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west virginia department of environmental protection

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**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 Elimination System (WV/NPDES) for Stormwater Discharges Associated with Construction Activities Permit No. WV0115924.

DWWM published a Class II legal advertisement in 24 state newspapers announcing DWWM's desire to reissue the general permit for stormwater associated with construction activities. The general permit was originally established on June 8, 1992, and was reissued on December 5, 1997, December 5, 2002, and December 5, 2007. The public notice announced a 30 day comment period and public hearing date for the draft general permit.

One public hearing was held during the public notice period. The public hearing was held at the WVDEP's Charleston headquarters on September 17, 2012.

This responsiveness summary highlights the issues and concerns that were identified during the public hearing 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. Section G.4.e.2.B. Stormwater Control Plan- It appears that projects are being encouraged to incorporate runoff reduction techniques as the method to achieve management of anticipated runoff volumes and pollutants post development. However, what is not apparent from the permit term is whether a benchmark numeric design standard such as capture the first inch of runoff from a 1 inch storm will be used in permit implementation. We request that DEP establish the 1 inch capture requirement as the uniform design standard for post construction management in WV by including it in the terms and conditions of this permit.

**DWWM is encouraging the use of low impact development but cannot mandate a specific standard. DWWM will encourage applicants to use the 1 inch capture requirement.**

2. Section G.4.e.2.Vegetative Buffer Requirement- It is noted this permit term introduces a new requirement that vegetative buffers on receiving streams or other water bodies on the project site be protected and maintained. For regulatory certainty, we feel it is important to define a reasonable interpretation of what a receiving stream requiring a buffer will be.

**The natural vegetative buffer requirement would apply generally to waters of the state as defined in Chapter 22-11-3; however, implementation would not be required in the exceptions noted. The exception language has been revised slightly for further clarification. (*Pre-construction conditions, such as when the buffer has already been removed by existing development or agricultural activities;*)**

3. Section G.4.b.2- As a permittee, the default 24 hour standard for corrective actions to be taken is too restrictive. The construction administration processes often require timelines which exceed 24 hours.

**DWWM believes that when this requirement is read in its entirety that this concern is address.**

4. We would like to make a broader point regarding the lack of post construction stormwater requirements for permittees covered by the General Permit for construction activities. As DEP is aware, the state's Small MS4s, also covered by the General Permit, are required as a part of their Stormwater Management Plan to reduce pollutants to the MS4 from development and redevelopment. This includes very specific performance standards (site design criteria) for all regulated acres such that the site manages the first inch of stormwater from a 24-hour storm preceded by 48 hours of no measurable precipitation on-site. There is no similar requirement in the Draft Permit. If DEP intentionally left post construction requirements out of the Draft Permit, we question whether creating a patchwork system with strict performance standards mandated only in limited area of the state but not in others is reasonable and fair to all localities.

**DWWM recognizes there currently is a patchwork system for post construction requirements in WV. However, at this time DWWM does not have the authority to institute a post construction requirement statewide. DWWM also does not believe that this General Permit is the vehicle to implement a post construction program, as unlike the MS4 General Permit, it covers stormwater discharges**

**only during construction. DWWM will continue to monitor the progress of the United States Environmental Protection Agency's (EPA) proposed nationwide stormwater regulation and will address this issue once that draft regulation is finalized or withdraw.**

5. The Draft Permit makes significant changes to current permit requirements regarding TMDLs. First, the WVMWQA questions what DEP means by effluent by "effluent limitations." The Draft Permit does not clearly explain the effluent limitations referenced for TMDL acreage limited areas would be numeric or non-numeric effluent limitations. Unless DEP is confident that it will not be asking permittees to comply with permit terms that are either operationally difficult or costly, or both, WVMWQA respectfully suggests that DEP retain the 2007 Permit requirements for TMDL and impaired waters.

**DWWM has been implementing TMDLs during the 2007 permit cycle in much the same way as proposed in this draft General Permit. If a TMDL is issued that has a cap on the maximum number of acres that can be permitted at a given a time for that water shed all projects proposed in that water shed must go through a TMDL review. Currently if there is no available acres an individual permit must be applied for which has a total iron limit of 1.5 mg/l. The proposed draft General Permit allows this requirement to be incorporated into the registration approval. This change will allow the applicant to start construction immediately after the registration is approved instead of having to wait an additional 30 days after an individual permit is issued.**

6. Section G.4.b. of the Draft Permit includes deadlines for submitting permit applications, SWPPs, and Notice of Intent (NOI) forms that add time, in some cases substantial amount, to the previous submittal deadlines in the 2007 Permit. WVMWQA asks that the DEP consider where its proposed deadlines are justifiable in light of EPA's Construction General Permit. In the Association's view, the existing deadlines in the 2007 Permit are more than reasonable and should be retained.

**DWWM believes the new timelines are appropriate in light of antidegradation reviews and the continuing number of TMDLs that have to be implemented. DWWM would like to point out EPA does not review Stormwater Pollution Prevention Plans.**

7. Automatic Coverage- The draft permit provides an exemption from submitting an application for permit coverage for construction of single family residences by the homeowner or homeowner's contractor if land disturbances are less than 3 acres. AEP requests that this exemption and automatic coverage also be available for linear utility projects and substations disturbing less than 3 acres. Soil disturbance for linear projects is typically very narrow and intermittent over a long distance so there is little disturbance in a given location.

