west virginia department of environmental protection

Division of Water and Waste Management
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Austin Caperton, Cabinet Secretary
dep.wv.gov

January 30, 2019
Re: WV Permit No. WV0116815
Responsiveness Summary

Dear Commenter,

The State of West Virginia, Department of Environmental Protection (DEP), Division of Water and Waste Management (DWWM) is reissuing the West Virginia General Water Pollution Control Permit for Stormwater Associated with Oil and Gas Related Construction Activities. The General Permit authorizes discharges composed of stormwater associated with construction of oil and gas field activities or operations associated with exploration, production, processing or treatment operations or transmission facilities, disturbing one or greater of land area, to the waters of the state.

The Director of the DWWM retains authority to require any owner/operator to apply for and obtain an individual WV Water pollution Control Permit. This authority will be exercised when the Director determines that such individual permit will be needed for better protection to the waters of the state.

The Draft Permit and Fact Sheet were made available for review by appointment between 8:00 a.m. and 4:00 p.m., Monday through Friday from September 21, 2018 through October 21, 2018 at the DEP Public Information Office, 601 57th Street SE, Charleston, WV 25304. The purpose was to provide an opportunity for the public to review and make comments if they preferred. Both documents were posted to DEP's website for review.

A public hearing was held from 6:00 to 8:00 pm on October 11, 2018, at the Coopers Rock Training Room, WV DEP Headquarters, 601 57th Street SE, Charleston, WV 25304.

Comments were accepted until October 21, 2018.

All comments received within the time period were considered prior to acting on the Draft Permit and are contained in the attachment. Response to substantive comments are provided.

Thank you for your interest and comments on General Permit No. WV0116815 for Stormwater Associated with Oil and Gas related Construction Activities. If you have any further questions or concerns, please do not hesitate to contact Rick Adams of my staff at 304-926-0499 ext. 1354 or by email at Rick.D.Adams@wv.gov.

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.

Sincerely,

Harold D. Ward

Harold D. Ward,
Acting Director

Note: Certain sections of the permit were renumbered just before reissuance.

Comment 1: Construction Plans. Require each construction plan to detail the specific BMPs to be used. It is not sufficient for plans to reference generic BMPs such as "Steep Slope Erosion Control (Typ.) See Detail" where the Detail is contained in a separate, disorganized collection of illustrations and it is not specified which steep slope control would be deployed.

Response 1: The permit requires details to be placed in the application, including organized illustration(s). G.5.e.2. Controls - states that each construction activity covered by this permit shall develop a description of controls appropriate for the project and implement such controls. Appropriate means a best management practice (BMP) that is suitable for a particular condition, situation or location.

Comment 2: The BMPs that the applicant includes—and the "calculations, watershed mapping, design drawings, and any other information necessary to explain the technical basis for the stormwater management plan" (see DEP Draft Permit, G.5.e.2.B. p. 26)—shall be part of the permit that is open for public review and comment.

Response 2: All information contained in an application is available to be viewed by the public using the Electronic Submission System (ESS), once that application is determined to be administratively complete. Post-construction stormwater management is not authorized by this permit, however certain local governments or entities have authority to require such plans.

If an entity has authority and requires a post-construction stormwater management plan that involves land disturbance, only then does the DWWM have any basis for acquiring the documents described in G.5.e.2.B. This section calls for the submittal of calculations, drawings, etc., but these would only duplicate those required by the authority. In short, DWWM cannot dictate the technical basis for designs. Conversely, some smaller jurisdictions with authority may have enforcement limitations and turn to DWWM to help them obtain the necessary documents from applicants.

Comment 3: DEP permit staff shall be required to conduct site visits at locations deemed problematic, or at the invitation of landowners and public stakeholders.

Response 3: DWWM permitting staff visits sites if needed, otherwise they rely on Environmental Enforcement inspector to visit and provide feedback.

Comment 4: DEP shall have the authority to deny a permit for a proposed route (or portion thereof) that has unacceptably high levels of stormwater runoff vulnerability due to factors such as steep slopes, landslides, karst, and other hazards that, especially in combination, present unmitigable dangers to existing water resources, water quality, and long-term pipeline integrity.

Response 4: DEP has authority to deny any project if it doesn't fall under DEP's requirements. Projects that fall under DEP's authority must provide sediment and erosion controls suitable for site conditions.

Comment 5: See ICWA letter dated October 17 and submitted to DEP on October 19, 2018 with 93 examples of failures which included inadequate BMPs. Not all steep slopes are the same. It is imperative that the DEP permit team and the public have adequate documentation and knowledge of site-specific issues to justify the granting of this permit and the use of the proposed E&S controls.

Response 5: This Agency concurs with your comment; all slopes are not the same. Therefore, DEP requires adequate documentation so site-specific information is obtained. It's a requirement that steep slopes are identified in the Erosion and Sediment (E&S) Control Plan and that appropriate BMP's with spacing requirements established on steepness of slope is proposed.

Comment 6: Failed BMPs. In the event that any BMP fails, ALL construction along the entire project shall be halted until revised construction plans that include enhanced BMPs that have been designed and certified by a registered professional engineer have been submitted by the permittee and reviewed and approved by the DEP permitting office. That office shall be under no requirement to approve that request by a certain deadline.

Response 6: Permit noncompliance is governed by state law (Chapter 22, Article 11 or Article 12) and is grounds for enforcement action; for permit modification, revocation and reissuance, suspension or revocation; or denial of a permit renewal application. Failure of a BMP, however, may not be a violation. The permittee must respond to BMP failure by providing additional or substitute BMPs. Failure to do so constitutes a violation of the permit.

Comment 7: Complete application. All plans (such as Karst Mitigation Plan and Landslide Mitigation Plan) must be submitted as an integral part of the permit before the permit can be deemed complete and ready to be reviewed by DEP and made available to the public for comment. If an applicant submits supplementary information during the review process, the application will only be deemed complete as of that new date, and all deadlines for review will be adjusted accordingly.

Response 7: There are two types of completeness: administratively complete and technically complete. An application is deemed administratively complete once all portions of the application are filled out, required attachments are provided, the authorized person has signed the certification form, and the fees are paid. Then DWWM staff conducts a review of the plans, requests appropriate additional information when necessary, and if appropriate, sends the application for public notice. Comments are received and reviewed and responses are prepared. The comments may or may not cause supplemental information to be requested. DWWM will review any supplemental information, then issue or deny the application.

Comment 8: Variances. In projects that are permitted by the FERC, variances submitted by the permittee to the FERC must be submitted to DEP as a major modification to the permit and subject to public comment in the same manner as the original permit.

Response 8: The requirements for major modifications are based on 47CSR10 which states, if "there are material and substantial alterations or additions to the permitted facility or activity that justify the application of permit conditions that are different or absent in the existing permit… an application is required." Formal public notice occurs when an application shows that a project will disturb 100 or more acres, discharge to a Tier 3 water, or for Large Construction Projects when the grading phase will last a year or longer.

