

**Virginia Department of Conservation and Recreation
Public Hearing on Proposed General Permit for Construction Activities Regulations
(4VAC50-60-10 et seq.)**

December 2, 2008 in Manassas, Virginia

Meeting Officer: Christine Watlington
Policy and Budget Analyst
Department of Conservation and Recreation

Opening:

Ms. Watlington: Good evening, I would like to call this public hearing on the Virginia Soil and Water Conservation Board's proposed General Permit for Discharges of Stormwater from Construction Activities Regulations to order. I am Christine Watlington, Policy and Budget Analyst for the Department of Conservation and Recreation. I will be serving as the meeting officer this evening. I welcome you to this hearing.

I would like to thank the City of Manassas for allowing us to use this facility.

Introduce DCR Staff assisting with the meeting.

With me this evening I have Eric Capps, DCR's Erosion and Sediment Control and Stormwater Permitting Manager, and Ryan Brown, our Policy and Planning Assistant Director, who will serve as our technical presenter.

I hope that all of you have registered on our attendance list. If not, please do so. Those wishing to speak should note that on the attendance list. Please also make sure that your contact information, including your name and address, is legible and complete as we will be utilizing it to keep you informed on the status of the regulatory action.

Purpose of the public hearing:

The purpose of this hearing is to receive input from interested citizens on the Board's proposed General Permit for Discharges of Stormwater from Construction Activities during the 60-day public comment period which closes on December 26th.

The Department used the participatory approach to develop the proposal. Following the publication of the Notice of Intended Regulatory Action regarding these regulations in April of this year and the public comment period on the NOIRA, the Department formed a Technical

Advisory Committee to assist in the development of the proposed regulations. The TAC included representatives from localities, consulting firms, environmental organizations, state agencies, colleges and universities, planning district commissions, and federal agencies. The TAC met three times during the months of July, August, and September. Following the completion of the TAC's work, the Soil and Water Conservation Board proposed these regulations at its meeting held on September 25, 2008. Copies of the proposed regulations are located on the table near the attendance list.

It is of note that there are two other regulatory actions currently being undertaken by the Soil and Water Conservation Board affecting the stormwater program. These are the actions to amend the technical criteria (including water quality and quantity), to establish criteria for locality-administered stormwater programs, and to amend the fees associated with the stormwater program. These actions will be subject to a later public comment period and separate public hearings will be held on them in the future. Today's General Permit action will not implement any of the provisions of those regulatory actions.

This concludes my introductory remarks. I would like to introduce Ryan Brown, DCR's Policy and Planning Assistant Director, who will explain in more detail what the proposed regulations do.

Mr. Brown: Thank you Ms. Watlington.

This regulatory action amends the General Permit for Discharges of Stormwater from Construction Activities. This action is necessary, as the existing general permit is good for 5 years and is set to expire on June 30, 2009.

All Virginia Stormwater Management Program permits, including this draft General Permit, are composed of terms developed pursuant to the greater body of stormwater regulations. As Christine noted, as the current regulatory processes to amend the technical criteria (Part II of the regulations, including water quality and quantity), local stormwater management program requirements (Part III), and fees (Part XIII) associated with the VSMP program are not final, the provisions of these proposed regulatory actions will not be implemented in this General Permit. We are aware that there may be some confusion over this point; I would note that a handout is provided near the back of the room explaining the three different regulatory actions that are ongoing that will affect the stormwater program. The actions affected technical criteria (including water quality and quantity), local programs, and fees will be the subject of separate public comment periods and public hearings in the future, likely during the Spring of 2009.

Still, important updates are proposed to be made to the General Permit in order to enhance program administration and promote clarity for the regulated community. The key proposed revisions to the permit include:

- 1) Updating and adding needed definitions such as “control measure”, “linear development project”, “qualified personnel”, “stormwater pollution prevention plan”, “Virginia Stormwater Management BMP Clearinghouse website”, and “minimize”. These new definitions are contained in section 10 and section 1100.
- 2) Specifying in section 1120 that this general permit shall become effective on July 1, 2009 and expire on June 30, 2014.
- 3) In sections 1130 and 1170, adding a statement that discharges to waters that have been identified as impaired on the 305(b)/303(d) Water Quality Assessment Integrated Report are not eligible for coverage under the permit unless they are addressed consistent with the terms of the permit, and that all control measures be protective of impaired waters.
- 4) Adding requirements in section 1170 that stormwater discharges from construction activities not cause or contribute to an excursion (i.e., a violation) above any applicable water quality standard, and that all control measures be employed in a manner that is protective of water quality standards.
- 5) Updates to section 1150 affecting the registration statement (i.e., application) for coverage under the general permit, including:
 - a. A requirement that a complete registration statement be submitted prior to “the issuance of coverage under the general permit that authorizes the commencement of land disturbing activities...”, and that the “operator of a construction activity is authorized to discharge...only upon issuance of coverage under the general permit...” Currently, land disturbance is permitted to begin upon submittal (usually, mailing) of the registration statement; this new language changes that practice to require that coverage under the permit actually be issued by the Department prior to the time that land disturbing activities begin.
 - b. A requirement that current permit coverage holders reapply for coverage under this new general permit by July 1, 2009. As the current general permit will expire on June 30, 2009, there are only two options in order to ensure continued coverage for active projects—either the existing general permit must be administratively continued, or all permit coverage holders must receive coverage under this permit. As either process requires reapplication by current coverage holders, and as it is believed that changes to this draft proposed permit will not detrimentally affect active projects, it is proposed that all projects receive coverage under this draft proposed permit.
 - c. A specification that only one construction activity operator may receive coverage under a single registration statement.

- d. A requirement that each registration statement note direct discharges to any receiving water identified as impaired on the 2006 305(b)/303(d) Water Quality Assessment Integrated Report or for which a TMDL WLA has been established for stormwater discharges from a construction activity.
- 6) Updates to the notice of termination referred to in section 1160, which ends permit coverage and becomes effective at midnight on the date that it is submitted (previously, it had been effective seven days after submission).
- 7) Updates in section 1170 to the requirements for and contents of a Stormwater Pollution Prevention Plan (SWPPP) for the construction site, including:
 - a. A requirement for the SWPPP to be made available to the public. Access to the SWPPP could be arranged at a time and location convenient to the operator (permittee), but no less than twice per month and during normal business hours.
 - b. A direct requirement that all operators implement an Erosion and Sediment Control plan for the site in accordance with the Erosion and Sediment Control Law and Regulations. Previously, the SWPPP had been required to address Erosion and Sediment Control through specific language in the permit; however, as a practical matter, operators simply followed their approved E&S plans. This change aligns the permit language with that practice.
 - c. Clarification that water quality and quantity requirements must be met by the operator. Under the current permit, there has been confusion at times as to whether or not water quality measures are required on every site statewide. The draft proposed language makes it clear that water quality is required on all sites.
 - d. The addition of an option for inspections of the site to be conducted every seven days by the operator. The operator can still choose the current inspection schedule of every 14 days and within 48 hours following a runoff producing event if desired.
 - e. A requirement that the operator report if there has been any correspondence with federal officials regarding endangered species on the site, and a description of any measures necessary to protect such species.
 - f. Requirements that TMDL wasteload allocations made to construction activities be addressed through the implementation of control measures and strategies contained in the SWPPP.
- 8) Again in section 1170, general updates to the basic Conditions Applicable to All VSMP Permits section that appears in every VSMP permit.
- 9) The inclusion of new sections 1180, 1182, 1184, 1186, 1188, and 1190. These sections are direct copies of the currently-effective (again, not the proposed) Part II (water quality and quantity) of the stormwater regulations. When the version of Part II that is currently

undergoing development becomes effective, it will repeal the existing Part II. This would mean that all permittees at that time would then immediately become responsible for meeting the new Part II requirements, even though their plans were developed to meet the existing (currently effective) Part II requirements, and even though construction of the project under those plans may be well underway. In order to avoid that inequity, the permit specifically references the water quality and quantity requirements of these copied sections, which will prevent the changes to Part II from affecting persons holding coverage under this general permit. A new general permit will then need to be developed to incorporate the changes to Part II on a going-forward basis for new projects.

- 10) Updates to forms associated with the General Permit, including the registration statement (DCR 199-146), notice of termination (DCR 199-147), transfer form (DCR 199-191), and permit fee form (DCR 199-145).

This concludes the summary of key provisions contained in the proposed regulations.

Ms. Watlington: Thank you Mr. Brown.

Before we begin receiving testimony on the proposed regulations, I would like to stress that this is an information-gathering meeting. Everyone wishing to speak will be heard. If necessary, we may ask speakers questions concerning their testimony or request additional information concerning a subject believed to be important to the process in order to help the clarify and properly capture your comments. Staff will be available after this hearing to take any individual questions you may have.

We will now begin the public comment portion of the hearing. When I call your name, please come to the front and use the podium. Please state your name and who you represent. If you have an extra copy of your comments, we will be happy to accept it.

Ms. Watlington called on Mark Simms representing the building industry.

Mark Simms

Mr. Simms introduced himself as representing the building industry and noted that he has been working in this field for 25 years and is an engineer and a responsible land disturber (RLD). He stressed balance in the development of this permit. This permit will bring additional costs to an industry that is already hurting.