**DWWM has chosen to only allow this exemption for single family homes that are being constructed or contracted for construction by the homeowner. A majority of these sites are actually less than one acre in size, and require General Permit coverage only due to being part of a larger common plan of development.**

**Developers who are constructing homes for sale are required to cover those sites under the General Permit registration for construction of the subdivision.**

8. **Deadline to Achieve Final Stabilization-** The draft permit provides that sites which have been granted coverage under the existing general permit between January 1, 2011 and November 5, 2012 be given continued coverage under the reissued general permit. Sites approved prior to January 1, 2011 must reapply for coverage by July 1, 2013 if not stabilized by June 30, 2013. AEP requests that the June 30, 2013 stabilization date be extended through September 30, 2013 and that the required reapplication date be extended to October 1, 2013. It is AEP's experience that, even when a site is appropriately seeded early during the springtime growing season, it is difficult to achieve final stabilization defined in the general permit as a "...vigorous stand of perennial grass that uniformly covers at least 70 percent of the ground..." by June 30. The additional time requested would allow for additional vegetative growth in order to achieve final stabilization and it would help avoid the need to reapply for permit coverage for projects that are no longer in active construction phases but have not quite achieved sufficient vegetative growth.

**DWWM has decided not to change the date as requested. DWWM has already sent 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 shall 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.**

9. **Final Stabilization-**The draft permit states that final stabilization includes (among others) a healthy, vigorous stand of perennial grass that uniformly covers at least 70 percent of the ground. AEP requests that "or native vegetation" be inserted after "perennial grass" to be consistent with Section J of the draft permit.

**DWWM agrees and this change has been made.**

10. **Approved Plans-**The draft permit states that "(c)ompliance with this General Permit, and the approved Stormwater Pollution Prevention Plan and the Groundwater Protection Plan is required upon the beginning of the construction project." Since not all projects require submission for approval of a SWPPP and submission of a Groundwater Protection Plan is not required per Section G.4., AEP requests that the following adjustments be made to add clarity to Section B:

"Compliance with this General Permit, the Stormwater Pollution Prevention Plan and the Groundwater Protection Plan is required upon the beginning of the construction project."

**DWWM agrees and this change has been made.**

11. Inspections and Entry-Section C.10.a. allows the Director or an authorized representative to enter the permittee's premises "at all responsible times". AEP suggests replacing the term "responsible" with "reasonable" to be consistent with the rest of Section C.10.

**DWWM agrees and this change has been made.**

12. Definitions-AEP requests that Section E.1 be expanded to include a definition of "Linear Project" in order to clarify the term used in Section G.4.e.2.A.i.e. AEP suggests the following definition as included in the federal general permit:

"Linear Project" – includes the construction of roads, bridges, conduits, substructures, pipelines, sewer lines, towers, poles, cables, wires, connectors, switching, regulating and transforming equipment and associated ancillary facilities in a long, narrow area.

**DWWM agrees and this definition will be added.**

13. Application Review/Approval Timeframes

In Section G.4, the draft permit proposes extending the review and approval timeframes for general permit coverage as follows:

- From 10 days to 20 days for projects disturbing less than 3 acres that do not discharge upstream of Tier 3 waters
- From 45 days to 75 days for projects disturbing less than 3 acres that discharge upstream of Tier 3 waters
- From 90 days to 120 days for projects that discharge upstream of Tier 3 waters (presumably if 3 acres or greater of disturbance), or that will disturb 100 or more acres, or that the grading phase of construction will last more than 1 year

The durations included in the current general permit can already present a difficult obstacle for construction project schedules. The proposed extended review and processing timeframes for obtaining general permit coverage are inappropriate and, in some cases, nearly defeat the purpose of a general permit. One purpose of having a general permit is to reduce the resource and time requirements for both the agency and the permittee as compared to the individual permitting process. The Fact Sheet offers no explanation as to why the timeframes need to be extended. The proposed permitting timeframes for projects that fall under the Notice of Intent (NOI) and Site Registration (with and without public notice) process are very long, far surpassing the processing timeframes associated with the U. S. Environmental Protection Agency's Final 2012 Construction General Permit, as well as other nearby states in which AEP operates. AEP urges the Department to maintain the existing processing durations to avoid further hardships associated with prolonged delays in project permitting.

**The rationale for these increases was noted in the fact sheet. DWWM needs the additional time to do the required Antidegradation reviews and to implement the ever increasing number of TMDLs. DWWM would like to note that these are maximum timeframes and DWWM will review all applications as quickly as possible. DWWM also would like to point out all of the new timeframes are less than the 180 day time frame that individual permits are subject to.**

14. AEP suggests that review and approval timeframes could be reduced by limiting the type of projects that undergo the public notice process that involves publication in local newspapers. AEP believes there is little to no value in publishing a public notice for a project that is not discharging to a Tier 3 water or that will not disturb 100 acres or more. Public notice for projects not discharging to Tier 3 waters as well as those disturbing less than 100 acres or more are appropriately communicated to the public via the public notice sign requirement at Section G.4.b.7. AEP urges the Department to evaluate the frequency of past public response to published notices of general permit coverage for projects that do not discharge to Tier 3 waters or that disturb less than 100 acres. If there has been little public response to such notices, it would seem to be advantageous and time saving for all if the Department eliminated this requirement except for discharges to Tier 3 waters and disturbance of 100 acres or greater, as these projects are in the true interest of the broader public. The required public notice sign is adequate notification for the public in the immediate area of a project, including adjoining and downstream owners.