Comment 9: Area under active construction. The permit should limit the length of ROW allowed to be under construction at any one time. All construction activity from tree felling, clearing, preparing ROW, trenching, placing pipes, backfilling, through final restoration must be completed within only one linear segment of the project route AND a DEP inspector must have certified that

the construction and restoration on that segment has met the permit conditions BEFORE construction activity on another linear segment can begin.

The length of the linear segment(s) subject to disturbance at any given time and under any given permit shall be limited by the number of DEP Enforcement Inspectors who can be dedicated to those construction areas to provide adequate on-site monitoring and enforcement.

Response 9: DWWM has authority to fashion a permit that uses erosion and sediment controls to protect water quality. Limiting the length of a right-of-way is not within the purview of the Agency.

Comment 10: Weather conditions. BMPs must be of sufficient strength and engineered capacity to work under all weather conditions. So-called "unusual rainfall" does not justify below maximum effectiveness BMPs.

Response 10: Per G.5.d.1.A of the general permit: "A preventive maintenance program shall involve inspection and maintenance of sediment and erosion control BPMs to identify and address conditions that could cause breakdowns or failures resulting in discharges of pollutants to surface waters." Inspection requirements are spelled out in Appendix A of this General Permit. With inspection and maintenance requirements, ineffective BMP should be identified and replaced.

The permit is intended to require BMPs, inspection of those BMPs, and repairs or selection of other BMPs when necessary based on site conditions.

Comment 11: Permit fees. Fees should be increased to make it possible for DEP to protect the soil and water resources of the state for all West Virginians.

Permit fees should be increased. The amount of DEP staff time needed to oversee these large-scale pipeline construction projects is immense. Permit fees should be increased to reflect the agency's resources needed to regulate the projects.

Response 11: The legislative rule 47 C.S.R. 26 with authority from W. Va. Code § 22-11-10, establishes schedules of fees for state water pollution control permits issued by the Director of the DWWM. It is at the discretion of the legislators to change fee structures.

Comment 12: Enhanced BMPs should also be required in karst terrain. Sediment laden water leaving the construction site is more likely to impact groundwater in karst terrain.

Response 12: DWWM acknowledges that karst terrain presents uniquely intertwined surface water and groundwater dynamics, which affect water resources. Stormwater originating on the construction site must pass through sediment trapping BMPs, whether discharged to surface waters or groundwater. Manmade conveyances that send stormwater underground require coverage via an Underground Injection Control Permit. In accordance with 47CSR58 § 4.10, an explanation of requirements for constructing in vulnerable areas has been added. (See G.5.e.2.C.3.)

Comment 13: The permit should include a requirement for monitoring turbidity. WV Water Quality Standards include criteria for turbidity. The permittee should be required to conduct frequent monitoring for turbidity to show compliance with the state standards.

Response 13: DWWM recently public noticed its intent to reissue its two general permits for stormwater discharges related to construction activities. WV0115924 is authorized by the National Pollutant Discharge Elimination System (NPDES) and the other is a state only permit for stormwater related to oil and gas construction activities, Number WV0116815.

Based on comments received from the public, industry, and for the NPDES permit from the EPA, DWWM reviewed each permit in light of its authority for discharge of construction related stormwater into waters of the state.

According to WV 6 0CSR 5, protection shall be applied to all waters of the state.

Tier 1 protection applies to all waters, but other Tiers also apply in some cases. Tier 1 protection applies where the level of water quality is not sufficient to support recreation and wildlife and the propagation and maintenance of fish and other aquatic life, or where the water quality meets but does not exceed levels necessary to support recreation and wildlife and the propagation and maintenance of fish and other aquatic life.

Tier 2 - A water segment shall be considered a Tier 2 high quality water where the level of water quality exceeds levels necessary to support recreation and wildlife and the propagation and maintenance of fish and other aquatic life. Degradation for Tier 2 shall be deemed significant if the activity results in a reduction in the water segment's available assimilative capacity (the difference between the baseline water quality and the water quality criteria) of ten percent or more at the appropriate critical flow condition(s) for parameters of concern.

Tier 3 Protection applies to Outstanding National Resource Waters (ONRW). In order to protect Tier 3 waters, the agency must determine that the proposed activity will be short term in nature and the changes in water quality will be temporary and limited, before the proposed activity may be authorized. Any proposed activity that would result in a permanent new or expanded discharge upstream of an ONRW segment is prohibited except where such source would improve or not degrade the existing water quality of the downstream ONRW segment.

DWWM's approach to construction general permits, whether for NPDES or it's state permit follows the same path as EPA's own construction general permit, which relies on BMPs to control the discharge of sediment or sediment-related parameters.

General permits for construction projects are the most effective permitting scheme any state or the EPA has ever conceived.

After carefully reviewing each Tier and confirming general permits are in fact the correct path forward for permitting the largest number of projects, DWWM then considered which BMPs are the most appropriate to protect water quality in each of the Tiers.

To meet anti-degradation, EPA calls for more frequent inspection of BMPs to confirm they're working properly. Also, EPA calls for stabilization of disturbed soils to occur sooner. Increased filtration is the final approach EPA identified for protecting these most sensitive waters.

DWWM follows EPA's approach. Use of these "enhanced BMPs" will allow DWWM to meet its anti-degradation obligations for Tier 2 and Tier 3 waters.

DWWM considered the comments received on both permits regarding compliance with Total Maximum Daily Loads (TMDLs). TMDLS are plans that prescribe reductions to load and wasteload allocations which will result in the attainment of water quality standards. Representation of a wasteload allocation for construction stormwater permits has evolved over time. It is the DWWM's position that all waters subject to TMDLs for sediment or sediment related pollutants be assured the same protection through the construction stormwater permits as Tier 2 and Tier 3 waters.

Though its state-only permit is not subject to NPDES influence, state regulation 60CSR5 directs DWWM along the path to protecting waterbodies from degradation. WV Code §22-11-2 contained the state's policy on protecting its water and here, in the law, the word "reasonable" is found. "It is declared to be the public policy of the State of West Virginia to maintain reasonable standards of purity and quality of the water of the State consistent with (1) public health and public enjoyment thereof; (2) the propagation and protection of animal, bird, fish, and other aquatic and plant life; and (3) the expansion of employment opportunities, maintenance and expansion of agriculture and the provision of a permanent foundation for healthy industrial development."

DWWM determined that both its permits should use the same *reasonable* approach for anti-degradation of its Tier 2 and Tier 3 waterbodies as well as compliance with TMDLs and that is the use of enhanced BMPs. No other approach is "reasonable".

EPA provides a detailed explanation in their 2017 Construction General Permit (CGP) fact sheet and in the previously issued 2012 CGP fact sheet for using enhanced BMPs.

