



west virginia department of environmental protection

**Responsiveness Summary
General West Virginia/National Pollutant
Discharge Elimination System (WV/NPDES) Permit WV0115924
For Stormwater Discharges Associated With Construction Activities**

The West Virginia Department of Environmental Protection's (WVDEP) Division of Water and Waste Management (DWWM) would like to take this opportunity to thank those individuals who submitted written comments on the General West Virginia/National Pollutant Discharge System (WV/NPDES) Permit for Stormwater Associated with Construction Activities Permit No. WV0115924.

DWWM published a Class II legal advertisement in 56 state newspapers announcing the WVDEP's desire to reissue the general permit for stormwater associated with construction activities. The general permit was originally established June 8, 1992, and was reissued December 5, 1997, and December 5, 2002. The public notice announced a 30 day comment period and public hearing dates for the draft general permit.

Two public hearings were held during the public notice period. The first public hearing was held at the WVDEP's Charleston headquarters on August 30, 2007. The second public hearing was held at James Rumsey Technical Institute in Martinsburg on September 4, 2007.

This responsiveness summary highlights the issues and concerns that were identified during the public hearings and in the written comments received during the comment period. In many cases multiple comments were provided on specific sections or issues, and both the comments and responses have been summarized to the extent possible.

Comments will appear first, with the WVDEP's response following in bold type. Comments reference the draft general permit unless otherwise noted.

1. **Page 1, Paragraph 1-** Several commenters stated the draft permit removes the term clearing from the definition of storm water discharges associated with small construction site activity. Removing the word clearing makes the state's definition of construction activity inconsistent with how EPA defined construction activity in the Phase I and Phase II storm water rules.

DWWM believes “clearing” as defined in the draft permit means cutting trees, brush hogging, etc., which will cause minimal, if any, earth disturbance.

2. **Page 1, Exemption 1-** One commenter stated DEP references “... larger common plan of development or sale.” The draft permit defines “common plan of development,” but not the phrase “or sale.” We propose the deletion of the phrase “or sale” unless some definition of this term is provided- the sale of property does not necessarily involve land disturbance.

DWWM believes that this phrase is consistent with EPA’s general permit. DWWM acknowledges that if a sale does not cause land disturbance, then it does not need permit coverage.

3. **Page 1, Exemption 6-** One commenter stated we note that the list of land disturbing activities associated with oil and gas activities that is contained in the General Permit does not make it clear that it is intended to be a representative, not exhaustive list.

DWWM agrees and language has been added to the permit to reflect that the list is not an exhaustive list.

4. **Page 1, Exemption 6-** One commenter questioned the difference between construction activities and land disturbing activities.

For the purpose of this section, they should be considered the same. DWWM wanted to use the same language that was used in the EPA fact sheet for the oil and gas exemption listed in the Energy Policy Act of 2005.

5. **Page 1, Exemption 6-** One commenter stated that the exemption refers to the Energy Policy Act of 2005. It seems that states should have the authority to make laws that are more strict than national guidelines, but if the Act’s wording explicitly outlaws states’ ability to cover this sector under NPDES permits, I would expect that WVDEP take alternative measures to prevent pollution from this sector as provided by the same Act.

The state may make laws more stringent than national guidelines through legislation. It cannot be done through the general permit.

6. **Page 2, Construction of single family residences-** One commenter stated it is not clear why this group is exempt from filing a permit application.

In the current permit, the developer had to incorporate a quarter-acre of disturbance for each lot planned in the subdivision. This put the burden on the developer to ensure that proper sediment and erosion control measures were in place when a home started to be constructed. In many cases, the developer no longer owned the property and had no legal authority for that lot. DWWM has decided the responsibility for proper sediment and erosion control for home construction should be on the homeowner or his contractor. If the subdivision developer is building the homes in the subdivision, those lots would be the responsibility of the subdivision developer and covered by the registration for the subdivision. With the development of the single family home guidance which is available online, DWWM feels an application procedure process for individual home construction is not needed.

7. **Page 2, Construction of single family residences-** One commenter stated that about two years ago WV removed a “lot transferability” clause from their website because there was no official law to support this clause. We would like to see this clause added to the permit.

The “lot transferability” clause can not be used because DWWM does not have the legal authority to implement it. DWWM also believes that with the language added to the draft permit on a single family residence this “lot transferability” clause is not necessary.

8. **Page 2, Construction of single family residences-** One commenter stated that it is unclear in the permit language whether this permit will apply to all home sites under three acres in disturbed area.

This language would not apply if the developer of the subdivision is also the homebuilder. Those lots would be the responsibility of the subdivision developer and covered by the registration for the subdivision.

9. **Page 2, Construction of single family residences-** One commenter stated it is also unclear what portions of the SWPPP requirements will be required.

DWWM feels the language in this section is clear that all requirements of the permit are required except for the application and the Notice of Termination.

10. **Page 2, Reapplication provision-** One commenter requested the effective date to have final stabilization completed for sites approved prior to January 1, 2006 be changed from June 30, 2008 to December 31, 2008 so that owners and contractors will have the full 2008 construction season to complete project stabilization.

DWWM has decided not to change the date as requested. DWWM is sending out letters advising the permittees of this requirement and believes that significant notice has been given. The current permit also has a requirement that if a project will have construction activities taking place for one year or longer, the project should go to public notice. If the project did go to public notice, the project will be rolled over. If the project did not go to public notice, it should have already been stabilized.