**The only other instance that a project would have to have public notice is when the grading phase will last for more than one year. DWWM'S Antidegradation policy requires that projects that will have a grading phase that will last more than a year must go to public notice.**

15. AEP further suggests that adoption of similar language to that found in the federal general permit in Table 1 on page 5 would be mutually beneficial in reducing the approval timeframe burden on both the Department as well as the permittee. The language is as follows:

*You are considered covered under this permit 14 calendar days after EPA has acknowledged receipt of your NOI on the Agency's website, unless EPA notifies you that your authorization has been delayed or denied.*

This approach would initiate permit coverage within a reasonable number of days following agency receipt of the NOI or site registration, unless notified by the agency that such authorization has been delayed or denied. The existing open-ended approach to permit coverage introduces tremendous uncertainty to construction project schedules, with potentially significant costs. With the routine, straight-forward nature of most construction projects in terms of types of soil-disturbing activities, and associated environmental risks, providing an official start date for these unexceptional projects would provide a needed measure of certainty. Notwithstanding our earlier comment

regarding automatic coverage for small construction sites, at a minimum this concept of default coverage within X days should apply to those projects less than three acres.

**DWWM has chosen not to make the suggested change. DWWM has had this process in place since 1992 and believe it is the most appropriate way to protect water quality and to have an enforceable Stormwater Pollution Prevention Plan and General Permit.**

16. Grading Phase of Construction-AEP requests that Section G.4.b.5 of the draft permit be revised to clarify that the Department is concerned with a tally of total time spent in the active grading phase or phases of a project in order to determine the whether the duration is greater than or less one year. One year, as referred to in this section, is not necessarily a calendar year. Please revise this section to read:

“Projects will discharge to Tier 3 waters or that will disturb 100 or more acres, or that the grading phase(s) of construction will last for a total of more than one cumulative year...”

**DWWM agrees and this change has been made.**

17. Public Notice Sign-Section G.4.b.7. of the proposed permit includes the requirement to post a public notice sign at a construction site within 24-hours of filing an application. This timeframe is much too short, unwarranted and unrealistic. Since the sign must include the date the application is filed, it is nearly impossible to have the sign created and posted within 24-hours of filing. This precise date is not generally known in advance of filing. It can take a sign printing company several days to process an order for a public notice sign. If the application is filed on a Friday or if the project is remote there is additional hardship with getting the sign posted within 24-hours of filing. The condition requiring posting within 24-hours generally forces the permittee into a position of noncompliance due to the impossibility of getting the sign constructed and posted that quickly. AEP requests the 24-hour timeframe be extended to 8-days. This extension will still allow for the sign to be posted in advance of obtaining permit coverage for the project.

**DWWM cannot make any changes to this requirement. The language was in an Agreed Order issued by the Environmental Quality Board.**

18. Construction Entrance-Section G.4.e.1.E. of the draft permit requires each site to have a stone access entrance and exit drives and parking areas. Many linear utility projects parallel existing paved roads and may require numerous points of temporary access on and off these roads. Due to project constraints, it may not be feasible or necessary to establish stabilized construction entrances for each point of temporary access. We recommend that the Department revise the control measure as follows:

“Linear utility projects shall implement effective off-site tracking controls at construction project entrances and exits, which can include controls such as stabilized construction entrances, sweeping and/or other tracking controls.”

**DWWM believes in instances where this may occur is best addressed during the review of the Stormwater Pollution Prevention Plan where the permit reviewer can use best professional judgment in elevating the need for multiple construction entrances.**

19. Vegetative Practices-Section G.4.e.2.A.i. of the draft permit contains new language that states, “Efforts should also be made to limit disturbance on steep slopes, minimize soil compaction, and preserve topsoil where feasible.” AEP wishes to take this opportunity to express agreement with the term “where feasible” due to the following considerations :

- Limiting Disturbance on Steep Slopes - Slopes vary significantly in length project-by-project. A very short slope may not require this type of sediment controls measure. Moreover, the natural terrain and other access limitations may make installation of linear sediment controls infeasible.
- Minimize Soil Compaction - AEP would like to note that this control measure must exclude access roads, equipment pads and other similar areas on linear utility projects that, by design and due to their function, will be compacted.
- Preserve Topsoil - It is not clear whether this control measure requires minimizing the disturbance or topsoil where feasible, or, alternatively, requires the stockpiling of topsoil for reuse. If the latter, we note that the stockpiling of topsoil in connection with linear utility projects may be feasible only on certain portions of the project, if at all, due to access, space and terrain constraints.

**DWWM concurs with the clarification comments provided by the commenter; however, does not believe language revisions are necessary in the General Permit.**

20. Section G.4.e.2.A.i.b. of the draft permit eliminates the requirement to initiate stabilization measures where construction activity will resume on a portion of the site with 14 days from when activities ceased. The current general permit allows a duration of 21 days from when activities ceased. AEP requests that the duration remain at 21 days as there is little value in initiating stabilization a few days earlier when construction activities are going to resume before substantial stabilization can occur anyway. The reduction in duration will result in the expenditure of time, money, and effort with no significant benefit.

**EPA’s narrative part of the Effluent Limit Guideline Rule requires DWWM to make this change.**



21. In addition, the Department should consider assigning a *de minimis* exemption for small areas of disturbance within a larger project footprint that may be infeasible to stabilize within the allotted duration.