EPA addresses construction stormwater permitting via a three-pronged approach which includes technology-based effluent limitations, water quality-based effluent limits (WQBELs) and Site Inspection Requirements and frequencies. Although it may sound as if specific limits are assigned to these discharges through technology-based limitations or WQBELS, what is addressed in these sections of their permit and explained in the fact sheet are BMP's necessary to stop, minimize, and/or control sediment from leaving the disturbed area and discharging into a stream. These non-numeric effluent limitations are designed to prevent the mobilization and stormwater discharge of sediment or sediment-related parameters, such as metals and nutrients, and prevent or minimize exposure of stormwater to construction materials, debris, and other sources of pollutants on construction sites. Nationwide, source control through minimization of soil erosion is relied on as a pragmatic and effective way of controlling the discharge of these pollutants from construction activities.

Section 3.1 of the 2017 CGP states that "EPA expects that compliance with the conditions in this permit will result in stormwater discharges being controlled as necessary to meet applicable water quality standards".

According to West Virginia's Integration Implementation Procedures, found in 60CSR5, antidegradation involves protecting a stream's designated uses at a Tier 1 level if the stream is impaired for a particular pollutant of concern, keeping high quality streams better than criteria

unless a lowering of water quality if justified based on socioeconomic considerations (Tier 2) and providing for only short term degradation of Outstanding National Resource Waters (Tier 3).

As mentioned above, EPA's approach, in the 2017 CGP, to address discharges to a water impaired for sediment or sediment-related parameters, and/or nutrients, or to a water that is identified by the state, as Tier 2, or Tier 3 for antidegradation purposes is to comply with increased inspection frequencies and stabilization deadlines outlined in the permit. As set forth in the EPA permit, the normal inspection frequencies are either to conduct a site inspection once every seven (7) calendar days or conduct a site inspection once every 14 days and within 24 hours of the occurrence of a storm event of 0.25 inches or greater. For a discharge to sensitive waters, EPA requires that the operator must conduct inspections once every 7 calendar days and within 24 hours of a storm event of 0.25 inches or greater. The operator must keep a record of rainfall measured in both instances.

Stabilization measures shall be initiated as soon as practicable in portions of the site where construction activities have temporarily or permanently ceased, but in no case more than seven days after the construction activity in that portion of the site has permanently ceased. It also requires that all erosion controls on the site are inspected at least once every seven calendar days and within 24 hours after any storm event of greater than 0.5 inches of rain per 24-hour period. These standard requirements are more stringent than the standard requirements for the EPA permit and nearly as stringent and protective as the EPA permit requirements to address discharges to waters impaired for sediment or sediment-related parameters, and/or nutrients, or to waters that are identified by the state, as Tier 2, or Tier 3 for antidegradation purposes. The permits would require that additional protective measures be employed at crossings of and in proximity to Tier 3 streams. Additional measures including permanent seeding and mulching must be accomplished within 4 days of reaching final grade; temporary seeding and mulching must be accomplished within 4 days when areas will not be disturbed for more than 14 days; the use of reinforced filtration devices (defined as belted silt retention fence, triple stacked compost filter sock and/or super silt fence) at all downslope perimeters; stream crossings in these areas must be completed within as soon as practicable once the crossing has begun; and disturbance must be limited as much as possible. Additionally, the permit requires all erosion controls in these areas are inspected at least once every seven calendar days and within 24 hours after any storm event of greater than 0.25 inches of rain per 24-hour period.

Since EPA's 2012 CGP fact sheet determined that by imposing on operators that discharge to sensitive waters additional requirements to stabilize exposed areas faster and to conduct more site inspections than other sites does not result in a lowering of water quality, and since the additional requirements to stabilize exposed areas faster and to conduct more site inspections than other sites in the Construction Stormwater General Permit registration in sensitive waters are equal to or more stringent than those used by EPA, it is DWWM's position that following the requirements of the Construction Stormwater General Permit registration will not result in the lowering of water quality. Thus, compliance with the Construction Stormwater General Permit will be sufficient to satisfy Tier 2, and the additional controls outlined in the SWPPP associated with this registration, which exceed EPA required controls to satisfy Tier 3 antidegradation, are sufficient to not result in a lowering of water quality, making individualized Tier 2 or Tier 3 review unnecessary.

Further, specific to West Virginia law pursuant to per Section 3.7 of the Antidegradation Rule 60 CSR 5, a Tier 2 review is not required for general permit registrations. Section 3.7 states that "On or after July 2, 2001, the effective date of these implementation procedures, new and reissued WV/NPDES general permits will be evaluated to consider the potential for significant degradation as a result of the permitted activity. Regulated activities that are granted coverage by a WV/NPDES general permit will not be required to undergo a Tier 2 antidegradation review as part of the permit registration process."

Additionally, as discussed above, the standard requirements in the Construction Stormwater General Permit addressing stabilizing exposed areas and conducting site inspections are nearly as stringent as EPA's additional requirements that are used to meet a Tier 3 review, which allows no degradation. By implementing these controls on all disturbed area under the permit registration coverage, Tier 2 antidegradation is fully addressed and an individual Tier 2 review and its associated baseline water quality is not required.

In waters with approved TMDLs for sediment, applicants will be required to employ the same anti-degradation BMPs. In waters listed as sediment impaired, where TMDLs have not yet been developed, applicants will utilize these same controls.

Comment 14: Fines for violating the permit should be increased. The amount of the fine should be such that it deters the company from violating permit conditions. Additionally, language should be included in the permit to explain the threshold of permit violations that will warrant a cease and desist order.

Response 14: Authority related to penalties is found in W. Va. Code § 22-11-22 and § 22-11-24. The legislators set the penalties and the Agency follows their determination.

Comment 15: The Notice of Intent Form Should Be Reinstated for Projects That Disturb 1 to less than 3 Acres. The O&G Draft Permit proposes to eliminate the Notice of Intent form to be submitted 10-days prior to commencing construction for projects "disturbing one to less than three acres that do not discharge to or upstream of Tier 3 Waters and that have a grading phase of construction that will last less than one year." This Notice of Intent approach to small projects has been proven efficient for permittees and sufficient to protect the environment in the context of these relatively small projects that pose little risk to the environments from stormwater runoff.

The WVDEP proposes to replace the Notice of Intent two-page form having a 10-day prior notice filing requirement with a "minor construction projects" application. While this change could appear to be innocuous, the requirements for a minor construction projects application are substantially identical to the "large construction projects" application (See G.4. "Application Requirements" p. 16). The primary difference may be the level of specificity required for design details, but that is not clear from the draft. The Associations suggest that imposing substantially the same requirements on a 1.5 acre project as a 99 acre project is unreasonable and unnecessary. Therefore, the 10-day Notice of Intent should continue to apply to minor construction projects.

Response 15: At the time of public noticing the draft general permit, there were 867 active projects of 1 to less than 3 acres in DWWM's records. These projects take considerable resources to track and inspect and, are often the source of uncontrolled erosion and sediment. DWWM staff

has reviewed and inspected NOI sites and identified weaknesses in the 2013 permit, as well as the CGP. Small sites authorized without review of proposed BMPs can cumulatively discharge large amounts of sediment into state waters.

