be inappropriate for DEQ to use this regulation to expand or define its TMDL authority. We recommend deleting "*or as required by a TMDL*" from the Note at the beginning of Part III.

Response: Agreed. The "Note" will be modified as suggested.

28. 9 VAC 25-750-50, Part III: Several provisions in Part III would establish requirements that are far beyond the scope of this rulemaking. From the TAC process, we understand that DEQ has borrowed this language from "conditions applicable to all permits" under other regulations. Consequently, Part III consists of many irrelevant provisions such as B.2, which would establish record keeping requirements for sewage sludge use and disposal activities. Such activities, however, are not governed by this permit. How would DEQ interpret this provision? How would third parties interpret it?

What value does its inclusion add? Why would the agency adopt sewage sludge use and disposal record keeping requirements here?

Response: As stated in the Response #18, Part III of the permit is the section "Conditions Applicable To All Permits". The items in this section are taken directly from the VPDES Permit Regulation, 9 VAC 25-31-10 et seq., and are included in all VPDES permits. Since this "General Permit Regulation" is both a VPDES permit and a regulation, this section must be included. While we do not modify this section, even for general permits, unless we modify the Permit Regulation, we recognize that some sections do not have direct applicability to separate storm sewer systems. We will include information in the separate guidance that is published for this regulation on what is expected from the small MS4s in Part III.

Another provision that is a very significant concern is Part J.1.b. This provision requires notice of any planned change to a permitted facility that could significantly increase the quantity of pollutants discharged. We are very concerned that this provision might be interpreted by the agency or third parties to require notification of routine expansions of storm sewer systems. There is no basis in the federal storm water program for imposing this new requirement. Historically, DEQ has had little interest in storm sewer system construction, which is generally considered a local prerogative. What would DEQ do with this information? If nothing, the burden, costs, and liability for a notification requirement cannot be justified. Indeed, there appears to be no different or additional regulatory requirements for system expansions. Does DEQ intend to regulate expansions, as this provision implies? There is nothing in this BMP-based program that to justify additional state involvement in routine system expansion. We suggest deleting this provision entirely or, alternatively, replacing it with a requirement to include a discussion of system "physical alterations or additions" in the annual reports.

Response: (See #28 response above.)

In creating this new regulation, the agency has the discretion, indeed the obligation, to omit unreasonable or arbitrary requirements. All of Part III requires a careful review to eliminate requirements unrelated to storm water. We believe that at least portions of the following sections fall within this category, though this is not necessarily an exhaustive list:

Part III.B.2 - delete references to sewage sludge use and disposal.

Part III.C.4 - delete "for all limitations that require averaging" because no averaging much less a numeric limit is required.

Part III.H - delete "including a bypass or upset" and "from a treatment works".

Part III.H.1 - delete entire provision because processing operations are irrelevant.

Part III.H.2 - delete entire provision because equipment breakdown is irrelevant.

Part III.H.3 - delete entire provision because this regulation does not apply to treatment works.

Part III.H.4 - Delete entire provision. This provision would require MS4 owners to report all flood conditions in the vicinity of their systems. We do not understand why the agency would desire this information. The impact of flooding is obvious relative to MS4s. We do not believe such reports would be useful or justify the cost of making

them. This would certainly be the case if DEQ does not intend to actually use this information. What benefit is realized by generating these reports? If none, this provision clearly should be deleted.

Part III.J.1.b - see discussion above regarding alterations, additions, and expansions.

Part III.L - delete second paragraph, which concerns effluent standards and prohibitions and sewage sludge requirements that are not relevant here.

Part III.Q - We are very concerned with this O&M provision, which speaks in terms of "installed facilities," "plant performance," "laboratory and process controls," and a requirement to install "back-up or auxiliary facilities." Obviously this provision was not intended for storm water collection systems. Moreover, it is somewhat redundant and confusing given the specific requirement to establish Minimum Control No. 6 - Pollution Prevention/Good House Keeping. We strongly recommend that this provision be deleted.

Response: (See #28 response above.)

29. 9 VAC 25-750-40: This Section requires the Registration Statement to include BMPs and measurable goals for these BMPs. Presumably the flexibility inherent in this section regarding the selection of BMPs and goals was intended to provided owners of small MS4s with sufficient latitude to design and implement storm water programs appropriate to their individual circumstances. We strongly support this concept and recommend that the agency retain it in the final regulation.

Response: The section will remain as written.