This represents an increase of regulations when what is needed is enforcement of the existing regulations. There are a lot of facilities not currently getting coverage. Jurisdictions need to do a better job of monitoring state agency and county projects and utility projects.

Mr. Simms explained that he does not understand the TMDL requirements proposed to be included. What are the monitoring requirements and the costs associated with this?

The public access to the SWPPP (stormwater pollution prevention plan) is an onerous requirement. Also, when would a project receive coverage? Today, when the registration statement is mailed in, that constitutes permit coverage. We will now have to wait to receive a notice of coverage? Waiting to hear back from DCR on applications will cause a quagmire.

Ms. Watlington called on Barrett Hardiman representing the Homebuilders Association of Virginia.

Barrett Hardiman

Mr. Hardiman introduced himself as representing the Homebuilders Association of Virginia.

Mr. Hardiman thanked the Department for including the current technical criteria in the permit. He requested that this language remain in the permit.

He expressed a desire for an administrative continuance for continuing permit coverage to be considered; this may be preferable for existing projects.

Concerning the public availability of the SWPPP, it will be both a time and financial burden to the developer. The SWPPP is a living document and is updated regularly. The SWPPP may contain proprietary information. Proving public access to the SWPPP does not increase the enforcement powers of citizens. The 7th Circuit Court in Texas has recently ruled that the Clean Water Act does not require that the SWPPP be made public.

While protecting endangered species is a vital part of balancing the ecosystem, the stormwater management permit is not a good place for this provision.

Ms. Watlington called on Steve Aylor representing the building industry.

Steve Aylor

Mr. Aylor introduced himself and noted that he represented the building industry.

Mr. Aylor noted that these regulatory changes would be a financial hardship on development.

Providing the SWPPP to the public is an unnecessary cost. Most of the public will not understand it. The erosion and sediment (E&S) plans are available from the localities and the localities will be able to answer questions concerning the plans.

The endangered species requirement is not necessary and does not fit with the purpose of this permit.

Requiring the notice of coverage letter before land disturbing can begin has no purpose. It increases the developer's cost and will not benefit water quality.

Ms. Watlington called on Paul Johnson representing Charles P. Johnson and Associates.

Paul Johnson

All engineers would like additional work; however, compounding regulations through the new technical criteria is not the right way to do this. The new technical criteria go too far. There are already good measures in place for the best management practices (BMPs). If the BMPs are maintained, they will do a good job. However, most BMPs are not sized or maintained correctly. People are not inspecting correctly. The existing regulations are not being enforced. It would be a better idea to enforce the existing regulations rather than develop new regulations. Constantly ratcheting up regulations is not the way to improve water or life quality.

Ms. Watlington called on Eileen Watson representing the Williamsburg Environmental Group.

Eileen Watson

Ms. Watson introduced herself as representing the Williamsburg Environmental Group and as the chair for the environmental committee of the Northern Virginia Building Association.

For ongoing permits, it is very important that the projects not be shut down during the interchange of this proposed permit and the current permit. How long will they be able to keep coverage? Is there a fixed turn around time for the Department to issue the notice of coverage? Will there be a grace period for the existing projects to retain coverage?

Also, does the endangered species requirement require additional analysis or studies to be done for this permit, or just a notation of what has otherwise been done?

Ms. Watlington called on Daun Klarevas representing Christopher Consultants.

Daun Klarevas

Ms. Klarevas introduced herself as representing Christopher Consultants.

This is a tough economic time for the industry. It will be a financial burden for the SWPPP to be available to the public, and developers will not be able to pass this cost on. The E&S plans are available from the locality for the public to view.

Ms. Watlington called on Mike Kitchen representing Christopher Consultants.

Mike Kitchen

Mr. Kitchen introduced himself as representing Christopher Consultants.

The SWPPP contains extremely technical information. There will need to be someone to interpret the information to the public. The E&S plans are available from the localities and they are able to explain the information to the public. This requirement should be removed.

Ms. Watlington called on Mike Trostle representing Richmond American.

Mike Trostle

Mr. Trostle introduced himself as a landscape architect representing Richmond American.

The clarifications in the certification requirements and the grammar corrections are good. However, this is hardly the economy to be adding on additional requirements for the construction industry. We should instead focus on delegation to localities.

It is nearly impossible to read through all of the regulations. It is very difficult to decipher which standard (whether local standards, E&S standards, or state stormwater standards) are the most important. Many of these standards are in conflict with each other. Synthesizing the information between all the sources is the most important thing that can be done.