**EPA's narrative part of the effluent limit guideline prohibits DWWM from making this change.**

22. Sediment Traps-Section G.4.e.2.A.ii.a. of the draft permit states that for locations that have a "drainage area of five acres or less, a sediment trap which provides a storage volume equal to 3,600 cubic feet per acre drainage area shall be installed." This language indicates that a sediment trap for any drainage less than five acres is required to be installed. Sediment traps are not always the preferred BMP for all small drainage areas. For example, installing a sediment trap for a very small drainage area associated with a linear project is unnecessary as silt fencing would be an effective BMP. Additionally, sediment traps are not feasible for linear utility projects which typically are constructed within narrow easements or rights-of-ways that make it extremely difficult to construct and maintain a retention structure. Also, there are times, when it is desirable to install a sediment trap that exceeds the specified 3,600 cubic feet per acre drainage specification. AEP requests that this language be clarified as follows:

*"drainage area of five acres or less, where a sediment trap is the preferred BMP, the sediment trap must provide a storage volume greater than or equal to 3,600 cubic feet per acre drainage are shall be installed."*

**DWWM believes adding sediment trap to G.4.e.2.A.ii.e will address the first part of this comment. DWWM would like to point out the sizing requirement is the minimum size a sediment trap can be and has never disallowed an applicant from proposing sediment traps that are sized larger than required.**

23. Sediment Basin Dewatering-Section G.4.e.2.A.ii.b. of the draft permit requires that sediment basins must be able to dewater the dry storage volume in 48 to 72 hours. AEP requests that an exception be made to the prescribed duration for sediment basins equipped with skimmer decant devices. Skimmers are very helpful in maintaining cleaner effluent from a basin but they can require additional dewatering time.

**DWWM recognizes that skimmers function differently than barrel risers, and encourage their use when appropriate. DWWM has reviewed skimmer manufacturer information and believe the dewatering requirement can still be met when skimmers are used. However, DWWM has inserted additional language in the General Permit to allow flexibility in evaluating this criteria when skimmers are used.**

24. Numbering Error-There are two sections identified as "G.4.e.2.A.ii.j." Please adjust the second instance of this section to "G.4.e.2.A.ii.l."

**DWWM agrees and this change has been made.**

25. Hay/Straw Bales- Section G.4.e.2.A.ii.k. of the draft permit prohibits the use of hay or straw bales as acceptable BMPs. While AEP understands that bales may not be a good replacement for silt fencing applications as they require much wider trenching for proper installation, they are acknowledged to be beneficial to reinforce silt fence in higher velocity trouble areas or to function as ditch checks. It can be difficult to place stone checks in certain project areas where equipment access is limited due to terrain or the fact that use of the equipment itself would result in substantial soil disturbance. AEP's experience in other states shows that there is value in proper use of hay/straw bales as BMPs. As such, AEP requests that hay/straw bales be allowed for use as ditch checks and as reinforcement for other BMPs, but not as a substitute for silt fence or similar BMPs.

**DWWM feels that hay or straw bales are not acceptable BMPs due to a high rate of functional failure and will not change this condition. Hay or straw bales should never be used as ditch checks. For a ditch check to function correctly, the check must lie flush with the contour of the ditch and have a low point in the center to allow flow to pass over and not around the device. It is very difficult to install rectangular bales such that these conditions are met. DWWM does not prohibit their use to reinforce silt fence as long as they are placed behind the silt fence. There are many new manufactured products that are light and easily installed where equipment access is limited.**

26. Visual Inspections-Section G.4.e.2.C.v. and Section G.4.e.2.D. require the permittee to conduct visual inspections. AEP requests that the Department add a statement consistent with Section 4.1.5 of the federal construction permit to allow the permittee to not inspect areas that are unsafe at the time of the inspection. AEP also requests that clarification be provided that, once a portion of the project has achieved permanent stabilization, temporary erosion and sediment controls may be removed from the area and no further inspections must occur in the stabilized area.

**DWWM agrees to add statements in the General Permit to allow the permittee to not inspect areas that are considered unsafe at the time of inspection and that once a portion of the project has achieved permanent stabilization, temporary erosion and sediment controls may be removed from the area and no further inspections must occur in the stabilized area.**

27. AEP also requests that the Department revise the frequency for conducting visual inspections to be consistent with the federal construction permit. Specifically, the operator should be given the choice of conducting inspections:

- At least once every 7 calendar days; or

- Once every 14 calendar days and within 24 hours of the occurrence of a storm event of 0.25 inches or greater.

The selected frequency would be identified when the SWPPP is written and maintained throughout the life of the project. In certain situations, the present mandate for all projects to conduct inspections within 24 hours of a 0.25 inch storm presents logistical issues should the event occur early in a weekend when the site is not normally staffed. As the note in the federal permit states, "(i)nspections are only required during the project's normal working hours." Also consistent with the federal permit, the Department could maintain the current frequency of weekly inspections plus after 0.25 inch storms for discharges to Tier III waters and waters subject to a TMDL for sediment or nutrients.

**DWWM has used the language found in the draft General Permit for at least the last two permit cycles and believes it is protective of water quality and has chosen not to make the suggested change.**

28. Employee Training-Section G.4.e.2.C.iv. of the draft permit requires training on a quarterly frequency "while construction activities are occurring". For clarity, AEP suggests inserting "subject to this General Permit" as follows:

"...while construction activities subject to this General Permit are occurring..."