11. **Page 3, C.1.b.-** One commenter requested to provide some reasonable notice to permittees this condition should be modified as follows: *“The permittee shall comply with all effluent standards or prohibitions established under Section 307(a) of the CWA for toxic pollutants within the time provided in the regulations that establish these standards or prohibitions after formal notification from the agency, even if the permit has not yet been modified to incorporate the requirement.”*

This requirement is established in 47CSR10-5.1.b. and is not subject to revision in the general permit.

12. **Page 3, C.1.b.-** One commenter stated the draft permit requires compliance with *“with all effluent standards or prohibitions established under Section 307(a) of the CWA for toxic pollutants...”* As there is no monitoring required under the permit, and no technology-based standards, other than best management practices, this section would appear irrelevant and could be eliminated. If the DEP decides not eliminate this condition, we urge that it adopt the recommended change stated in comment 11.

This requirement is established in 47CSR10-5.1.b. and is not subject to revision in the general permit.

13. **Page 4, C.8.-** One commenter requested that the following change “... kept on site...” to “... maintained on site...”

This requirement is established in 47CSR10-5.8. and is not subject to revision in the general permit.

14. **Page 5, C.14.a.-** One commenter stated that this section shall (in general) comply with Appendix G of Federal NPDES permit. The Civil/Willful/Negligent penalties amount have been revised/increased recently. These penalties shall be linked to Federal NPDES permit. Few examples are given in item 2, 3 and 4 below. Subpart C.14.a - Civil penalty amount shall match (minimum) with Federal NPDES CGP Appendix G part B. Federal EPA has increased the civil penalty amount to \$27,500 per day for each violation. Subpart C.14.a - WILLFUL violations amount in Federal NPDES CGP is double than NEGLIGENT violations. See Federal NPDES CGP Appendix G part B. Subpart C.14.a - Additional wording shall be added for second or subsequent convictions as suggested in Federal NPDES CGP Appendix G part B.

The penalties listed in this section are the penalties that the state may assess. The state does not have the authority to enforce the federal penalties. This section will remain unchanged.

15. **Page 5, C.15.-** One commenter requested that the DEP clarify that, with regard to stormwater discharges, outlet markers should be required only at the location of velocity dissipation devices.

The change requested cannot be made in this permit; it must be done by a rule change. This condition is taken directly from 47CSR11.9.

16. **Page 5, C.15.-** One commenter suggested that DEP clarify the law and eliminate this requirement on construction site discharges, especially considering the fact that these types of discharges are temporary in nature.

The change requested can not be made in this permit; it must be done by a rule change. This condition is taken directly from 47CSR11.9.

17. **Page 8, Common plan of development-** One commenter requested clarification with this definition and phased projects.

DWWM believes that the definition of common plan of development adequately addresses this comment.

18. **Page 9, Construction activity-** One commenter stated this definition implies that an owner/operator would be responsible for earth disturbance activities at his chosen off-site borrow area. Often times, however, the borrow site is owned/operated by a separate entity. The language of this section should be modified, to reflect our independent owner/operator's responsibility for storm water controls.

The landowner where the borrow or waste site will be located can apply for a registration. If that landowner does not have a registration or is

unwilling to apply for a registration the borrow or waste site will have to be registered under the owner/operator's registration if he wants to use that location.

19. **Page 9, Construction activity-** Several commenters requested that DEP put the word clearing back in the definition of construction activity.

DWWM believes "clearing" as defined in the draft permit means cutting trees, brush hogging, etc., which will cause minimal, if any, earth disturbance.

20. **Page 9, Construction activity-** One commenter stated that this definition omits the example of "house lots in subdivisions." Its omission will be misinterpreted to imply they are omitted from the permit.

DWWM believes that the definition of construction activity adequately addresses this comment.

21. **Page 9, Establishment-** One commenter stated the definition of "Establishment" on p.9 improperly omits construction sites, commercial, residential and government sites. Since the permit only covers an "establishment" the wording needs to be plain and accurate. Perhaps the intended definition of Establishment is "owner of a construction site or of a Common plan of development." The draft permit also uses the terms project, activity, individual establishment or person, developer, registrant and permittee. A single word would be clearer.

The definition of establishment came directly from the Code of West Virginia, Chapter 22 Article 11 Section 3.

22. **Page 9, Final stabilization-** One commenter requested that DEP add, "suitable for growth" immediately after "70 percent of ground."

DWWM believes this change would make this condition too subjective.

23. **Page 10, Notice of intent and Notice of termination-** One commenter stated the definitions of NOI and NOT specify the "developer" to submit the forms. This term is not defined or used elsewhere, and confuses the issue which has always been confusing, of who must file.

DWWM agrees and "developer" has been changed to "applicant" for Notice of Intent, and "developer" has been changed to "permittee" in the Notice of Termination definition.

24. **Page 10, Notice of intent-** One commenter requested that the definition used in the existing permit be used, not the definition in the draft permit.

The Notice of Intent is intended for small and short duration projects. The current permit and draft permit requires that any project that will have construction activities taking place for one year or more must go to public notice. DWWM believes that length of construction is as important as size of the project, and if a project is going to have construction activities taking place for a year or longer, the stormwater pollution prevention plan must be reviewed and the project sent to public notice. These requirements are beyond the scope of the Notice of Intent and a site registration application must be submitted. The definition will not be changed.

