

COMMONWEALTH OF VIRGINIA
Department of Environmental Quality
Division of Water Quality
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Subject: Guidance Memorandum Number 04-2018
Requirements for VWPP to Impact Wetlands Within Storm
Water BMPs

To: Regional Directors

From: Ellen Gilinsky, Ph.D., Director 

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Summary:

This guidance is provided to the Central Office and Regional Office water permit staff concerning the requirements for a Virginia Water Protection Permit to impact wetlands that have developed within storm water BMPs permitted under VPDES storm water regulations.

Electronic Copy:

An electronic copy of this guidance in PDF format is available for staff internally on DEQNET, and for the general public on DEQ's website at <http://www.deq.state.va.us/water>.

Contact information:

Please contact Ellen Gilinsky, Director of the Office of Wetlands and Water Protection and Compliance, at 804-698-4375 with any questions about the application of this guidance.

Disclaimer:

This document is provided as guidance and, as such, sets forth standard operating procedures for the agency. However, it does not mandate any particular method nor does it prohibit any particular method for the analysis of data, establishment of a wasteload allocation, or establishment of a permit limit. If alternative proposals are made, such proposals should be reviewed and accepted or denied based on their technical adequacy and compliance with appropriate laws and regulations.

VPDES AND VWPP PERMITS - STORM WATER BMPS

SUMMARY:

A VWP Permit may be required under certain circumstances for storm water BMPs when a maintenance plan is being established and a maintenance area is designated. For new BMPs constructed in state waters as part of a VPDES MS4 Permit Storm Water Management Program, this will generally occur as a matter of course in the VWP process. However, for new BMPs constructed from uplands, and for existing structures designated as BMPs by localities in the Storm Water Management Program required by a VPDES MS4 permit, VWP permitting requirements are less obvious and clarification is considered appropriate. This guidance provides such clarification. It should also be noted that not all BMP construction and/or maintenance activities are associated with VPDES MS4 permits. Some may be privately maintained features constructed historically without regulatory requirements or more recently under authority other than VPDES MS4 permitting requirements. It is assumed that these features will eventually require maintenance activity as well, independent of any regulatory maintenance mandate. This guidance should be used as a guide in addressing these situations. The following items summarize the critical decision issues of this guidance. Detailed discussion follows this section.

1. **New Purpose Built BMPs.** New storm water BMPs constructed in state waters are subject to VWP permitting. Preparation of a maintenance plan and designation of maintenance areas are permit requirements. To the extent that proposed maintenance is conducted in accordance with this plan and any further the conditions contained within the VWP permit, no additional permitting should be required. Of course, no permit would be required for purpose built BMPs constructed in an upland.
2. **Existing Purpose Built BMPs (with maintenance plans established under VPDES MS4 program).** Depending on the nature of the existing maintenance plan, VWP program staff should review these BMPs for wetland impacts to document the designated maintenance area and determine if a VWP permit may be required. However, given the large number of large and medium MS4s, this effort could be extensive. More practically, VPDES MS4 program staff should coordinate with VWP program staff to ensure proper communication of any VWP requirements to permit applicants and current permittees. Also note that per 9 VAC 25-210-60, the following activity is exempt from permitting requirements:"8. Maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, groins, levees, dams, riprap breakwaters, causeways, bridge abutments or approaches, and transportation **and utility structures** (*emphasis added*)." Given that these BMPS can be considered utility structures per the MS4 requirements, a VWP permit should not be required for their normal maintenance.
3. **Existing Purpose Built BMPs (with no maintenance plan).** A VWP permit may be required to establish a maintenance plan and designate a maintenance area if maintenance work will involve dredging or excavating vegetated wetlands. However,

note that depending on the nature and extent of such activities, they may fall under the exemption to VWP permitting requirements noted above (9 VAC 25-210-60:8).

4. **Features redesignated as storm water BMPs.** State waters and wetlands (including borrow pits) are subject to VWP permitting to redesignate the existing feature as a BMP and to establish a maintenance plan and designate maintenance areas if maintenance work will involve dredging or excavating vegetated wetlands.