Another problem area for NOIs was the one-year grading phase limitation. The permit encouraged prospective applicants to wait until permit coverage was granted before letting projects go to bid. Though the advice was sound, newly approved permittees found they were not able to squeeze the whole project into one year: letting projects to bid, selecting contractors, and ensuring projects were completed was just too much to accomplish in so short a time. Contractor delays, difficulty in obtaining materials, financing issues, local rules and a myriad of other obstacles plagued the one-year time limit. Some permittees failed to comply with the timeframe, thereby failing to comply with the permit. DWWM's limited resources were no match to the legwork needed to track down non-compliant permittees. The 2013 permit's remedy for an NOI project that needed more time was for the permittee to upgrade to a Site Registration Application (SRA). Due to the fact that the project had exceeded its year, this forced all such projects into public noticing of their respective SRA applications.

Some permittees who did not complete their projects within the year received an annual fee invoice. Some misunderstood that annual fees are not the same as permit renewal fees. Many refused to pay their annual fees based on the fact that their approval was for one year only.

To further complicate the NOI approach many of the permittees who had completely stabilized their projects failed to notify DWWM to close out their registrations. Many simply went out of business without notifying DWWM.

A different approach was sorely needed. So, DWWM came up with the approach which no longer limits small projects to just one year.

DWWM determined that by easing the time constraints in the grading phase in a tradeoff for better descriptions of the nature of the activity, better protection of state waters was likely. Furthermore, permittees will not be forced into upgrading their permit coverage mid-project and will not be subject to what some called "unfair" public notice requirements.

Comment 16: Application of the Groundwater Protection Act to the O&G Draft Permit is Improper. As with the existing General Permit, the O&G Draft Permit continues to inappropriately contain multiple references to the Groundwater Protection Regulations (GPR) at 47 CSR 58 (see, e.g., Sections G.4.a.1, G.4.a.2 and G.5. "SWPPP/GPP") and requires the development of Groundwater Protection Plans (GPPs), now including submission of the plans to the WVDEP for approval with both the minor construction projects application and large construction projects application. The O&G Draft Permit should be revised to remove the GPP requirements.

As a practical matter, there is no need for GPPs where SWPPPs are required. GPPs are redundant, as they apply to earth-disturbing activities, because they mimic the run-off control requirements of the SWPPPs. SWPPPs are more than adequate for prevention of contamination of surface water or groundwater.

More important, there is no authority for requiring GPPs for oil and gas operations. The Scope of the GPR is described in the following fashion:

1.1. Scope. -- This rule establishes a series of practices which must be followed by any person who owns or operates facilities or conducts activities subject to the provisions of W. Va. Code §22-12-1 et seq. and is subject to regulation by the Division of Environmental Protection's Office of Waste Management or Office of Water Resources.

Oil and gas operations are not regulated by the Division of Water and Waste Management, the successor to the Office of Waste Management and Office of Water Resources. They are regulated by the Office of Oil and Gas.

In its response to comments when the GPR were adopted in 1994, the WVDEP acknowledged that fact:

Two commenters stated that the proposed rule should not apply to operations that are regulated by the Division of Environmental Protection's Office of Oil and Gas, or Office of Mining and Reclamation. The Division shares this belief and offers that it was not the intent of this rule to apply to oil and gas or mining facilities or activities. . . Section 1.1 of the proposed rule has been modified in such a way as to make the rule only applicable to those facilities or activities regulated by the Division of Environmental Protection's Office of water Resources or Waste Management. The same commenter recommended the definition of industrial establishment be changed so as to exclude oil and gas activities. The Division maintains that the above change eliminates the concern and therefore will not change the definition of industrial establishment per this comment. Department of Commerce, Labor and Environmental Resources, Division of Environmental Protection, Responsiveness Summary, December, 1992 (underlining in the original). The GPR are directed to "industrial facilities" that produce "industrial wastes, sewage, or other wastes" and is not intended to address storm water sedimentation from construction activity: 2.7. "Industrial Establishment" means any mill, factory, tannery, paper or pulp mill, mine, colliery, breaker or mineral processing operation, quarry, refinery, electric power generating facility, well, and each and every industry or plant or works, or activity in the operation or process of which industrial wastes, sewage, or other wastes are produced. Furthermore, any facility or activity not set forth above may be subject to any or all of the requirements of this rule at the director's discretion pursuant to section 5 of this rule. This definition does not include private or publicly owned sewage treatment operations.
47 CSR 58-2.7. While there is a reference to "well" in that definition, it must be read in conjunction with the response to comments and Scope section, which clarifies that it is only wells regulated by the DWWM, such as underground injection control wells, that are regulated by the rule. The development of a GPP as a condition of coverage under the O&G Draft Permit coverage is redundant of SWPPP requirements and is not contemplated by state law. References to GPPs and the GPA and requirements for preparation and submission of GPPs should be eliminated.

Response 16:

Construction activities include activity with the potential to contaminate groundwater. Stormwater is often considered to recharge groundwater.

Furthermore, the law says, “Where a person is operating a source or conducting an activity in compliance with the terms and conditions of a permit, rule, order, directive or other authorization issued by a groundwater regulatory agency pursuant to this article, such person is not subject to criminal prosecution for pollution recognized and authorized by such permit, rule, order, directive or other authorization.”

Comment 17: Compliance with the Adopted General Permit Demonstrates Compliance with Water Quality Standards. Section A of the O&G Draft Permit states that "discharges covered under this General Permit shall not cause or contribute to a violation of the Legislative rules governing water quality or groundwater protection . . . ." While we understand that the goal of the stormwater program is to protect water quality, the purpose of the Permit is to explain how that is done, and how compliance is demonstrated. By complying with BMPs that are expressed in the O&G Draft Permit and the SWPPP, the permittee is deemed to be protecting water quality standards.

We have seen in several federal court cases how a relatively innocuous requirement to comply with water quality standards has been taken out of context to punish dischargers for activities that it, and the WVDEP, believed had been satisfactorily addressed. We can see the same happening here, too. For example, stormwater that is running clear and without visible sediment from a site where BMPs are being effectively implemented might have sufficient iron or aluminum to be in violation of water quality standards, simply as a result of naturally high levels of those constituents in dirt.

It would be much more useful, and consistent with the state's permit program, to state that construction activities that comply with BMPs in the Permit and their SWPPP are meeting water quality standards. If it comes to the attention of the WVDEP that the BMPs are not sufficient, even though they are properly implemented, the WVDEP has the ability to require additional protective measures. As the WVDEP has stated in its Erosion and Sediment Control Best Management Practice manual, West Virginia Department of Environmental Protection, Division of Water and Waste Management, Revised August 29, 2006 ("Sediment BMP Manual"):
Surface water discharges associated with construction activity are subject to applicable state water quality standards. The Construction Stormwater General Permit does not authorize the violation of those standards. WVDEP expects that the selection and implementation of appropriate BMPs will result in compliance with standards for surface water discharges from construction sites. Proper implementation and maintenance of these controls is critical to adequately control any adverse water quality impacts from construction activity.
Sediment BMP Manual, p. 1-3 (emphasis added).