25. **Page 10, Permanent detention/retention facility-** One commenter stated that the word evapotranspiration is spelled wrong.

DWWM agrees and this change has been made.

26. **Page 11, Pre-development-** One commenter stated the definition of pre-development refers to the condition of the land in primeval condition: "prior to development." I support this.

No response needed.

27. **Page 11, Sediment trap and Sediment basin-** Several commenters stated that the definitions of "Sediment trap" and "Sediment basin" on p. 11 define them as structures where the "majority" of the sediment settles out. This reduction is helpful but not enough. The permit needs to define them as structures where "enough sediment settles out so the discharge to surface waters complies with turbidity and narrative water quality standards."

These definitions come from the West Virginia Best Management Practice Manual. Sediment traps and basins are just one component of a stormwater pollution prevention plan. The stormwater pollution prevention plan is designed to meet the water quality standards noted. If the sediment trap or basin is the final component of the stormwater pollution prevention plan then the discharge from the sediment trap or basin should comply with the noted water quality regulations.

28. **Page 11, Stormwater-** One commenter stated Page 1 and section G.2 allow only discharge of "Stormwater" so the question of whether this term includes just water or also some suspended material is crucial. Page 12 defines stormwater too narrowly as only runoff. Page 11 says runoff is just a fraction of the "rainfall" so this definition does not include any suspended material in the discharge. Therefore the permit does not allow suspended sediment in the

discharge. This is impractical. No practical method removes all suspended material. Either the definition of stormwater or the rule on p.1 and G.2 needs to be broadened to include suspended sediment up to the state's turbidity and narrative standards.

DWWM disagrees with this comment and feels that the definition of stormwater adequately addresses this comment.

29. **Page 12, Rainfall events-** One commenter stated that the definition of rainfall events on p.12 should reinstate the current permit's citation to NRCS' handbook or to another standard source, to avoid people using their own data.

DWWM will evaluate all rain data submitted. In some cases local data would be more beneficial than regional data.

30. **Page 12, Reference to multiple regulations-** One commenter requested the DEP clarify that any reference to rules made in this permit means the rules as they existed on the date the proposed draft permit was issued for comments.

When legislative rules change, the permit must be changed to comply with these rule changes. If a rule changes during the term of this draft permit, it will be evaluated and the appropriate action will be taken for the registrations already issued.

31. **Additional definitions-** Several commenters requested that the following definitions be added to the draft permit; permittee, MS4, developer and responsible party.

DWWM appreciates this suggestion and will take it into consideration during the next permit cycle. These definitions will not be added at this time.

32. **Page 12, F.2.a.-** One commenter stated that this condition requires reporting “any noncompliance which may endanger health, property or the environment immediately after becoming aware of the circumstances...” The phrase “endanger health, property or the environment” is vague and is broader than the requirement in 47 C.S.R. 10-5.12.E., on which it is based. We would suggest that the reporting required by 47 C.S.R. 11, for discharges to water of the state, is sufficient for purposes of this permit, and Condition F.2.a. could be eliminated.

DWWM has changed this part of the requirement to match the wording in 47CSR10-5.12.e.1.

33. **Page 13, G.2.-** One commenter stated that construction activities in areas affected by pre-law mining have the potential for encountering acid mine drainage. This drainage is not included in the definition, nor are any other

surface or subsurface sources of pollution for which a permittee may not be responsible. How will the agency handle these cases, particularly when the permittee may take steps to reduce these discharges to the environment?

If the agency is aware of a discharge that would not allow a project to be covered under this general permit, DWWM has the option to issue an individual permit.

34. **Page 14, G.4.-** One commenter requested “so long as” be replaced with “if” in the sentence, “These two plans may be combined into one plan so long as all of the requirements for both plans are met.”

DWWM agrees and this change has been made.

35. **Page 14, G.4.b.-** One commenter stated G.4.b. on p. 14 discusses DEP notifications to improve a SWPPP *during* the 45-day review period *before* construction begins. However G.4.b.2 requires that "such notification" result in a 24-hour fix for "an active construction site." This confuses the time frames for fixes before and during construction. The rules should be separated. Probably 5-day fixes should be allowed during the review period, so staff can have multiple cycles to review the proposed fixes without having to deny registration, and 1-day fixes during active construction. When would 30 days ever be appropriate, as in G.4.b.1?

The condition G.4.b. requires the initial application for a site registration to be submitted 45 days before construction begins. If technical corrections or additional information is requested during the review, G.4.b.1. requires that this information be submitted within 30 days after the applicant is notified. Once the application is approved, if during an inspection of the active construction project it is determined that a change needs to be made to the approved plan, this change must be made within 24 hours after notification, unless additional time is provided by the Director or an authorized representative.

36. **Page 15, G.4.b.3.-** One commenter stated that this permit maintains that it is not necessary for sites under 3 acres to submit their SWPPP as part of their NOI application. Perhaps, this requirement is good since the NOI process is intended to be a streamlined procedure. However, has the agency evaluated how many small sites are actually 1) Developing SWPPPs that conform to the guidelines of the permit; and 2) Maintaining the SWPPP on the site and completing prescribed inspections and updates to the SWPPP?