Most of the state does not know of or understand this permit. VDOT and many localities do not. Northern Virginia is one of the few regions that does. Enforcement of this permit is the problem. Developers respond to the localities enforcing the permit through inspections. The state is not implementing or enforcing the permit as it should be.

Having the SWPPP open to the public will be a terrible burden on the developers. To have site employees go sit down with the public, who are not knowledgeable enough to understand the SWPPP, is a burden.

Additionally, not having a specific timeframe for the Department to issue the notice of coverage will be a significant burden and is not appropriate. This will compress the developer's timeframe

for buying and developing lots. This process should either be left the way it is under the current permit or the department should have a 1 or 2 week deadline at most.

The endangered species requirement is not relevant to the permit and should be removed.

Ms. Watlington called on Pete Rigby representing Paciulli, Simmons and Associates.

Pete Rigby

Mr. Rigby introduced himself as representing Paciulli, Simmons and Associates.

The text for the definitions in this permit does not match the definitions for the other stormwater actions. This is very confusing. The definition of adequate outfall has not been amended to include wetlands.

Is the switch from "surface" waters to "state" waters intended? This is a significant change from the existing permit. Do we intend to regulate groundwater under this permit?

The reference to the 2009 registration statement should be removed.

It is impracticable and absurd to have the SWPPP be available to the public. This is a significant time and financial burden on the developer. Regarding having revisions to the SWPPP be approved within 7 days, this will require a massive effort on the part of the reviewing authority and is not realistic.

The references to the BMP Clearinghouse are not appropriate. The Clearinghouse does not permit public review.

The timeline for this permit to be in place by 2009 and the impact of the other stormwater actions on this permit is confusing and unclear.

Ms. Watlington called on Jeff Kelble representing the Shenandoah RiverKeeper.

Jeff Kelble

Mr. Kelble introduced himself as representing the Shenandoah RiverKeeper. He noted that his organization is represented by the UVA law clinic and written comments will be received from the clinic on his behalf.

Mr. Kelble explained that he wished to argue for stricter requirements. This permit has significant legal deficiencies. Permits are being issued in impaired waters and waters with TMDLs (Total Maximum Daily Loads), in many cases after we have already spent money on agriculture practices in those areas. Today, the Department gives a rubber stamp to projects. There is no review. There is no public involvement. This makes it very difficult for citizens who are trying to enforce the Clean Water Act; citizens do not have enforcement powers under local Erosion and Sediment Control programs.

Mr. Kelble also noted that documentation of efforts on a site is often lacking. BMPs are often not being monitored properly. The Clean Water Act requires that discharges to streams be documented. This permit sets a low bar; permittees have not seen it necessary to comply.

The SWPPP is essential for the public to be able to see the effort made by developers to maintain and install BMPs that address E&S. Without the SWPPP, the public is unable to determine what the developer is doing to address any issues.

The existing permit has not forced people to become educated about the technical information contained in the SWPPP. It would be beneficial and efficient for developers if the local E&S permits and this general permit were combined.

The proposed permit should be issued for 1 year rather than 5 years. There is never a good time to implement new regulations. However, for years, development has outpaced the ability of localities and the state to enforce these regulations. The improvements that have been made in reducing agricultural runoff are being negated by the increased runoff from urban sites.

Sites at a high risk for violating a TMDL or causing additional impairments should be permitted under an individual permit rather than this general permit. The U.S. Environmental Protection Agency (EPA) has guidelines to assist in determining which sites should be permitted under an individual permit. The effluent guidelines that EPA has recently issued should be incorporated into this permit.

Ms. Watlington: That concludes the list of speakers that I have.

Mr. Brown: Mr. Brown emphasized that speakers should submit written copies of their comments if they wished to see those comments incorporated into the record verbatim. Otherwise, minutes would be developed based on summaries of the testimony given by the speakers.

Ms. Watlington: A handout is provided on the table outlining the public comment submittal procedures I am about to cover and the dates and locations of the remaining public meetings.

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Persons desiring to submit written comments pertaining to this notice and this meeting may do by mail, by the internet, or by facsimile. Comments should be sent to the Regulatory Coordinator at: Virginia Department of Conservation and Recreation, 203 Governor Street, Suite 302, Richmond, Virginia 23219. Comments also may be submitted electronically to the Regulatory TownHall. Or comments may be faxed to the Regulatory Coordinator at: (804) 786-6141. All written comments must include the name and address or email address of the commenter. In order to be considered, comments must be received by 5:00 PM on December 26, 2008.

With that announcement, I would like to thank each of you for attending this meeting and providing us with your views and comments. This meeting is now officially closed. Staff will be available afterwards to take any individual questions you may have.

I hope that everyone has a safe trip home.