We strongly support the goal of protecting the state's water resources. The Associations' members operate in good faith, using BMPs that both the WVDEP and we have concluded protect water resources. If it is discovered, through no failure or negligence on either party, that water quality standards maybe violated, it should not be deemed a Permit violation, but a reason to investigate the cause and extent of the effect on water quality and, where necessary, impose additional protective measures. Commenters also incorporate by reference the statements presented by the West Virginia Manufacturers Association to General Permit No. WV0115924 regarding "Prohibition of Violation of Water Quality Standards."

Response 17: Please see Response 13. The goal of the permit is to protect water quality through the implementation of BMPs, inspections, and response to inspection results.

Comment 18: Stormwater Discharges to "TMDL Areas" Should Not Be Restricted. There are multiple references in the O&G Draft Permit to "TMDL areas" (see, e.g., Page 2, above section A). We acknowledge that discharges to areas where Total Maximum Daily Loads have been developed for sediment or related pollutants might require the application of additional or enhanced BMPs, but we believe the principle has been stated too broadly in the O&G Draft Permit. There are many TMDLs (for example, for fecal coliform) that are unrelated to earth-disturbing activities associated with oil and gas construction activities. An oil and gas construction project that discharges stormwater into a stream for which a TMDL was established for matters other than sediment should not be subject to enhanced BMPs if its discharge is not going to contribute to the impairing parameter.

The Associations believe the WVDEP should also recognize through this permit that discharges of stormwater from oil and gas construction activities are nonpoint Load Allocations under the TMDL program, not Wasteload Allocations. Accordingly, any restrictions related to TMDLs should be eliminated or, at minimum, very carefully circumscribed.

Response 18: Please see Response 13.

Comment 19: The O&G Draft Permit Should Continue to Use Precipitation Events of 0.50 inches. The WVDEP proposes to dramatically increase the inspection burden for both minor construction projects and large construction projects by reducing the trigger threshold for precipitation events from 0.50 inches to 0.25 inches for a 24-hour period (See C.12.a., G.5.e.2.D., G.5.e.2.D.ii. and throughout Appendix A). Again, without a reasoned basis, WVDEP simply doubles the inspection frequency in the absence of evidence supporting a benefit to such increase. A 0.25 inch precipitation event may or may not result in any runoff depending on ground conditions where a 0.50 inch precipitation event can be expected to generate runoff under most circumstances. In the absence of compelling reasons to change the standard from 0.50 inches, the Associations urge WVDEP to retain the existing precipitation event standard. Requiring this inspection within 24 hours is also impracticable, as weather conditions or safety may prevent such an inspection; as such, appropriate exceptions for those conditions are necessary here.

Response 19: DWWM reviewed the draft permit and found that Enhanced BMPs include inspections following 0.25 inch rain events. Other sections of the permit contained the same requirements which set up a conflict between areas requiring Enhanced BMPs and those that don't. To eliminate the conflict and support the Enhanced BMP, the draft permit has been revised to explain when inspections following 0.5 inch rain events are appropriate.

Also, see Response 13.

Comment 20: "Enhanced BMPs" Should be Limited to Discharges to Tier 3 Waters. The definition of "enhanced best management practices" states that the "use of such practices apply when disturbed areas discharge to Tier 3 Waters, or to state waters for which a TMDL for Total Recoverable Iron [is] approved." The application of enhanced BMPs to Tier 3 Waters makes sense

as those are generally the more sensitive waters in West Virginia. However, in other sections of the O&G Draft Permit, enhanced BMPs are referenced in connection with "projects discharging to any waters other than Tier 1 or where BMPs are found to be inadequate to protect water quality." (See C.12., C.12.e. and C.12.f.). The use of enhanced BMPs for all waters except discharges to Tier 1 Water is overly broad and unnecessary where standard BMPs are generally adequate to protect water quality, including Tier 2 Waters. Indeed, since Tier 2 is the default designation for West Virginia waters "enhanced BMPs" become the standard rather than the higher standard and as such should be rejected.

Response 20: See Response 13.

Comment 21: 7-Day Seeding/Mulching and Inspection Requirements Are Adequate.

The O&G Draft Permit shortens the seeding and mulching requirement to 4 days which is too short a time to accommodate multiple or overlapping precipitation events, as well as holiday and weekend breaks in construction activity (See C.12.a.). The existing requirement that "stabilization measures shall be initiated as soon as practicable in portions of the site where construction activities have temporarily or permanently ceased, but in no case more than seven days after the construction activity in that portion of the site has permanently ceased" is adequate. The existing General Permit imposes a duty to act as quickly as practicable with a 7-day maximum at the end of construction. This approach provides the needed flexibility to accommodate varying weather conditions and other circumstances that may require more than 4 days to seed and mulch. Importantly, WVDEP should clarify that the 70% revegetation requirement is not part of the stabilization measures time deadlines, as this will create an impossible standard. The WVDEP should also clarify that these activities must occur in the appropriate timeframe to the extent that weather conditions allow. This would include adjustments in timing accounting for continuous rain events that last over a period of days.

In addition, the O&G Draft Permit shortens the routine inspection requirement from once every 7 calendar days to once every 4 calendar days, at least for non-Tier 1 Waters (See Appendix A). This requirement that will be applicable to most permits coupled with the increased frequency of inspections related to the reduced threshold for precipitation events increases the inspection frequency and related recordkeeping without any assertion or demonstration that the change improves water quality. The Associations assert that the current requirements continue to provide adequate protection of water quality.

Response 21: G.5.e.2.A.1.c. already states that weather conditions must allow germination or the time frame doesn’t apply.

Also, please see Response 13.

Comment 22: Best Management Practice Manual is a Guidance Document and Its Use Should Not Be Mandated.

Section C.15. provides that "erosion and sediment control methods shall be implemented in accordance with the BMP Manual" (emphasis added). However, the BMP Manual is a guidance document that has never been subject to public notice and comment as required for legislative,

procedural and interpretive rules under the West Virginia Administrative Procedures Act (See W. Va. Code §29A-3-5). The effect of mandating the use of a BMP Manual is to treat those provisions as rulemaking without following the necessary statutorily mandated steps for approval. The BMP Manual should continue to be treated as a guidance document that is recommended but not required. More specifically, the Erosion and Sediment Control Best Practice Manual dated 2006 and revised August 29, 2016, specifically provides "[t]his manual should be used as guidance for developing sediment control plans for the General West Virginia/National Pollution Discharge Elimination System Water Pollution Control Permit for Stormwater Associated with Construction Activities. However, the use of other best management practices manuals may also be acceptable." The requirement of the general permit is to protect water quality and construction activities that use measures adequate to protect the environment should be authorized without approval of the Director.
The same argument and conclusion applies to the pipeline right-of-way diversions required in G.4.e.2.A.2.o. (which should be renumbered as G.4.e.2.A.iii.d.), which requires the use of the "West Virginia Department of Environmental Protection Sediment Control Best Management Practice Manual." To the extent, this references a manual different from the BMP Manual referenced in C.15., it too should be treated as a guidance document and not a requirement.