In order to manage its workload Environmental Enforcement inspectors generally focus the limited inspection resources available on sites that are three acres and greater. The larger sites have a greater potential for environmental impact and tend to be disturbed for longer periods of time.

Inspection staff also prioritizes sites that are less than three acres that cause water quality standards violations.

37. **Page 15, G.4.b.4.-** One commenter stated the draft permit should be modified to require that the public notice procedure must be utilized where additional applications for registration or major modification of an existing registration under the draft permit are submitted by the same developer for a common development with open registrations that will collectively disturb 100 or more acres. Under the W. Va. Water Pollution Control Act, the Director, Division of Water and Waste Management, Department of Environmental Protection may only issue a permit for the discharge of pollutants into the waters of West Virginia, after public notice and an opportunity for a public hearing. W. Va. Code Ann. § 22-11-8 (a) (West, Westlaw through 2007 Reg. Sess.)

DWWM believes the public notice procedure that has been implemented adequately addresses this comment. The instructions to the application will detail phases and common plan of development.

38. **Page 15, G.4.b.5.-** Several commenters stated they felt this requirement is overly burdensome. One commenter stated they would like 72 hours to post the required sign. Several commenters stated they disagreed with the assertion that the public notice and participation process is in adequate without the sign requirement. One commenter stated that the WVDOH will not allow any sign or other possible obstruction on their right-of-ways that does not meet their requirements.

This requirement was an agreed order to appeal nos. 04-11-EQB and 04-14-EQB. The change requested cannot be made.

39. **Page 15, G.4.b.5.-** Page 2 exempts small single family construction from filing the NOI and NOT, but imposes "all other terms" of the permit. Therefore the sign requirement in G.4.b.5 on p.15 needs to accommodate these projects, but it is written in terms when the NOI is filed. A parenthetical addition can accommodate small single family construction. Furthermore G.4.b.5 requires 5 items in the sign, but refers to a template which has other information. It would be better for the permit to match the existing template by replacing items 1-5 as follows:

"1) Phone number, Email and Street addresses to contact DWWM about the Sediment Control Plan, and

2) Date, Name of Registrant or Contact, Project Description, and Phone.

(Projects exempt from filing shall erect a sign before construction activity starts, with the following change in item 1: a statement that DWWM does not have the Sediment Control Plan, but can provide general information about the stormwater program)"

The agreed upon language states "... Within 24 hours of filing a NOI

or a Site Registration Application....” It is the opinion of DWWM that because single family homes that disturb less than three acres do not have to file an application, condition G.4.b.5. does not apply. In regards to the information on the sign, DWWM has decided to leave the condition as written in the draft permit.

40. **Page 15, G.4.c.-** One commenter requested that DEP include guidance in the permit explaining when a modification is necessary. DEP should also provide specific examples of what constitutes a major modification versus a minor modification to a general permit registration.

DWWM has developed a modification policy that became effective on July 16, 2007. This policy is available upon request. DWWM believes this policy adequately addresses this comment.

41. **Page 15, G.4.c.-** One commenter stated that the draft permit should be modified to prohibit the approval of a registration or major modification of an existing registration where construction activities are contemplated to occur on land which is not owned by the registrant unless done with the written approval of the landowner.

DWWM believes condition C.5. adequately addresses this comment.

42. **Page 16, G.4.d.1.A.-** One commenter stated that in order to maintain consistency in the general permit, the term “devices” should be replaced with the term best management practices (BMP). BMP is defined in the definition section.

DWWM agrees and this change has been made.

43. **Page 16, G.4.e.1.C.-** One commenter stated that the estimates of pre- and post-peak discharges in G.4.e.1.C on p. 16 should reinstate the required methods (or require a licensed professional). The current "estimate" may be done by anyone using any "technical evaluation" (p.9), such as the builder using his years of experience.

DWWM has made the following change to this condition: “*Design procedures shall follow professionally accepted engineering and hydrologic methodologies.*”

44. **Page 16, G.4.e.1.D.-** One commenter suggested the format of this paragraph be changed and suggested a bullet-format.

DWWM believes the paragraph as written is adequate. Bullet format was not used anywhere else in the draft permit so, to remain consistent it will not be used here. The instructions that are developed for the application will provide

more detail in regards to what needs to be shown on the site maps.

45. **Page 17, G.4.e.1.E.-** One commenter stated that this condition does not require the single entrance, with filter cloth, as declared on p.8 of the Fact Sheet.

Construction entrance details are evaluated with each registration review. If filter cloth appears to be needed, it will be noted in the technical review.

46. **Page 17, G.4.e.2.A.i.-** One commenter requests to know DEP's justification for the seven-day limit on temporarily halting construction, as opposed to a more reasonable time period such as 30 days. Condition G.4.e.2.A.i. contains a related limit of 21 days for resuming construction activities prior to stabilization. We request that DEP explain the need for temporary seeding for such short durations, especially when appropriate on-site BMPs are in place.

DWWM agrees that this is contradictory and has removed the word "temporarily".

47. **Page 17, G.4.e.2.A.i.-** One commenter asked for some flexibility to the following requirement; "A record of the dates when major grading activities will occur, and when construction activities temporarily or permanently cease on a portion of the site, and when stabilization measures will be initiated shall be included in the plan."

This requirement is intended to include general timelines, not exact dates. Listing the seeding and mulching requirements in the permit will meet the stabilization requirement for this particular condition.

