



## Exempt Action Final Regulation Agency Background Document

<b>Agency name</b>	State Water Control Board
<b>Virginia Administrative Code (VAC) citation</b>	9 VAC 25-680
<b>Regulation title</b>	Virginia Water Protection General Permit WP3 for Linear Transportation Projects
<b>Action title</b>	Revisions and Renewal of 9 VAC 25-680
<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 WP3 will expire on October 1, 2006 for general linear transportation projects, and will expire on August 1, 2006 for linear transportation projects of the Virginia Department of Transportation. 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; extending the permit authorization period to up to 7 years; reiteration of provisions in the main VWP regulation for purposes of emphasis; clarified the project extent for a Notice of Planned Change; 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 WP3 govern the permanent and temporary impacts up to two acres of nontidal wetlands or open water, and up to 1,500 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 25-680 - Virginia Water Protection General Permit WP3 for Linear Transportation Projects.

### 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 WP3**

**9 VAC 25-680**

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 25-680

1. *Kimberly Vanness Larkin, Northern Virginia Building Industry Association (NVBIA):*
  - a. -10 Definitions: same as -660.
  - b. -20 Purpose: applaud lengthening of time to seven years.
  - c. -30 Authorization: same as -660.
  - d. -40 Exceptions: and/or language does not match -680-30; revised and/or language throughout regulation; add 'new' before stormwater management in G1; G12 is too broad and at minimum recommend deleting 'other land use protective easement'.
  - e. -60 Application: agree with removal of cross sections from B11; do not agree with wording change in B15, as it does not take into account other A&M measures reviewed; in B16b, define where lat/long is to be located – recommend center of restoration; 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.
  - f. -70 Compensation: recommend removing 'minimum' as it relates to mitigation ratios; if there is a need to require higher ratios, project should not qualify for GP.
  - g. -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.
  - h. -100 VWP general permit:
    - revise and/or language in paragraph IA1
    - applaud lengthening of time to seven years in IA5
    - 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
- in IIA8, replace ‘stream’ with riparian, as riparian also applies to stream buffer areas, not just stream itself
- in IIE3b add ‘or at approved photo stations’ after site and before prior in second sentence
- in IIE3f, and/or language
- in IIE6a9, add ‘as appropriate’ after reference site
- in IIII1, and/or language

*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 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 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 up to two acres of wetlands, or up to two acres of open water, or any combination of wetlands and open water that is up to two acres, in addition to impacting up to 1,500 linear feet of stream bed. The impacts can be permanent, temporary, or a combination of both, provided that the two acre and 1,500 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 at this time.
- 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.
- 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.
- 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 at this time.
- 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 at this time.
- 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.
- Section 100, Part II A 8 will be revised to replace “stream” with “riparian”.
- No change is proposed to Section 100, Part II E 3 b since photo stations are not required to be approved for construction monitoring.
- No change is proposed to Section 100, Part II E 6 a (9) since the 6a section includes the language “as applicable”.
- 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 at this time.
- The TAC consensus was to revise the title of Section 100, Part II A. Therefore, no change is proposed to Section 100 at this time.

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

*DEQ Response:* 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. *Tracey Harmon, Richard Woody, and Cooper Wamsley, Virginia Department of Transportation (VDOT):*

- a. Miscellaneous: (oral) Oral comments pertain to WP3 only and will submit written comments also

- b. -10 Definitions:

(oral) VDOT supports the definition of single and complete

(written) definition of single and complete should be verbatim to USACE definition; therefore, keep i.e. versus e.g.

(written) keep the current definition of conversion; proposed change could require compensation for temporary impacts resulting in project cost increase

- c. -30 Authorization:

(oral) Regarding thresholds, VDOT would like to keep the 2 acres for wetlands/open water, and can support 1,500 LF for streams but would prefer 2,000 LF for streams

(written) request 2,000 linear feet limit for stream bed impacts

- d. -40 Exceptions:

(oral) DEQ should only target aquatic species with gp regulation; please develop policy or official guidance on what 'significantly' means re: section -40 E; please clarify wording to demonstrate that one can still apply for a gp authorization even if impacts >1/10 in an easement area

(written) request that DEQ allow use of general permit in protected areas as long as impacts occur within the threshold of the permit, including those projects impacting less than 1/10 acre and 300 linear feet

- e. -50 Notification:

(oral) VDOT concerned about liability for disclosures of all easements on a property where impacts will occur; VDOT concerned about having to provide compensation

for all impacts once reporting-only limits exceeded; for example, if project impacts 2 acres wetlands and only 30 feet of stream, it's understood that 2 acres of wetland mitigation req'd but should not also have to provide equivalent of 30 feet stream mitigation; VDOT concerned that requirement for topo map and documentation of impacts when <1/10 will be burdensome

(written) in A1, a disclosure statement regarding protected areas should not be required, as it will increase project costs by \$25,000-30,000 and require additional 80 man hours per project; requesting requirement be deleted, or as alternative, revise language to allow VDOT to provide information regarding protected areas through its existing procedures associated with the State Environmental Review Process; concerned that requirements in A2, providing detailed location map, disclosure of protected areas, and verification of impacts totals for less than 1/10 acre/300 LF, will eliminate current reporting spreadsheet and require a complete application for minor impacts; in A1 compensatory mitigation should only be required for the impact threshold that is exceeded; request that the thresholds be treated independently and separately from each other

- f. -60 Application: in A13, delete requirement to distinguish nonperennial from perennial and last sentence; request that the Corps and VDOT make this determination without coordination with localities; in B17, delete requirement for RPA on transportation and utility delineations maps, as this information is not available to VDOT staff and it clutters plans