30. The waiver provisions assume that if a Total Maximum Daily Load (TMDL) Plan has been developed, the MS4 does not need a permit. This is misleading because there is no deadline for implementation of TMDL Plans in Virginia. Although a plan may be required by 2011, there is presently no deadline for plan implementation to actually remove the impairment. There should not be a waiver provision for MS4s unless they are subject to a TMDL Plan with a definite compliance date.

Response: The waiver provisions in the regulation are taken directly from the VPDES Permit Regulation, 9 VAC 25-31-10 et seq., and allow the Board to waive permit coverage if a TMDL has been developed that addresses the storm water pollutants of concern, **and shows that storm water controls are not needed based on waste load allocations**. The waste load allocations (and the waiver) are not impacted by the implementation plan, or it's compliance date. No change will be made in this section.

31. All MS4s should be regulated, not just those in designated urbanized areas. Stormwater discharges in suburban areas or less developed areas can cause water quality problems, and the requirement for a general permit for all MS4s would prevent pollution.

Response: As stated in Response #5, the federal Phase 2 storm water regulations require small MS4s in "urbanized areas" (as determined by the latest decennial census) to be permitted. These MS4s include systems owned by localities, federal, state (including VDOT), and universities.

EPA studies found that these systems, and small construction sites, have the greatest impact on storm water discharge water quality out of all the currently unregulated storm water discharges. We do not believe that extending coverage to all MS4s would improve water quality perceptively, and it would be an unnecessary economic burden on the affected localities and other MS4s. The regulation will not be changed.

32. If a locality does not own or operate the municipal storm sewer systems within its borders, it should still be required to assure that the appropriate entity has complied with the requirements of this regulation. Protection of local water quality should be a shared responsibility, and it would be relatively simple for the responsible party to submit a copy of the registration to the locality.

Response: If a locality does not own or operate the municipal storm sewer systems within its borders, they are not regulated under the Storm Water Phase 2 Regulations. As such, DEQ has no authority to require them to do anything under this program. It is DEQ's responsibility to assure that the appropriate entity has complied with the requirements of this regulation. This regulation will not be modified to incorporate this suggestion.

33. Under "Special Conditions", if a TMDL requirement is not being met by the responsible MS4, the Board should require modification of the program to implement the TMDL and meet water quality standards. This language should be "shall", not "may".

Response: The use of the word "may" over "shall" allows the Board and the permittee some degree of flexibility in the TMDL implementation. The Storm Water Management Program (SWMP) may not be the appropriate place to address a specific TMDL implementation. If it is, the Board will require that the SWMP be modified.

34. The MS4 General Permit should require that releases of oil or hazardous substances shall be prevented, not "prevented or minimized". A little oil or hazardous substance over a period of time will cause water quality and habitat degradation.

Response: While we understand the reasoning behind this suggestion, it is not practically possible to prevent all releases of oil or hazardous substances to the MS4. Things happen which are outside the control of the permittee. The permit language will be modified to read: *"...prevented or minimized to the maximum extent practicable..."*.

35. The permittees should not have the entire 5-year term of the permit to develop and implement their stormwater management programs. This is excessive. One to two years should be sufficient, particularly since they are only required to implement best management practices, which are well-established.

Response: EPA's Phase 2 Storm Water Regulations allow the permitting authority (in this case DEQ) to specify a time period up to 5 years from the date of permit issuance for the permittee to develop and implement their storm water management program. DEQ has written the permit to allow the permittee the full five years for the development and implementation of the program. We feel this is appropriate since most of the impacted localities have limited staff and resources

to administer this program. This allows them the flexibility to develop and implement this program at a pace which (we hope) won't cause them severe economic problems. The regulation will remain as written.

36. We disagree with the allowance for two or three permit cycles (10–15 years) for compliance with the requirement to reduce pollutants to the “maximum extent possible” (MEP). Water quality will be diminished or degraded in the interim.

Response: This "allowance" is not in the regulation, but is discussed in the permit Fact Sheet. The Fact Sheet states: *"The pollutant reductions that represent MEP may be different for each small MS4, given the unique local hydrologic and geologic concerns that may exist and the differing possible pollutant control strategies. Therefore, each permittee will determine appropriate BMPs to satisfy each of the six minimum control measures through an evaluative process. The Board will evaluate small MS4 operator's proposed storm water management controls to determine whether reduction of pollutants to the MEP can be achieved with the identified BMPs.*

Application of the MEP standard is envisioned as an iterative process. MEP should continually adapt to current conditions and BMP effectiveness and should strive to attain water quality standards. Successive iterations of the mix of BMPs and measurable goals will be driven by the objective of assuring maintenance of water quality standards. If, after implementing the six minimum control measures there is still water quality impairment associated with discharges from the MS4, after successive permit terms the permittee will need to expand or better tailor its BMPs within the scope of the six minimum control measures for each subsequent permit. This process may take two to three permit terms."