The Associations also urge the WVDEP to authorize the use of the West Virginia Erosion and Sediment Control Field Manual dated May 2012, developed by the WVDEP's Office of Oil and Gas. The provisions of the OOG manual are familiar to oil and gas developers and contractors and would allow consistent implementation of BMPs across different but geographically nearby construction locations.

Response 22: The Agency agrees the Best Management Practice Manual should not be mandated. The Agency encourages the use of its guidance documents. However, if the applicant has different proposals the Agency will take them into consideration. The change has been made to the language.

Comment 23: Advanced Application Filing Requirements Are Too Long.

The O&G Draft Permit extends the deadline for filing applications from 10 to 20 days for minor construction projects not discharging to or upstream of a Tier 3 Water, from 45 to 60 days for large construction projects not discharging to "sensitive waters" and from 90 to 100 days for construction projects discharging to Tier 3 Waters, or disturbing 100 acres or more, or grading will last more than one year. The additional time delay coupled with an undefined period for approval of the applications by WVDEP, creates unreasonable restrictions on commencing construction for oil and gas operators. The Associations request that the deadlines be rolled back and that a requirement be added that construction may commence upon the expiration of the existing 10, 45 or 90 days in the absence of an objection by the Director. An open-ended time period for review and approval is disruptive and costly to time sensitive construction activities that are important to the economic advantages of oil and gas development, production, processing and transportation.

Comment 23a: Page 1, last Paragraph - states "[a]uthorization to discharge under this permit occurs upon the Director's approval of the registration application and is subject to the following terms and conditions:" Is the applicant permitted to commence earth disturbing activity as long as no discharge occurs? Approval should be presumed to have been granted in the absence of the

Director's action upon the expiration of the 10-day, 20-day, 45-day, 60-day prior application submittal as applicable.

Comment 23b: Page 2, Paragraph 3 -- Please confirm that existing permit coverage pursuant to a Notice of Intent qualifies for minor construction activity application and coverage.

Response 23, 23a & 23b: The draft permit expanded the information needed to adequately describe the nature of the construction activity. The changes are based on DWWM's 5 year' experience with the permit and its review of nearly 1200 applications. By obtaining better descriptions of the nature of the activity, the DWWM is anticipating better protection of state waters. By providing realistic review time frames DWWM will be capable of quality reviews.

These projects are often the source of uncontrolled erosion and sediment. By increasing the time for reviews DWWM is in a better position for completing comprehensive evaluation of proposed controls. An application might describe a 4-acre project or a 4500-acre project, regardless, the permit must contain time frames applicants can rely on.

The DWWM works with applicants when an expedited review is requested however does not have sufficient staff to expediate all reviews. An example of DWWM's cooperation is prioritization of applications related to safety issues such long wall mining beneath a pipeline.

If an applicant demonstrates there will be no discharge based on no need to construct a trapping device the DWWM will review to determine applicability of the permit. Please note projects in karst areas require an UIC permit for stormwater directed to sinkholes or other karst features.

Comment 24: The Definition of Construction Activity Should Exclude Maintenance and Use. The definition of "access road" includes the language "[t]he term includes access roads constructed, used, reconstructed, improved, or maintained for use in all construction operations." However, the definition of "construction activity" at 47 C.S.R. §10-2.8 provides that "[c]onstruction activity does not include routine maintenance that is performed to maintain the original line and grade, hydraulic capacity, or original purpose of the facility." The terms "access road" and "construction activity" in the O&G Draft Permit should be revised to exclude routine maintenance, including the use of an access road without improvement consistent with its original purpose. The imposition of the terms of the O&G Draft Permit on maintenance of access roads or of existing facilities is unnecessary and inappropriate. The Association request that the definitions of "access road" and "construction activity" be modified accordingly.

Response 24: DWWM understands the commenter's concern for maintenance during construction versus routine maintenance that is not associated with a construction activity**.** DWWM asserts the draft permit language is appropriate since the definition for "Construction Activity" limits the permit authority to a period of "site development". ("Construction Activity" means land disturbance operations such as grubbing, grading, filling, and excavating *during site development* for residential, commercial or industrial purposes. This includes, but is not limited to, access roads, borrow and spoil areas and equipment lay down or staging areas where such land disturbance activity will take place.)

Comment 25: A Minimum 50-foot Vegetative Buffer Requirement is Vague and Overbroad.

The requirement in section G.4.e.2.A.i that "[v]egetative buffers should be a minimum of 50 feet" is unreasonably restrictive and should be deleted. The section already provides that "[s]ite plans should ensure that existing vegetation is preserved where attainable" and that a "natural vegetative buffer shall be provided adjacent to receiving streams or other waters on or near the project site." The general language is sufficient to protect existing vegetation "where attainable" while allowing for flexibility to utilize construction techniques and BMPs that are protective of water quality and the environment generally. In any event, the term "vegetative buffer" lacks adequate definition concerning what activity may occur in a buffer area, such as necessary tree removal or limited vehicle movement which are not included in the definition of "construction activities." The imposition of a fixed 50-foot buffer along with the requirement for a justification for any encroachment is simply an unnecessary administrative restriction on construction activities, especially when enhanced BMPs may be imposed in such circumstances, if necessary.

Response 25: DWWM reviewed the draft permit and determined the language should remain because the permit states that justification for any encroachment must be provided by the applicant. In practice this means the applicant would include a statement explaining why protecting the buffer is not reasonable.

It is DWWM's position that vegetated buffers, particularly forested buffers and those along headwater streams, deliver tremendous economic, ecological and other benefits. Among these benefits, buffers:

- intercept non-point source pollutants carried by surface water runoff and remove the excess nitrogen, phosphorus and other substances that can pollute water bodies;
- stabilize stream banks and minimize erosion;
- decrease the frequency and intensity of flooding and low stream flows;
- prevent sedimentation of waterways;
- through shading, reduce swings in stream temperatures and prevent elevated temperatures harmful to aquatic life and
- replenish groundwater and protect associated wetlands.

Comment 26: Steep Slopes Requirement Are Not Included in Proposed Permit No. WV0115924.

The O&G Draft Permit includes requirements related to "steep slopes" and reporting of "critical potential slope failure" that are not included in the proposed General Permit for Stormwater Associated with Construction Activities. Without explanation the WVDEP incorporated additional requirements for "steep slopes" and a reporting requirement for an undefined term "critical potential slope failure" without regard to whether the potential failure may impact water quality. The Associations request that the O&G Draft Permit be revised to conform to the non-oil and gas construction activities general permit, by removing these additional requirements for "steep slopes" and "critical potential slope failure."

Response 26: DWWM acknowledges that its general permit for Stormwater Associated with Oil and Gas Related Construction Activities addresses steep slope related requirements due to the nature of projects included in this permit. Frequently, pipelines traverse vertically. During a review of pipeline construction projects, field staff found 90 hillside slips, landslides, or mudflows on just

37 permitted projects. Over 3338 acres of land had been impacted by an average of 2.4 slides per project. These numbers do not include the damages done without purview of permit coverage: field staff found a total of 147 slips, landslides, and mudflows.