48. **Page 17, G.4.e.2A.i.-** One commenter stated that, as in the current permit, 7 and 21 days with raw land exposed to rain (p. 17) overwhelm sediment collection measures and do not protect water quality. Mulching is cheap and effective and should be done on or before the next day when the weather service predicts rain is "likely."

DWWM believes that a properly implemented stormwater pollution prevention plan will adequately protect water quality, and mulching when rain is likely is not warranted.

49. **Page 17, G.4.e.2.A.i.c.-** One commenter stated that DEP should require re-seeding in 14 days, not 30. They should use seeds which germinate and show coverage in less than 14 days, and water them as needed. It will not be a thick stand in 14 days, but gaps will be clear and can be re-seeded.

DWWM believes the seeding and mulching timeframes are as short as practical.

50. **Page 18, G.4.e.2.A.ii.a.-** Several commenters requested the option to utilize the calculated storage volume for a two-year 24 hour storm for the drainage area in lieu of 3,600 cubic feet per acre of drainage area.

DWWM believes the current storage volume criteria for sediment traps is simple and effective and has not revised that language. However, when justification is provided, DWWM will consider requests by designers to utilize comparable alternative design methods.

51. **Page 18, G.4.e.2.A.ii.b.-** Several commenters requested the option to utilize the calculated storage volume for a two-year 24 hour storm for the drainage area in lieu of 3,600 cubic feet per acre of drainage area.

DWWM believes the current storage volume criteria for sediment basins is simple and effective and has not revised that language. However, when justification is provided, DWWM will consider requests by designers to utilize comparable alternative design methods.

52. **Page 18, G.4.e.2.A.ii.b.-** One commenter stated that G.4.e.2.A.ii.b on p.18 needs a timeframe to dewater the dry storage volume. Why impose a timeframe for the wet storage which is rarely dewatered?

DWWM agrees this was an error and has been corrected.

53. **Page 18, G.4.e.2.A.ii.a./ G.4.e.2.A.ii.b.-** One commenter stated that wet storage in traps and basins needs a requirement that mosquito larvae be controlled.

DWWM is not aware of any studies, data or other literature that indicate that properly constructed and maintained temporary sediment basins or traps pose a significant risk as mosquito breeding habitat. As such, the DWWM does not believe it is necessary to require mosquito larvae control as a condition of the general permit. However, if, in a specific case, a sediment basin or trap proves to be or is suspected to be a significant risk for mosquito breeding habitat, corrective actions would be required.

54. **Page 18, G.4.e.2.A.ii.c.-** One commenter suggested replacing the word “like” with “similar”.

DWWM agrees and this change has been made.

55. **Page 18, G.4.e.2.A.ii.h.-** One commenter advised that this condition should be replaced with the following, “In an effort to reduce the potential of sediments entering the stream, all trapped sediments will be disposed on an upland area.”

DWWM has chosen not to change this condition.

56. **Page 19, G.4.e.2.A.ii.j.-** One commenter stated that in order to maintain consistency in the general permit, the term “devices” should be replaced with the term best management practices (BMP). BMP is defined in the definition section.

DWWM agrees and this change has been made.

57. **Page 19, G.4.e.2.A.iii-** One commenter stated that standard conditions of 100' buffers and immediate stabilization should be reinstated for Tiers 2.5 and 3, though individual reviews are also good. Permits may not backslide.

DWWM disagrees that this draft permit is less restrictive. The conditions in the current permit were presumptive conditions and not requirement. DWWM believes that this change has actually strengthened this condition by requiring all projects that will discharge to a Tier 2.5 or Tier 3 stream to go through an antidegradation review.

58. **Page 19, G.4.e.2.A.iii-** One commenter stated implementation of antidegradation is too weak. Upstream of Tier 2.5 or 3 streams the existing permit requires 100- foot buffers and immediate stabilization. But the new draft permit removes these requirements. These requirements are essential. The new draft permit proposes that construction activities discharging to Tier 2.5 and 3 waters will go through antidegradation review process. This is good, but the antidegradation review process allows the DEP Secretary to determine that activities are short-term and therefore not subject to the rules. So in practice, this new requirement may be meaningless.

DWWM disagrees that this draft permit is less restrictive. The conditions in the current permit were presumptive conditions and not requirement. DWWM believes that this change has actually strengthened this condition by requiring all projects that will discharge to a Tier 2.5 or Tier 3 stream to go through an antidegradation review.

59. **Page 19, G.4.e.2.A.iii-** One commenter stated that the permit does not implement antidegradation for discharges to Tier 2 streams: streams that meet water quality standards for construction related parameters such as turbidity criterion or various narrative criteria.

DWWM believes that compliance with the general permit and implementation of the stormwater pollution prevention plan meets the antidegradation requirements for Tier 2 streams.

60. **Page 19, G.4.e.2.B.-** One commenter suggested the following changes:

“The completed project shall convey stormwater runoff in a manner that

will protect minimize potential for post construction erosion at both the site and the receiving stream from post construction erosion. All waterways and other runoff conveyance structures shall be permanently stabilized as appropriate for expected flows.”

This provision also states, “In developing structural practices for stormwater control, the operator shall consider the use of...” The term “operator” implies that the site will require a permit to operate after construction activities have been completed and the permit registration terminated. We request that the term “operator” be replaced with the term “permittee” in this subsection.