5. **BMPs that have been inadvertently colonized by vegetated wetlands.** Existing BMPs that have been colonized by wetland vegetation because of inadequate or nonexistent maintenance may be subject to VWP permitting and compensatory mitigation to restore the feature, establish a maintenance plan and designate a maintenance area if the wetland condition is now considered normal circumstances and the restoration and/or maintenance will involve dredging or excavation of vegetated wetlands. Note, however, that depending on the nature and extent of such activities, they may fall under the exemption to VWP permitting requirements noted above (9 VAC 25-210-60:8).

6. In general, maintenance activities within a designated maintenance area are not subject to VWP permitting. Maintenance activities outside of a designated maintenance area are subject to VWP Program review and possible permitting.

BACKGROUND:

Based on the interconnections between certain authorities regarding impacts in wetlands contained in (1) the VPDES individual permit regulation for large and medium MS4s (9 VAC 25-31-120), (2) the VPDES general permit regulations for small MS4s (9 VAC 25-31-121 and 9 VAC 25-75-10), and (3) the VWPP regulation (9VAC 25-210), there have been concerns raised over the applicability of the VWPP regulation to facilities specifically designed as storm water BMPs. This concern also extends to manmade lakes that have historically been utilized for agricultural, aesthetic and/or recreational purposes and are now identified by local government as MS4 BMPs. As written, the VWPP regulation does not differentiate between natural, manmade or "accidental" wetlands with respect to the requirement for a permit. Similarly, there is no regulatory differentiation between BMPs constructed expressly for the purposes of storm water control versus pre-existing water features, such as borrow pits and lakes, that have been incorporated into local storm water plans.

The MS4s are required to maintain their storm water BMPs; however the maintenance approach and frequency is not specified and is left up to the MS4 to decide. Frequencies will differ based upon several site specific factors, including the drainage inputs. A maintenance plan should be developed that documents the required storage volume for purposes of either storm water quantity or quality control, whichever determines the storage volume, with appropriate hydrologic analyses to verify the required storage necessary to provide the water quality/quantity benefits. The plan should also designate the maintenance areas within the BMP needed to maintain the volume.

Growth of wetland vegetation, as well as the prevalence of sediments that hold water, is typically present in many of these BMPs, especially as they age, and the BMPs may need to be dredged/scraped of sediment build-up as part of routine maintenance to ensure proper storm water retention. This maintenance cleaning may therefore involve disturbing wetlands that are present within the BMP, thus possibly necessitating a VWP permit for wetland impacts. The VWP permit for wetland impacts associated with maintenance dredging will likely only be required for the initial maintenance cycle, when the wetland impacts have not previously been identified as maintenance areas. The interpretive difficulty arises because while the presumptive purpose of both of these programs is to maintain/improve water quality within the Commonwealth, one program encourages the removal of colonizing wetlands and the other program may require their protection depending upon their location and the purpose of the BMP. Wherever possible, MS4 maintenance plans should attempt to satisfy quantity/quality objectives while avoiding and minimizing impacts to surface waters and wetlands.

RELEVANT REQUIREMENTS OF VPDES STORM WATER PERMITS

VPDES individual and general permits for storm water require that structural and non-structural storm water BMPs be implemented and maintained at some non-specified interval. While many of these facilities were constructed for the express purpose of serving as a BMP, others were pre-existing water features that were retrofit (or simply designated) to serve also as a regional BMP. While single purpose BMPs, whether constructed in an upland or in-stream, will have a maintenance plan to maintain storage volumes, the pre-existing water features will likely not have such a plan.

Common requirements of MS4 permits include a program to continue implementation and maintenance of structural and nonstructural best management practices to reduce pollutants in storm water runoff from construction sites. The permittee is explicitly responsible for obtaining any required State or federal permits necessary to complete maintenance activities, including permits for land disturbance, wetlands disturbance, and dredging.