Under the CSW permit, most projects are non-linear. Power lines in steep slope areas require little right-of-way construction, no trenching and usually just pad to pad disturbance. Though trenching is a part of sewer and water line construction, these projects generally are placed along established road rights-of-way.

DWWM reviewed and agreed a definition of “critical potential slope failure" was needed. That has been included in section E:

Comment 27: Spill Reporting Should Be In Accordance With Oil and Gas Statutes and Rules.

This permit is for oil and gas operations, and therefore the spill reporting obligation is not 47 C.S.R. 11-2 as referenced in section F.1., but rather 35 C.S.R. 1-3. Oil and gas operations are required to report releases of reportable quantities, not all releases of every kind.

Response 27: This permit addresses stormwater during oil and gas construction activities. Stormwater discharges are regulated under WV 22-11. So, the Agency uses state regulation reporting requirements. No change has been made.

Comment 28: Public Notice Requirements

The O&G Draft Permit includes references to "public notice" but does not include a description of when a public notice is required. In any event no public notice requirement should be imposed in the O&G Draft Permit. Commenters are not aware of any rules requiring public notice for applications for coverage under a general permit, once the general permit has been finalized.
The purpose of a general permit is to establish general conditions that apply to similar types of discharges that are protective of the environment. Those that can operate within the requirements of the permit are allowed to do so. Such persons are not applying for a permit, they are applying for coverage under a permit that has already been reviewed, subject to public comment, and approved. The full public notice process should not start again with any application for general permit coverage. Commenters request that the references to "public notice" as a prerequisite for be general permit coverage be deleted.

Response 28: The Agency understands the concern and agrees with commenter; this is a general permit that went through the public comment period. A facility applies for a registration to operate under this permit’s terms and conditions. This general permit established standard conditions for similar types of projects with similar geographic conditions. However, for certain projects to qualify for general permit coverage such as projects of 100 acres or more, projects discharging stormwater to Tier 3 streams, or projects with grading or stabilization lasting one year or more, public input is appropriate. Public notice is necessary for these projects as per G.5.b.4.

Comment 29: Page 2, Paragraph 2 -- Because the proposed general permit for stormwater associated with construction activities expressly authorizes continued coverage until June 30, 2019 to have final stabilization completed for sites approved prior to January 3, 2017 (approximately 18

months), the O&G Draft Permit should provide a similar continuation of coverage through October 31, 2019 and have until that time to submit an application to continue permit coverage, if necessary to achieve final stabilization.

Response 29: The commenter is referring to a practice known as "roll-over". The general permits are issued for 5 years, but applications submitted late in the permit term are subject to the expiration date of the permit and may only get coverage for a very short time frame. To compensate for brief coverage, rollover gives permittees more time to complete their projects without having to immediately apply for coverage under the reissued permit.

After reviewing the current CSW draft permit, EPA took exception to rollovers.

The EPA approach is to reissue their permit and give a deadline for applying under the new permit, regardless of how little time was approved for a project under the expiring permit. DWWM disagreed with EPA's strategy and the two agencies compromised.

Permittees who were issued approvals from March 1, 2018 through the effective date are required to submit a certification agreeing to abide by the terms and conditions of the reissued general permit. Certifications will not impose application fees and will require updated progress maps in PDF form and updated timetable for major activities as found in G.5.e.1.A. If no land disturbance has taken place, the progress map is not necessary.

Further, the commenter expressed concern over the rollover timeframes in the two permits. DWWM will provide permittees of both permits one year prior to effective date with this option.

Comment 30: Page 2, Paragraph 2 – Suggest adding "or other vegetation" after "perennial grass" in the 3rd sentence of that paragraph.

Comment 30a: E. - Definition of "Final stabilization" – Insert the words "or other vegetation" after "grass" and insert "but not limited to" after "includes."

Response 30 and 30a: Two sections of the draft permit already suggest vegetation other than grass are effective stabilization measures. See both below.

G.5.e.2.A.1.c. Areas where the seed has failed to germinate adequately (uniform perennial vegetative cover with a density of 70%) within 30 days after seeding and mulching must be reseeded immediately, or as soon as weather conditions allow.

Section J.
Stabilization includes pavement, buildings, waterways (riprap, concrete, grass, or pipe), a healthy, vigorous stand of grass or native vegetation that uniformly covers more than 70 percent of the ground, stable outlet channels with velocity dissipation which directs site runoff to a natural watercourse, and any other approved structure or material.

Comment 31: C.9. - This section is redundant of section C.8 and should be deleted. Alternatively, and at a minimum, insert following the word "Director" the words "upon reasonable request" and delete the words "or has the potential to protect water quality." which is vague and overly broad.

Response 31: C.8. is relevant to persons who have already obtained permit coverage.

C.9. is relevant to applicants and is intended to obtain enough information as necessary to evaluate the nature of the construction activity.

DWWM agrees with the commenter that the wording could be improved to ensure a proper request and adequate response time is provided. The entire premise of the permit relies on controls having the potential to protect water quality, and therefore limits the language change to:

C.9. Other Information

The applicant shall furnish to the Director, upon request and within a reasonably specified time, any additional, practicable, site-specific information that is determined necessary to protect water quality or has the potential to protect water quality.

Comment 32: C.12.a. – The WVDEP should clarify that the addition of the project SWPPP within 6 months to maintain coverage by the permit will only require notification to the agency.

Response 32: As explained in Response 13, the TMDL might trigger the need to implement Enhanced BMPs (unless already implemented). As illustrated in Response 13, DWWM reviewed the process and certification has been chosen as the remedy for this situation too. Permittees who are already implementing Enhanced BMPs in the area of the TMDLs need take no action beyond continuance of their Enhanced BMPs. Permittees who are not using Enhanced BMPs in the TMDL area of concern are required to submit a certification to the Director, attesting that they agree to abide by the requirements in the (reissued) permit and will implement Enhanced BMPs.

Comment 33: C.12.b. -- Please provide additional information on where stream tier designations are listed and mapped so applications may be developed.

Response 33: Use this hyperlink for Interactive Maps for Tier 3 Stream information. **https://dep.wv.gov/WWE/Programs/wqs/Documents/Tier%203%20Info/WV_Tier_3_Maps 20101006.pdf.** This project was developed to enable the general public to determine which stream sections will receive Tier 3 Antidegradation Review Protection. Directions are provided here for use of interactive Maps.

DWWM will revise Interactive Maps to provide Tier 1, 2 and Trout Stream mapping information. In the interim, DWWM will provide a shapefile of stream information upon request.

Comment 34: C.12.g. - Please insert at the end of the sentence the following "upon a finding that water quality impacts have been observed and that standard BMPs cannot adequately protect water quality standards."