DWWM has decided not to change the existing language for the first part of this comment. DWWM has changed the word “operator” to “permittee.”

61. **Page 19, G.4.e.2.B.-** One commenter suggested replacing “post construction” with “post development”, which is defined in the definition section.

DWWM agrees and this change has been made.

62. **Page 19, G.4.e.2.B.-** One commenter stated that Section G.4.e.2.B on p.19 omits post-construction rules. This is a major change which may be good or bad. It leaves builders on their own, without the shelter of DEP standards, in facing citizen enforcement actions about post-construction flows which cause "significant adverse impact to the... hydrologic, or biological components of aquatic ecosystems" Such impact is forbidden by 47CSR2-3.2.i. Construction lowers evapotranspiration from plants, and increases impervious surface, so it raises storm flows and reduces base flows. Thus construction impacts the hydrology and usually the biology of the receiving stream. Individual permits will allow better public comments than the general permit does (though builders will object to the delays and cost), but handling post-construction permits or citizen suits will overload DEP resources.

The basic stormwater management plan requirements have not been changed from the previous general permit, i.e., the completed project shall convey stormwater runoff in a manner that will protect both the site and the receiving stream from post-construction erosion. The impervious surface threshold language was dropped, because after almost five years of implementation of this portion of the criteria, staff had determined it to be ineffective. It was originally hoped that the criteria would assist designers in determining how to meet the basic intent of this section. Instead, the criteria had been proven to be a source of confusion for plan designers and also focused emphasis on whether the threshold was met versus erosion protection. The proposed language requires technical justification for all plans, not just those meeting the previous impervious surface threshold. DWWM will continue to evaluate the stormwater management plan criteria and consider methods to assist in effective implementation of this requirement.

63. **Page 19, G.4.e.2.B.-** DEP proposes to remove the requirement for post-construction storm water management, even though it is required in the current permit. Removing this requirement from the construction storm water permit will have serious and far-reaching effects.

See response to comment 62.

64. **Page 19, G.4.e.2.B.-** One commenter stated that existing language in this section does not seem adequate to protect against post-construction increased flow (velocity and/or volume) in the project SWPP design without the subsections G.4.e.2 (B) i. and ii.

See response to comment 62.

65. **Page 19, G.4.e.2.B.-** One commenter stated that while the new draft permit appears to be consistent with the existing permit, the agency has removed the specific guidance from the previous permit that provided guidance and standards to the permittee as to how they comply with the requirement to protect stream channels from erosive flows coming from the site post-construction. A significant concern to the agency and any permittee should be, will removal of this permit language open this permit program up to third party lawsuits and bring the permit into the courts as to whether any proposed or completed development projects are adequately meeting the permit condition not to contribute to erosive flows in stream?

See response to comment 62.

66. **Page 19, G.4.e.2.B.-** One commenter stated that this draft removes "natural" from the term "natural water course" (G.4.e.2.B on p.19) but either term is narrower than the legally correct term, "surface waters," used elsewhere in the permit. "Watercourse" is only one of 13 allowable types of surface waters listed in WV Code 22-11-3(23). What legal basis does DEP have to deny discharge to the other 12 types of surface waters? EQB has noted DEP's confusion, saying DEP's letter which tried to allow discharge to grassy swales "appears, on its face, to contradict or cast confusion on the terms and conditions of the permit" (<http://listenv.homestead.com/files/channelorder.htm>). It would be wise for DEP to replace "water course" with the broader term consistent with law, "surface waters."

DWWM has changed the language to “surface waters.”

67. **Page 20, G.4.e.2.C.i.-** One commenter requested that DEP add the statement “Burning of solid waste is prohibited” to this section.

The burning of solid waste is a violation of Legislative Rule Title 33

Series 1. DWWM believes it is better to reference the entire rule instead of particular sections.

68. **Page 20, G.4.e.2.C.iv.-** One commenter stated that this condition indicates that a permittee "... shall inform personnel at all levels of responsibility of the components and goals of the SWPPP." Please define "all levels of responsibility," or change the language to clarify that this requirement only applies to those employees directly involved with earth disturbing activities.

DWWM believes it is important that all levels of personnel be trained. Someone not directly involved in the earth-disturbing activity maybe directing people who are, and if that person is not properly trained, improper guidance may be given.

69. **Page 20, G.4.e.2.C.iv.-** One commenter stated G.4.e.2.C.iv on p.20 requires a "quarterly basis" for training, which is unclear. If you mean the majority of staff or senior staff should be trained every quarter, say so.

See response to comment 68.

70. **Page 20, G.4.e.2.C.vi.-** One commenter stated G.4.e.2.C.vi on p.20 omits records of cleaning sediment, which the old permit required in G.4.d.1.F. Since p.8 of the Fact Sheet highlights this as the key maintenance task, why would you drop it? Please reinstate it. Records will show the owner and DEP whether staff are doing the key environmental work between site visits.

DWWM believes that the term "maintenance" includes sediment removal.

71. **Page 20, G.4.e.2.D.-** One commenter stated that there are no dormancy clauses within the new permit, meaning that if the land development or construction is not active for any amount of time due to weather/climate (frozen ground, snow, ice, etc...), the site is stabilized, or there is no activity on the site for any amount of time the inspections should take place less often. What we are recommending is that there is a dormancy clause added to the new permit that allows the inspections of these dormant sites to take place every 30 days or after rain events instead of on weekly intervals.