- g. -70 Compensation:

(oral) VDOT concerned that the general permit regulation is over-reaching in regards to stream assessment and compensation; VDOT believes that stream bank protection should be considered self-mitigating

(written) in A, compensatory mitigation should only be required for the impact threshold that is exceeded; request that the thresholds be treated independently and separately from each other; request reversal of word order in sentence #3 of B so that the sentence does not imply that practicable is restricted to ecological justifications only; request predictable ratio for stream compensation and are concerned with the potential effects of the use of SICAM on determining compensation requirements; concerned about acquiring DEQ approval of compensation plan changes prior to making in-field decisions; need more flexibility in field; concerned about condition to perform stream restoration in the dry; request insert "as practicable"

- h. -80 Notice of planned change:

(oral) VDOT supports increase to 100 LF for notice of planned change; VDOT concerned that notice of planned change does not address a single and complete project; VDOT concerned that procedure for getting approval of a compensation site change will be burdensome; Sections -80 B and I contradict one another



(written) in B, permittee should be able to add impacts through a plan-change regardless of their location to previously authorized impacts as long as the impact amounts are within the limits allowed and the permit has logical termini

i. -95 Transition:

(oral) VDOT supports the transition language

k. -100 VWP general permit:

- IC5 – request compliance with this program approval meet the requirements of this permit erosion and sediment control conditions
- IIA5 – request more flexibility than in last sentence; obtaining advanced approval can result in unnecessary time delays, cost overruns, additional water quality impacts; delete ‘in advance’
- IIB2 – request elimination of requirement to photograph each surface discharge from the site
- IID4 – add ‘as practicable’ at end of first sentence

*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 Single and Complete will stand as proposed in the draft WP1-WP4 regulations in order to be inclusive of other examples other than road projects. No change 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.
- DEQ will revise Sections 40 G (or F in some cases) and 50 A (or in some cases B) in each regulation regarding impacts in deed restricted areas. Impacts less than one-tenth acre wetlands or open water, or less than 300 linear feet stream bed, will be allowed provided that compensation is provided and all informational requirements of Section 60 B are submitted, with exception to B 20. The applicant may qualify for either a VWP general permit or individual permit, regardless of the amount of impacts. These changes will also initiate a change to the Forms section of WP1.
- DEQ proposes to revise Section 50 in the WP1 and WP3 regulations to exclude VDOT-administered projects from the requirement of submitting a disclosure statement with a permit application due to timing conflicts between VDOT’s project progression process and DEQ’s permit process. Rather, the VDOT State Environmental Review Process (SERP), National Environmental Policy Act (for federal actions), and VDOT’s Geographical Information Systems will be used to provide such information on proposed project areas. Results of these processes will be provided to all state agencies involved with permitting a proposed VDOT-administered project.

- DEQ proposes to revise Section 50 in the WP1 and WP3 regulations to exclude VDOT-administered projects from the requirement of submitting the following informational items via a permit application for up to 1/10 acre or 300 linear feet of impacts: dimensions and topo map. These informational items are provided on a separate application form for VDOT-administered projects having up to 1/10 acre or 300 linear feet of impacts, as provided for in the Forms section of the WP3 regulation. Drawings (Section 60 B 11) and the quantity of impacts (Section 60 B 17) are not currently required application information for up to 1/10 acre or 300 linear feet projects.
- The proposed Section 60 language in each regulation is a recommendation to submit information on the type of stream impact (perennial or nonperennial). The submittal of such information is not required. Therefore, the language will stand as proposed in each regulation. No change is proposed.
- The requirement to submit Resource Protection Area (RPA) boundaries on application plans or drawings will remain as proposed in each regulation in order to inclusive of all types of projects. VDOT and DEQ guidance will clarify this requirement to respective staff members. No change is proposed.
- DEQ proposes to revise Section 70 in general permit regulations WP2, WP3, and WP4 to change the use of the terms “practicable” and “ecologically preferable” to match the VWP program regulation 9 VAC 25-210 and the State Water Control Law.
- The requirement in Section 70 to compensate for all impacts once certain limits is the current DEQ policy imposed on other members of the regulated community. In order to be consistent, no change is proposed.
- No stream ratios were included in Section 70 because specific assessment and compensation methodologies are not part of the proposed regulation changes. No change is proposed.
- DEQ proposes to change the language of Section 80 to include the road project-specific boundaries of “logical termini”.
- The requirement in Section 80 to notify DEQ and obtain approval for changes to compensation site plans will remain as proposed in each regulation in order to inclusive of all types of projects. VDOT and DEQ guidance will clarify this requirement to respective staff members. No change is proposed.
- The special conditions regarding erosion and sediment control in Section 100 of each regulation will remain as proposed. VDOT and DEQ guidance will clarify these requirements to respective staff members. No change is proposed.
- The special conditions regarding photographic monitoring in Section 100 of each regulation will remain as proposed since the language as proposed does not make photos of discharges a requirement, but rather uses this activity as example of items to document via photographs. No change is proposed.
- The requirement for working in the dry noted in Section 100, Part I C 18 and Part II D 4 should be considered on a case-by-case basis to determine if a change in construction methods is warranted. VDOT and DEQ guidance will clarify this requirement to respective staff members. No change is proposed.
- The requirement in Section 100, Part II A 5 to notify DEQ and obtain approval for compensation site plans will remain as proposed in each regulation in order to inclusive of all types of projects. VDOT and DEQ guidance will clarify this requirement to respective staff members. 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)