**DWWM agrees and this change has been made.**

29. Additionally, in the effort to provide clarity and use resources more efficiently, AEP requests this requirement be revised to read:

"Employee training programs shall inform all on-site personnel who are directly involved with construction activities at all levels of responsibility of the components and goals of the SWPPP...."

**DWWM has agreed to make the language clarification requested.**

30. Good Housekeeping-Section G.4.d.1.B. of the draft permit contains new language that states "Good housekeeping... includes minimizing the exposure of building materials, building products, construction wastes, trash, landscape materials, fertilizers, pesticides, herbicides, detergents, sanitary waste and other materials present on the site to precipitation and to stormwater." Many utility projects include materials and equipment that are designed to be exposed to the elements after construction is complete (e.g., power poles, tower components, insulators, conductors, pipes, electrical and other equipment). These and similar types of materials should be specifically exempted from this requirement.

**The new language was incorporated due to requirements of the Effluent Limitations Guidelines Rule (40 CFR Part 40) and will not be changed. Please**

**note that the requirement states that exposure be minimized, however, does not prohibit exposure.**

31. Discharges to Impaired Waters-Section G.4.b.6. of the draft permit contains new language regarding projects that discharge to waters with approved Total Maximum Daily Loads (TMDL's). Very little information has been provided in the draft permit or the Fact Sheet to clarify this section. The draft permit states that projects that discharge to waters with an approved TMDL that have "acreage limits for Stormwater Construction General Permit Registrations" will have registrations issued for one (1) year." No information has been provided in regard to which waters have acreage limits, their quantification, or how the limits were developed. It is inappropriate that information in regard to how the acreage limits were developed has not been published for public comment as part of the Fact Sheet. In fairness to the regulated community, AEP requests that this information be published for public comment before the draft permit is finalized, rather than forcing each commenter to research all TMDLs in the state to determine those that may apply.

**TMDLs are developed by the Watershed Branch Section of DWWM. The Watershed Branch sends all draft TMDLs to public notice and holds local public meetings in regards to the draft TMDL. The information requested by the commenter is published and the regulated community's time to comment is during the public notice phase of the draft TMDL. Once the TMDL is final and approved by EPA, they must be implemented as written. The final TMDL are posted on the WVDEP's web site at the following web address:  
<http://www.dep.wv.gov/WWE/watershed/TMDL/Pages/default.aspx>  
Additional information has been added to the fact sheet.**

32. To date, there is no regulation or guidance from U.S. EPA indicating that states must impose numeric pollutant limitations on stormwater if BMP controls are able to meet water quality objectives. During 2010 U.S.EPA issued a revised guidance document on means to regulate stormwater sources. This document appeared to suggest that the agency, in contrast to the previous guidance issued in 2002, encouraged states to implement numeric pollutant limitations on these sources. The agency is now in the process of revising the 2010 guidance, in light of concerns expressed by many stakeholders that no public comment period was provided prior to guidance issuance. As such, U.S. EPA's 2002 guidance currently stands and this document supports the implementation of BMPs in lieu of numeric limitations on grounds that the latter are neither feasible (based on unpredictability of storm events) nor necessary (absent a showing that BMPs are ineffective to meeting water quality objectives). Neither the Fact Sheet nor the draft permit contains language explicitly stating this – i.e., that properly implemented BMPs can be used to limit the pollutant loadings from construction stormwater sources.

**The guidance referred to in this comment is in regards to the effluent guideline for turbidity and the commenter is correct that the EPA has not required states to implement that numeric limit at this time. If the TMDL acreage cap for stormwater construction General Permit registrations has been met for the project subwatershed, a numeric limit will be set Total Iron. , then For TMDL's**

**that have been established at this point, a Total Iron limit of 1.5 mg/l will be required.**

33. Furthermore, stormwater discharges are highly variable in peak and volume. TMDLs acreage limits fail to recognize this variability. Given the interplay between storms, sources on the ground, and receiving waters, even the best BMPs can be rendered ineffective by storm variations. Current stormwater treatment technologies are generally limited to treating the first ¾ inch to 1 inch of rainfall during a 24 hour period. Technologies to economically treat larger or longer storms do not exist and would be overly burdensome to construction projects to implement. It is generally understood that BMPs are only effective to a point and cannot be expected to thoroughly address runoff from larger storm events. AEP requests that the Department clarify the design storm that the permittee will be held responsible to adequately address for compliance purposes. It would be unreasonable to expect that compliance can be maintained with effluent limits no matter how large the storm event and it would be overly vague and unfair not to quantify a threshold storm design criteria that can be considered during project planning. It is requested that the design storm be identified and the general permit specifically exempt sampling requirements during storms greater than design.