Based upon the process as described above, water quality will not be diminished or degraded, but will be continuously improving with the ultimate objective of assuring maintenance of water quality standards.

37. We disagree with DEQ's interpretation of the Defenders of Wildlife, et.al vs. Browner case in the Ninth Circuit Court. The court upheld EPA's issuance of MS4 permits with water quality based effluent limitations. DEQ's fact sheet on this regulation goes to great lengths to defend their lack of using such limitations. DEQ should recognize that there may be some MS4 discharges that will require more than BMPs to achieve pollution reduction to the maximum extent practicable.

Response: EPA's interpretation of CWA section 402(p)(3)(B)(iii) was reviewed by the Ninth Circuit in *Defenders of Wildlife, et al vs. Browner*, No. 98–71080 (September 15, 1999). The Court upheld EPA's action in issuing five MS4 permits that included water quality based effluent limitations. The Court did, however, disagree with EPA's interpretation of the relationship between CWA sections 301 and 402(p). The Court reasoned that MS4s are not compelled by section 301(b)(1)(C) to meet all State water quality standards, but rather that the Administrator or the State may rely on section 402(p)(3)(B)(iii) to require such controls. Accordingly, the *Defenders of Wildlife* decision is consistent with the EPA's 1996 "Interim Permitting Policy for Water Quality-Based Effluent Limitations in Storm Water Permits." The 1996 Policy describes

how permits would implement an iterative process using BMPs, assessment, and refocused BMPs, leading toward attainment of water quality standards. The ultimate goal of the iteration would be for water bodies to support their designated uses. This is the approach DEQ will be using for the small MS4 permitting process.

38. We are concerned about the provision for sharing responsibility. It is unclear how the permittee will be held accountable and how enforcement will be handled if another entity implements the control measures. An agreement between the parties cannot be enforced by DEQ, unless DEQ is a party to the agreement or some provision is made in the agreement to define DEQ’s role in enforcement.

Response: As the permit states, *"The permittee remains responsible for compliance with the permit obligations if the other entity fails to implement the control measure (or component thereof)."* DEQ will be reviewing the Annual Reports submitted by the MS4, and will be inspecting the MS4 and reviewing their Storm Water Management Program. Enforcement action will be taken against the permittee if they are sharing responsibility and the other entity fails to implement the control measure. The permittee himself would then be responsible for implementing the control measure.

39. The goal of this program should be to improve and maintain water quality standards as soon as possible. It should be emphasized that the MS4s must comply with the permit requirements to protect water quality, or enforcement will occur.

Response: The goal of this program is to improve water quality. As such, the permit requires the MS4 operator to develop, implement, and enforce a storm water management program designed to reduce the discharge of pollutants from the MS4 to the maximum extent practicable (MEP), to protect water quality, and to satisfy the appropriate water quality requirements of the Clean Water Act and the State Water Control Law. As the Fact Sheet has stated, the pollutant reductions that represent MEP may be different for each small MS4, given the unique local hydrologic and geologic concerns that may exist and the differing possible pollutant control strategies. Therefore, each permittee will determine appropriate BMPs to satisfy each of the six minimum control measures through an evaluative process. The Board will evaluate small MS4 operator’s proposed storm water management controls to determine whether reduction of pollutants to the MEP can be achieved with the identified BMPs. Application of the MEP standard is envisioned as an iterative process. MEP should continually adapt to current conditions and BMP effectiveness and should strive to attain water quality standards.

If a permittee is not fulfilling his permit obligations or requirements, then appropriate enforcement action will be taken by DEQ.

List of persons submitting comments on the VPDES General Permit Regulation for Discharges of Storm Water From Small Municipal Separate Storm Sewer Systems, 9 VAC 25-750-10 et seq.

Name of Commenter	Representing	Comment Number
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Larry Gavan	Virginia Department of Conservation and Recreation	1
William Beisch/ C. Scott Crafton	Chesapeake Bay Local Assistance Department	2 - 5
Arthur L. Collins	Hampton Roads Planning District Commission	6 - 13
Mark Smith/ Lori Kier/ Chuck Schadel	U.S. Environmental Protection Agency	14 - 18
Christopher D. Pomeroy	Virginia Storm Water Coalition (through McGuire Woods)	19 - 29
Frederick E. Hughes, Jr., P.E.	City of Richmond	25
Patricia A. Jackson	James River Association	30 - 39