DWWM disagrees with this comment and believes the inspection and maintenance requirements are appropriate.

72. **Page 20, G.4.e.2.D.-** One commenter requested that the DEP consider weekly inspection to be conducted by QUALIFIED PERSONNEL. The definition of qualified personnel may include Certified Professional in Erosion and Sediment Control (CPESC), a Professional Engineer or personnel working under PE. (www.cpesc.org).

DWWM has chosen not to revise this condition at this time.

73. **Page 20, G.4.e.2.D.-** One commenter requested that the DEP consider for projects larger than 3 acres, weekly reports shall be submitted to WV DEP on monthly basis. Each monthly report with one copy must be submitted to WVDEP on or before the 28th day of the month following the reporting period

DWWM believes it is more appropriate that these reports be available for the inspector's review onsite. The inspector will be able to verify the accuracy of the reports.

74. **Page 20, G.4.e.2.D.-** One commenter requested that the DEP consider that for projects larger than 3 acres, the Department on a case-by-case basis shall require any permittee who has coverage under this CGP to conduct inspections on a more frequent basis than prescribed in this CGP. Examples include, but are not limited to, permittees who have compliance problems and permittees whose Site's stormwater discharges to environmental sensitive waters (such as waters classified as Tier 2.5 or 3 Waters and Trout Waters, etc.).

DWWM disagrees with this comment and believes the inspection and maintenance requirements are appropriate.

75. **Page 21, G.4.f.-** One commenter stated that G.4.f on p.21 omits the former wording that plans are available to the public upon request *by the public*. Why would you drop that simple rule and make it ambiguous whether the request has to come through DEP or directly from the public? Please keep the previous wording, which is difficult enough. Also please add a time limit of 5 days, such as DEP itself faces. With no time limit, the requirement is a recipe for conflict and litigation. This issue has become more important now that small single family projects' records are not available from DEP.

The change made from the current permit was done for grammatical purposes and DWWM believes the intent of this condition has not been changed. DWWM does not have the authority to require a five-day deadline.

76. **Page 21, G.4.g.-** One commenter stated the draft permit should be modified to require approval by the U.S. Army Corps of Engineers of an application for a permit under Section 404 of the Clean Water Act, 33 U.S.C.A. § 1344 (West, Westlaw through Feb. 1987 amendments) before approval of any registration or major modification of an existing registration where the contemplated construction activities will result in fill material being discharged into waters of the United States. The commenter further states that Under W. Va. Code Ann. § 22-11-8 (b) (1) (West, Westlaw through 2007 Reg. Sess.), it is unlawful for any person, unless he holds a permit, to allow wastes emanating from any point source to flow into waters of West Virginia. In instances where waters of West

Virginia, are not also waters of the United States, there is no 404 Permit from the Corps of Engineers and, therefore, no compensation by way of mitigation for the loss of states waters. Accordingly, in these cases, the draft permit should be modified to require an approved mitigation plan to compensate for the loss of state waters before approval of any registration or major modification of an existing registration which provides for construction activities that fill waters of West Virginia.

The DEP's Office of Legal Services is reviewing this issue and will provide DWWM with the guidance necessary to comply with the West Virginia Code.

77. **Page 21, G.4.g.-** One commenter stated that the permit keeps language that the permittee has to meet local storm water management rules and regulations in instances where the local jurisdiction is a regulated MS4 and/or has local storm water regulations. It continues to be unclear as to what process and procedure the DEP uses for the permittee to show compliance with local rules.

DWWM believes that a letter from an applicant stating that they are meeting the necessary federal, state, or local statutes, ordinances, or regulations meets the requirement of this condition.

78. **Page 21, G.4.g.-** One commenter requested DEP publish a list of communities with MS4 programs and/or local requirements as a supplement to the permit instructions.

DWWM will provide a list of MS4s as a part of the application package. DWWM believes it is the applicant's responsibility to comply with any local requirements.

79. **Page 21, G.4.g.-** One commenter requested that the agency develop an automated notification procedure to make local programs aware of submittals of applications in their jurisdictional area. It would also be beneficial if a copy of the state submittal be submitted to the local entity.

DWWM believes that the information available on the DEP's website found in the E Permitting Section allows local programs to track registrations in their area. DWWM can make submittals available to the local programs if requested, but DWWM does not have the resources to provide every local program a copy of every registration submittal.

80. **Page 21, G.4.g.-** One commenter stated that the draft permit should be modified to prohibit the approval of a registration or major modification of an existing registration where there is an ongoing violation by the applicant of the federal Clean Water Act and/or the W. Va. Water Pollution Control Act within the State

of West Virginia. Under W. Va. Code Ann. § 22-11-4 (a) (10) (West, Westlaw through 2007 Reg. Sess.), the Director, Division of Water and Waste Management has the power of supervision and enforcement over permits issued under the Water Pollution Control Act. Inherent in the power to supervise is the power to withhold the permit based upon wrongdoing by the applicant.

DWWM disagrees with the statement that inherent in the power to supervise is the power to withhold the permit based upon the wrongdoing by the applicant. DWWM believes this power must be explicitly written in W. Va. Code Ann. § 22-11-4 (a) (10) (West, Westlaw through 2007 Reg. Sess.).