**The TMDLs that have been issued at this time do not take into account a design storm event. This issue would need to be addressed during public comment period for draft TMDLs.**

34. If TMDL acreage limits have been met at the time of application, the draft permit states that "effluent limits will be set and discharge monitoring required." Neither the draft permit nor fact sheet indicates that the acreage limits and the current status of availability of acreage within a watershed will be kept up-to-date and made publically available. As such, it is likely that an applicant will file an NOI or site registration form before knowing that the project will ultimately require monitoring for compliance with effluent limits. It is assumed that the applicant would become aware of these requirements either with the granting of permit coverage or via a request for further effluent treatment controls made by the Department during application and SWPPP review via a notice of deficiency. In the event of the later, the permittee would then have to design and engineer a control that was not considered during original project planning. This will take time and could foreseeably require rearrangement of the project layout beyond just an addition of the control itself. It is important to understand that project planning is in the final stages before the appropriate erosion and sediment controls details and drawings are developed. By the time a permit application is submitted, the construction schedule is typically set and the project may be either out to bid or a contractor has already been selected. Discovering during the permitting phase that effluent monitoring will be required, and that additional treatment controls may be necessary, introduces significant schedule interruption, re-working of plans, and associated costs into the project. AEP requests that up-to-date watershed information, including status of designated construction acres, be posted publically to aid in project planning. AEP understands that the posted status may always be subject to change up or down due to unapproved projects in the queue ahead of an application or due to approval of an NOI but such information would be immensely helpful early on in project planning to let the operator know if the threshold is close to or has been reached.

**Acreage limits set are noted in the final TMDL. DWWM makes adjustments almost daily to our cap spreadsheet. Due to the temporary nature of construction projects it is impossible to have a spreadsheet on our website that would accurately show what acreage is available in real time. The commenter could call and inquire about a particular TMDL and sub watershed and we could advise them of the amount of cap available at that time but it could change the next day. The draft permit already states that projects should not go out to bid until a registration is issued to prevent the kinds of issues the commenter has raised. The only other alternatives to implementing the approved TMDLs that have acreage caps which have been met is an individual permit which will take longer to issue and longer to begin construction or denial of the General Permit registration.**

35. Neither the draft permit nor Fact Sheet addresses which impairments are going to be considered a concern for construction project discharges to impaired waters. Many streams in West Virginia carry a variety of impairments including, CNA-biological, fecal coliform, PCB's, iron, selenium, pH, aluminum, dioxin, and bacteria. Most of these constituents would not be considered to be associated with soil disturbing activities. As such, AEP urges the Department to only require monitoring for parameters that would be expected to be associated with soil disturbing activities. Moreover, the draft permit fails to list what the associated effluent limits would be.

**At this time the impairment of concern is Total Iron and the limit will be 1.5 mg/l. This will information will be incorporated in the Fact Sheet and Permit.**

36. Neither the draft permit nor Fact Sheet expresses whether the effluent limitations would be concentration based or loading limits. While AEP believes either option is problematic, concentration based limits would allow the sampler to avoid estimating/measuring flow that would vary between storm events as well as varying during any given period during a single storm event. As such, AEP requests that if effluents limits cannot be avoided, that they be concentration based limits. In addition, since the limits would be related to Total Maximum *Daily* Loads, it would seem evident that entire days with no discharge from the construction site should be factored when the Department measures compliance with effluent limitations. How is the Department planning to factor times of no discharge into compliance evaluations? How does the agency calculate a "daily allowable load" from a source category that is episodic, characterized by significant variability of pollutant concentration along a temporal scale, and has no predictability in terms of duration of pollutant discharge (i.e., storm events are stochastic)?

**The limit will be a concentration. The permittee will be required to take a sample during the discharge event during the required sampling frequency. If there is no**

**discharge during the required sampling frequency then the permittee will report "No Discharge".**

37. Neither the draft permit nor Fact Sheet discusses effluent monitoring frequency or whether the permittee will be allowed to sample a reduced number of "representative outlets" versus every point-source discharge from the project area in the TMDL watershed. AEP requests that the Department establish the monitoring frequency at no more than quarterly. Construction personnel are not accustomed to, nor are typically trained in, performing effluent monitoring activities. It is possible that personnel from off-site will have to arrange to come to the site to conduct monitoring activities associated with qualifying rainfall events. Similarly, certified laboratories will need to be identified to conduct the analyses. Monitoring effluent from a project during less active time periods in project execution (such as during the winter) when the site may not be routinely staffed would also require coordination. A quarterly monitoring frequency will allow for coordination and necessary planning while also considering the need to execute the sampling during a qualifying rain event. A reasonable number of representative outlets will allow the permittee to collect samples from qualifying rain events during the first 30-minutes of flow (assuming that these will be sampling criteria under the new general permit).

**The sampling frequency will be based on the size of the project and will range from semi-annually to monthly. DWWM will allow representative sampling points.**

38. Neither the draft permit nor Fact Sheet specifies if and how the effluent monitoring would need to be reported to the Department. Effluent monitoring associated with individual NPDES permits must be reported via West Virginia's e-DMR program. The e-DMR system suffices for long-term, more permanent operations that obtain individual NPDES permits. These facilities typically have appropriate staffing levels and computer access to accomplish e-DMR reporting. AEP questions the applicability and usability of the system for a multitude of smaller, short-term projects where staff may or may not have computer access. AEP requests that reporting of effluent monitoring data be flexible in allowing the permittee to report data via hard-copy reports or simply maintain the records on-site for inspection.

**The DMRs will have to be submitted by e-DMR.**

39. Neither the draft permit nor Fact Sheet explains how DEP will evaluate the reported pollutant levels. The agency seems to assume that the level of any pollutant from construction stormwater sources will be equal to, or greater than, the applicable water quality standard which must be restored via implementation of TMDLs. Thus, there

seems to be a presumption of "reasonable potential" before pollutant levels are actually evaluated by the agency. AEP requests clarification on this issue.