VWPP REQUIREMENTS FOR DISTURBING WETLANDS IN STORM WATER BMPS:

There is an exclusion in the VWPP regulation in 9VAC25-210-60, that states that "Any discharge, **other than an activity in a surface water governed by §62.1-44.15:5 of the Code of Virginia**, permitted by a Virginia Pollutant Discharge Elimination System (VPDES) permit in accordance with 9VAC25-31-10 et seq." does not require a VWPP permit. The activities governed by [§62.1-44.15:5](#) as reference above include:

the dredging, filling or discharging of any pollutant into, or adjacent to surface waters;

otherwise altering the physical, chemical or biological properties of surface waters;

excavation in wetlands;

on or after October 1, 2001, conduct the following activities in a wetland:

1. New activities to cause draining that significantly alters or degrades existing wetland acreage or functions;
2. Filling or dumping;
3. Permanent flooding or impounding; or
4. New activities that cause significant alteration or degradation of existing wetland acreage or functions.

If the BMP was constructed in state waters, it is clear that impacts to wetlands that colonize within the BMP are regulated. The only exception would be in maintenance areas within a BMP, if authorized as part of a VWP Permit. VWP permits contain special conditions for Stormwater Management Facilities, as follows :

1. Storm water management facilities shall be designed in accordance with best management practices and watershed protection techniques (i.e., vegetated buffers, siting considerations to minimize adverse effects to aquatic resources, bioengineering methods incorporated into the facility design to benefit water quality and minimize adverse effects to aquatic resources) that provide for long-term aquatic resources protection and enhancement, to the maximum extent practicable.

2. Compensatory mitigation for unavoidable impacts shall not be allowed within maintenance areas of storm water management facilities.

3. Maintenance excavation shall not exceed the original contours of the facility, as approved and constructed.

4. Maintenance within storm water management facilities will not require mitigation provided that the maintenance is accomplished in designated maintenance areas as indicated in the facility maintenance plan."

Also of note is the exclusion for maintenance of "utility structures" contained within the VWP permit regulation, 9 VAC 25-210-60, which excludes: "8. Maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, groins, levees, dams, riprap breakwaters, causeways, bridge abutments or approaches, and transportation **and utility structures** (*emphasis added*)." Given that these BMPS can be considered utility structures per the MS4 requirements, a VWP permit should not be required for their normal maintenance.

Regardless of whether a BMP was constructed from uplands or within state waters, it should have a maintenance plan per the VPDES storm water regulations. Therefore, any wetland dredging or excavation that occurs within the designated maintenance area will not require a VWP permit and consequent compensation because the activity is covered by the VPDES storm water permit. However, disturbance of any native or colonizing wetlands outside of the designated maintenance area is a regulated activity.

Most of the ponds and lakes installed prior to the MS4 storm water regulation, but that are now designated as a BMP by the MS4 permittees, were installed for purposes other than storm water management. This would include lakes created for previous use as an agricultural water source or other purposes originating from damming a tidal or nontidal tributary and later identified as a BMP for a municipality. Any dredging of such BMPs, including wetland or open water dredging, to change bottom contours to improve boat access, the open water "aesthetic", swimming, install beaches, etc., that provides storage capacity in excess of the water quality/quantity storage volume is subject to a VWP permit. Also, if the pre-existing facility does not have a maintenance plan under its VPDES storm water designation, then it should be required to establish one as a requirement of the MS4 permit. The VPDES permit writer should coordinate with the VWPP Program staff to ensure wetland issues and concerns are addressed in the maintenance plan, and to eliminate duplication of permitting requirements by addressing wetlands concerns within the MS4 permit.

Borrow pits that result from a previous borrow operation and are secondarily converted to a storm water BMP are covered under the above rules. Abandoned borrow pits that subsequently colonize with wetland vegetation are regulated as isolated wetlands. If they are converted to a BMP, any wetlands outside of maintained areas identified in the maintenance plan for the BMP would be regulated under the VWPP program. Disturbance of wetlands within the designated maintenance area would not require VWP permit. If there is no maintenance plan and wetland areas are to be disturbed, then a maintenance plan should be required under the VPDES permit with VWP Permit staff involvement.

We also note that under certain circumstances storm water BMPs can serve in part as compensation for on-site wetland impacts resulting from project construction. Any areas within the BMP that were counted as compensation (i.e. wetland benches constructed around the edge of the BMP) are not part of the maintenance area of the BMP and cannot be disturbed as a condition of the VWP permit issued for the project.