81. **Page 21, G.5.-** One commenter requested that the following changes to the discussion of impaired waters: “ *Sites that discharge into a receiving water that is listed on the current Clean Water Act 303(d) list of impaired waters as impaired for sediment must document in the SWPP how the BMPs will minimize the discharge of sediment.*”

This section of the draft permit is identical to the section in the current permit. This section was added to the current permit at EPA’s request, and the language used was from EPA. This section will not be changed.

82. **Page 21, G.5.-** One commenter stated when Total Maximum Daily Loads are developed, storm water discharges should be considered load allocations rather than waste load allocations. Load allocations are often subject to best management practices, as are storm water construction activities. The commenter went on to state that most of those persons applying for a storm water permit will be unaware of whether a TMDL has been done for a receiving stream, or what additional BMPS are needed. Therefore, we would urge DEP to revise Condition G.5 to require the DEP to advise storm water construction permittee holders of what particular additional BMPs should be in place in order to comply with a TMDL. Otherwise, the permittee should be able to assume that their discharges to impaired waters are not going to contribute to the condition causing the 303(d) listing.

Per 40CFR122.44(d)(1)(vii)(B), NPDES permit requirements must be consistent with the assumptions and requirements of available wasteload allocations. As such, DEP will authorize and/or condition individual registrations under the general permit as necessary to ensure consistency with TMDL wasteload allocations.

83. The USEPA has asked that the following statements be added to the permit, “The permittee should consider low impact development (LID) in the design of the site and the best management practices. This will allow the site to retain its natural hydrology and infiltrate stormwater within the boundary of the site. The use of impervious surfaces for stabilization should be avoided.

This statement has been added to the permit under Section G.4.e.2.B.

84. The USEPA has asked that the following statement be added to the permit, “For those projects that may impact historic preservation sites, the permittee should coordinate the project with the State Historic Preservation Officer.”

This statement has been added to the fact sheet.

85. One commenter requested that the DEP develop a program to shorten the review period for linear projects, regardless of the acreage proposed to be disturbed.

DWWM believes that the review time for all projects is not overly burdensome and ensures that the site specific stormwater pollution prevention plan meets the requirements of the General West Virginia/National Pollutant Discharge System (WV/NPDES) Permit for Stormwater Associated with Construction Activities Permit No. WV0115924.

86. Several commenters stated that they understand the WVDEP is considering allowing Municipal Separate Storm Sewer Systems (MS4s) or other government organizations to administer the NPDES requirements and/or permits. These commenters went to state that they strongly object to a sub-division of government administering the NPDES permits. They stated that they need an efficient and consistent approach to NPDES permitting. If various sub-divisions of government apply their own approach to NPDES permitting, costs may increase substantially due to unpredictable requirements and enforcement. Also, the law and case law does not permit a sub-division of government to regulate a higher form of government.

Phase II stormwater regulations (40 CFR 122.44(s)) included provisions that would allow for further streamlining and coordination among program at the state and local levels, particularly relating to the regulation of construction site runoff. The “qualifying local program” provision for the management and oversight of stormwater runoff from construction activities allows for such streamlining, particularly as regulated municipalities develop and implement their programs. Under this provision, the NPDES authority can formally recognize a municipal program that meets or exceeds the provisions of its own construction general permit.

87. Several commenters stated that there needs to be increased funding and staffing for this program.

DWWM acknowledges that additional staffing and funding would improve compliance and enforcement of the permit and hopes to increase staffing for that purpose. However, this issue cannot be addressed as a part of the draft permit.

88. Several commenters stated that there needs to be meaningful enforcement. Meaningful enforcement means inspecting sites with qualified inspectors, and issuing fines that are large enough to scare permittees.

DWWM believes penalties proposed are consistent and meaningful through the use of Title 47, Series 1 of the Code of State Rules. The rule takes into account deviation from the requirement, potential for harm to human health and the environment, as well as other penalty adjustment factors. However, this issue cannot be addressed as a part of the draft permit.

DWWM acknowledges that additional staffing and funding would improve compliance and enforcement of the permit and hopes to increase staffing for that purpose. However, this issue cannot be addressed as a part of the draft permit.

89. Several commenters stated that there needs to be more and better trained inspectors.

DWWM acknowledges that additional staffing and training would improve compliance and enforcement of the permit and hopes to increase staffing for that purpose. However, this issue cannot be addressed as a part of the draft permit.

90. Several commenters stated that there needs to be increased education of developers and contractors.

DWWM recognizes that additional education efforts are needed and plans to continue to implement the educational programs as soon as the draft permit is finalized. DWWM has held numerous workshops throughout the state in the past five years. However, this issue cannot be addressed as a part of the draft permit.

91. Several commenters stated that there needs to be extra scrutiny for publicly-funded projects in regards to inspections.

DWWM acknowledges that additional staffing and training would improve compliance and enforcement of the permit. However, this issue cannot be addressed as a part of the draft permit.

92. One commenter stated that there has been very little enforcement on builders who do not register, especially on individual lots in a Common plan of development. DEP field staff needs to be trained (a) that brown water leaving a site is a violation, and (b) that lots in a Common plan of development must register.

The first part of this comment can not be addressed as part of this draft permit. DWWM believes that the second part of this comment has been addressed with the language in the draft permit dealing with single family residences.

BY: _____
Director