**The data will be evaluated the same as any other effluent limit. If the result is at or below the effluent limit then there is no violation. If the result is above the effluent limit then a violation must be reported.**

40. Notwithstanding the above detailed comments, we are concerned that the lack of specific details regarding monitoring and effluent limits in the draft permit violates the WV NPDES regulations at 47-10-10 wherein the Director is required to issue draft general permits which must provide specific monitoring and effluent limitations for review and comment. Neither the draft permit nor Fact Sheet discusses how (and even if) the applicant would be given the opportunity to review permit terms in draft in the event that effluent limits are imposed. AEP requests that the applicant be given the opportunity to review and comment upon a draft version of the permit coverage in the event that effluent limits are imposed. AEP also requests that the Department clarify if an appeal process will be available should a permittee be aggrieved by permit conditions imposing effluent monitoring and limitations, consistent with WV 40CSR10.

**The applicant will be made aware of the frequency before the registration has been issued and the effluent limit will be 1.5 mg/l for Total Iron. The applicant can appeal the issued registration with they believe to be aggrieved by the permit conditions. DWWM would also note that an individual permit can be applied for if the applicant does not agree to be covered by the terms and conditions of the General Permit.**

41. TMDL Waiver- AEP requests that a waiver provision be inserted into the final version of the construction stormwater general permit. We believe that a waiver should be granted for any one of the following: 1) the Department has implemented an approved TMDL that addresses attainment of the pollutant(s) of concern and controls on stormwater discharges from construction activities are not needed to attain the applicable WQS relative to reductions from other load and wasteload sources; 2) the contribution of pollutant loading from stormwater discharged due to construction activities was not discretely evaluated in development of the TMDL; or 3) the duration and magnitude of the disturbance caused by the construction activity would result in a de minimis incremental pollutant load increase and would not jeopardize the schedule of attainment of the WQS.

**The final TMDL must be implemented as issued and a wavier cannot be written into the General Permit.**



42. Section J-Notice of Termination-As with the current general permit, the Department has created a system regarding permit termination which leaves the permittee in an unacceptable position. A Notice of Termination (NOT) is filed when the permittee determines that all areas have achieved the stabilization endpoints and all temporary BMPs have been removed. The NOT form itself indicates that permit coverage is in fact terminated upon submittal of the form. Coincident with this notification, all activities associated with the terms of the permit (e.g., inspections, maintenance of the SWPPP, etc.) are ceased by the operator. However, the Department makes a practice of conducting final site inspections of many, but not all sites. If in the inspector's opinion, the final stabilization endpoints have not been met, the site automatically becomes again subject to the terms of the permit. In fact, we understand the Department's position to be that the NOT is null and void and the site was always subject to the permit, even during the period between NOT submittal and DEP inspection, in spite of the fact that the form indicates the permittee's obligations have ceased. We are not aware of any other state's general permit, nor does the federal permit, include such provisions involving constraints on the NOT process and we ask that the Department give due consideration to an inspection program which is not linked to the NOT process.

**The Notice of Termination will be modified to include a statement that the submittal of the NOT is a request for a final inspection. A final inspection has been conducted for all projects that a Notice of Termination had been submitted for and this will continue to be done. It has been the experience of the inspection staff that a fair share of projects that had a NOT submitted was indeed not stabilized. If DWWM went with the recommendation of the commenter that NOTs are accepted without a final inspection these site would have continued to discharge sediment laden water to water of the state.**

43. Section J of the draft permit requires the submittal of a completed Notice of Termination (NOT) to "request a final inspection." If the Department intends to conduct permit termination in this manner, it is imperative that the Department includes a default timeframe for which final inspection will occur. In spite of the Department's belief that these inspections are expediently conducted, in AEP's experience, there can be a prolonged period of several weeks to months between filing the NOT and the final inspection date. Therefore, we request that a provision be added that DEP accepts the NOT unchallenged within 21 days of receipt unless the permittee receives written notification prior to the end of the 21 day period that the inspection has resulted in denial of termination. This would make it clear that the permittee is expected to continue to implement the SWPPP during this review period and not be subjected to uncertainty of coverage. Further, the NOT form would need to be revised to make it clear that it is only a request for termination and not a statement of actual termination. Finally, we believe that this final inspection process should be limited to only larger sites and those that discharge to Tier III or TMDL waters. For sites not subject to a final inspection, the NOT form with its current wording should be used for

this purpose. This will allow Department inspection staff to focus on projects that had more significant impacts and would help reduce the inspection load so that NOT final inspections could occur more quickly.

**The Notice of Termination will be modified to include a statement that the submittal of the NOT is a request for a final inspection. A final inspection has been conducted for all projects that a Notice of Termination had been submitted for and this will continue to be done. It has been the experience of the inspection staff that a fair share of projects that had a NOT submitted was indeed not stabilized. If DWWM went with the recommendation of the commenter that NOTs are accepted without a final inspection these site would have continued to discharge sediment laden water to water of the state. DWWM would like to note that the site is to be stabilized and all temporary BMPs removed before the NOT is submitted. It is recognized by DWWM that the inspection, maintenance and training requirements are not required while the NOT is pending. If the NOT is denied then these requirements would be required while the permittee is conducting the corrective action and until a new NOT is submitted.**

44. General Comment 1 - The draft General Permit lacked inclusion of emergency provisions for immediate coverage included in the most recent reissued federal permit. At times, there is an immediate need to address emergency conditions such as those resulting from extreme weather conditions or a landslide. At a minimum, it would be advantageous for the Department to include such provision for electric utilities. Severe storms can damage electric utility lines causing severe and prolonged outages. These situations require immediate response and repair, which do not provide time for obtaining permit coverage prior to commencing construction activities. We request that the Department add provisions parallel to those for "emergency-related projects" contained in the federal permit including the provision to delay training.

**DWWM agrees with this provision and will add it to the General Permit. DWWM would like to note it has by policy always allowed emergency projects to start before an application has to be submitted and approved.**

45. General Comment 2 – AEP requests that the Department work with AEP and other utilities to pre-approve "standard" SWPPP documents and streamline the permitting process for linear electric transmission and substation projects. These two types of projects are almost identical in nature from project to project, with the exception of extent. AEP believes by pre-approving standardized SWPPP documents, the Department can focus its limited resources on just the project-specific erosion and sediment control plans and shorten review time. AEP would welcome a meeting with the Department to further discuss this concept. We note that Virginia has had in place for many years a process of approval of company-specific erosion & sediment control standards for electric utility lines.

**If the commenter wishes to pursue this DWWM is agreeable and has done similar approvals for individual oil and gas companies.**

46. EPA commented that federal regulations require that the fact sheet that is prepared with the permit “briefly set forth the principal facts and the significant factual, legal, methodological and policy questions considered in preparing the draft permit.” Specifically, the regulations require “[a] brief summary of the basis for the draft permit conditions.” The fact sheet submitted to EPA did not provide a rationale for the bulk of the requirements contained in the permit; rather pieces of permit language and a simple summary of certain portions of the permit itself are contained within the fact sheet. The enclosed marked version of the fact sheet and permit recommended changes which would be more consistent with the regulatory requirements. EPA also recommends that WVDEP reconsider the entire fact sheet to evaluate whether each section could be rewritten to more thoroughly provide a supporting rational for permit requirements.

**DWWM made the majority of the changes EPA recommended to the draft General Permit and fact sheet. DWWM also reevaluated the entire fact sheet and added additional supporting rational where we that appropriate.**

47. The permit must be consistent with the commitments that WVDEP has made in its Chesapeake Bay Watershed Implementation Plan (WIP) including any efforts to improve the Bay’s water quality. West Virginia’s Final Phase II WIP states, in its Contingency Section, that “[i]f statewide post-construction stormwater management requirements are not realized, the WVDEP will pursue expansion of the General Permit for Construction Stormwater to require post-construction controls as necessary to comply with the Chesapeake Bay TMDL.” EPA recommends that a post-construction standard be added to this draft permit.

**DWWM would like to note that the Contingency noted in the comment above goes on to say, “the Construction Stormwater General Permit is scheduled for reissuance in 2017 and the WVDEP will be able to include more specific requirements that it determines are necessary.” DWWM believes that this permit cycle is not the appropriate time to add this requirement since the evaluation of the WIP will not be done until 2015 and several other contingences are to be taken before this one. The fact sheet has been updated to reflect the Chesapeake Bay TMDL and what the WIP II states.**

48. West Virginia maintains a special application addendum for project occurring in counties that drain to the Chesapeake Bay; however, this for, and the requirements that it be used by persons proposing land disturbance activities in those areas, is not a condition of the draft permit. These should be added to the draft permit.

**The Chesapeake Bay addendum will be made part of the application process for persons proposing land disturbance activities in the Chesapeake Bay counties once the draft permit is issued and becomes effective.**

49. EPA's CGP requires the permittee to ensure that personnel working on-site receive proper training prior to commencement of earth-disturbing and/or pollutant-generating activities. EPA recommends that these requirements be added to West Virginia's permit.

**DWWM has decided not to change the training requirements found in its draft General Permit.**

50. EPA has concerns that all permittees be required to submit an application in accordance with 40 C.F.R. 122.28(b)(2)(v). EPA regulations establish that all construction projects over an acre (or that will disturb less than one acre of total land area but that are part of a larger common plan of development) require submission of a Notice of Intent (NOI)—unless that state has made a “finding” that an NOI requirement would be inappropriate. The plain language of the regulation requires such a “finding” to include consideration of the “the type of discharge; the expected nature of the discharge; the potential for toxic and conventional pollutant in the discharges; the expected volume of the discharges; other means of identifying discharges covered by the permit; and the estimated number of discharges covered by the permit.” Further, the state shall provide a rationale for not requiring an NOI in the public notice for the general permit. So, unless West Virginia has addressed the criteria described in the regulation (and, EPA also recommends, documented those criteria in the Fact Sheet), the state must continue to require NOIs for all covered projects.

**DWWM has held several conversations with EPA after we received this comment. DWWM has added a rationale for this provision in the Fact Sheet and believes the comment has been adequately addressed.**

51. EPA requires that the language in Section C.14 of the permit entitled "Liabilities" be updated.

**DWWM has made the requested changes.**

The Division of Water and Waste Management will issue Permit Number WV0115924 on December 5, 2012.

Sincerely,



Scott G. Mandirola  
Director

SGM/wft

cc: Attached Address List

## **RIGHT OF APPEAL**

**Notice is hereby given of your right to appeal the terms and conditions of this order which you are aggrieved by to the Environmental Quality Board by filing a NOTICE OF APPEAL on the form prescribed by such Board for this purpose, with the Board, in accordance with the provisions of Section 21, Article 11, Chapter 22 of the Code of West Virginia within thirty (30) days after the date of receipt of such order.**