Response 34: C.12.g. was removed from the draft permit as being duplicative of C.12.e. DWWM finds the recommendation reasonable, based on Response 13 which is thorough, and so the statement now reads, “The Director reserves the right to require Enhanced BMPs for any project stormwater discharges associated with land disturbing activities authorized by this permit, upon a finding that water quality impacts have been observed and that standard BMPs cannot adequately

protect water quality standards. However, this finding is not required for discharges already subject to Enhanced BMPs. (See C.12.d.)

Comment 35: C.13.a. – Delete the word "by" before "imprisonment."

Response 35: This language is from §22-11-24. No change has been made.

Comment 36: C.16. -- This section appears to assume a large construction project by reference to "FERC inspector" and the Associations request that the quarterly reporting be limited to very large construction projects such as those disturbing 100 acres or more, or, in the alternative, to limit construction reporting to "annually, or within 120 days of completion of the project, whichever first occurs."

Response 36: DWWM agreed with this commenter to some degree. The FERC reference was erroneous. The purpose of the report is to provide the DWWM with accurate and timely land disturbance and stabilization updates which are sometimes difficult to ascertain on large projects.

It is the nature of the activity that the projects are be completed in a short term, therefore, DWWM's position of quarterly progress reports is reasonable for projects disturbing 100 or more acres.

After learning that the EPA agreed to submittal of "certifications" as a remedy for certain issues related to the state's CSW permit, DWWM determined this item could be resolved with the same approach. In fact, many problems may be solved with more frequent contact with permittees. The DWWM determined the submittal of certifications describing project status is a reasonable resolution for problems that have plagued construction stormwater permitting for a long, long time. See Response 13 for information about failure to notify when projects are complete, or failure to pay annual fees.

The permit has been revised as follows:
Construction Activity Reporting Requirements

For projects disturbing 100 or more acres, permittees are required to file quarterly or as otherwise required by the Director, a construction report accurately depicting the extent, location and status of construction activity.

A status report for other projects shall be submitted upon request from the Director.

All reports submitted to the Director shall be certified in accordance with C.6, and signed by an authorized representative in accordance with 47CSR10 § 4.6 and shall be filed on a form provided by the Director. (See G.5.e.2.)

Comment 37: D.3. and D.4. Section D.3 of the Permit defines and prohibits Bypasses, and Section D.4 defines Upsets and explains the conditions under which they can be claimed as an excuse for noncompliance. Bypasses and Upsets are more commonly seen in the individual NPDES permits, where permittees are usually operating wastewater treatment systems. For a storm water permit, we expect these terms will be applied differently. For example, as described in the Permit, an Upset

could be any failure of a BMP that occurs for some reason beyond the permittee's control, as long as the appropriate steps are taken in accordance with the Permit. Importantly, usage of the phrase "treatment facility" should be removed here, as that phrase is not applicable in the construction stormwater process.

Response 37: DWWM agreed that the term "treatment facilities" located in sections D.3. and D.4. was inappropriate for this permit and the term has been replaced with "best management practices".

Comment 38: D.5. - Commenters suggest that the WVDEP remove Section D.5, "Removed Substances." This provision makes some sense in industrial NPDES permits, where there might be substances in wastewater treatment sludges that require special handling and disposal. That is not the case here, where the removed substances are going to be sediment and dirt. The Permit prohibits discharges of other substances, and there is little danger posed by what collects in sedimentation ponds and ditches. We suspect that this condition is honored more in the breach than in the observance, and that it serves no environmental protection role. At the least, Commenters suggest that an exception be added, allowing the disposal of earth that is removed from sediment control structures.

Response 38: DWWM agreed Section D.5, as it appeared in the draft permit did not describe conditions likely found on a construction site. The section has been modified to read:

"D.5. Removed Substances
From time to time incidents occur on construction sites that cause materials to be removed. Soils or stormwater affected by fuel spills or other substances may require special handling and disposal. Such shall be disposed of only in a manner and at a site subject to the approval of the Director.

Sediment removed from a trapping device or from a stream, lake, or river after deposition by stormwater runoff from a construction related activity, shall be placed behind sediment trapping BMPs in a manner that prevents further impact to receiving waters."

Comment 39: E. - Definition of "Common plan of development" - Commenters urge a clarification by adding at the end of the definition the following: "However, non-contiguous construction activities (for example, construction activities that are at least one-quarter mile distant from another construction activity that are not physically connected) shall not be aggregated or deemed a part of a common plan of development, regardless of acreage disturbed at each separate site." This language will allow pipeline maintenance/upgrade operations, such as pig launching and receiving, to be evaluated separately and not part of a common plan for purposes of determining whether and to what extent permit coverage is appropriate.

Response 39: Per the definition, "Common plan of development" *is* a contiguous construction project.

Comment 40: G.4.b – The reference to "sensitive waters" defined in Section C.12. is unclear since there is no definition in C.12. as to what the term "sensitive waters" means. If the term "sensitive waters" is to be used in this permit, it should either be clearly defined in the referenced Section C.12. or in Section E.

Comment 40a: Appendix A, Page 30, 1st & 2nd paragraphs – The term "sensitive waters" is undefined, so it's unclear what the language "unless the site discharges to sensitive waters" or "sites discharging to sensitive waters" means.

Response 40 & 40a: We deleted the term "sensitive waters" from the permit.

Comment 41: G.5.b.5. and G.5.b.5.b. -- Please revise the 72-hour signage placement requirement to 7 days. Because the application must be submitted at minimum 10 days (or 20 days based on proposed language) prior to discharge to waters, allowing additional time for signage placement will not result in any adverse effects. Also, item 4) in G.4.b.5. is unreasonably cumbersome and should be deleted as impractical and ineffective.

Response 41: The draft permit already proposed additional time from the 24-hour signage placement to 72 hours and finds this timing reasonable. The posting of the sign serves to notify the local public of the proposed project and limits formal public notice to the criteria listed in G.5.b.5.

After reviewing the draft permit language, DWWM found the comment expressed a valid concern. The sign could not display so much information. The requirements for the sign have been revised to:

- The applicant's name and emergency telephone number;
- Project Reference ID;
- Call DWWM at 800-654-5227 or DEP.Comments@wv.gov for info on this stormwater permit.

7 business days of assignment of the permit registration number, the applicant shall affix such number to the sign or to the posted notice.

Comment 42: G.5.b.5.c. -- Please insert after the words "shall provide the" the word "initial" to recognize that the signage may be relocated as needed from time to time to accommodate construction activity and movement.

Response 42: The word "initial" has been inserted after "shall provide the" in this sentence.

Comment 43: G.5.e.1.B. -- Insert at the beginning of the paragraph "Except for linear projects," because these requirements are not applicable to linear projects. Also, please clarify whether bleeder drain BMP requirements meet the necessary measures for subgrade saturation.

Response 43: DWWM agrees since trenching excavation is temporary and should be placed back to approximate original contour, G.5.e.1.B. has been revised to read, "Trenching activities associated with linear projects that will restore the grade to the approximate original contour are not required to provide cut and fill estimates or cross sections of areas that are not to receive any fill that is not created by trenching."

Drain BMP requirements meet the necessary measures for subgrade saturation.

Comment 44: G.4.e.1.B.2. – This provision should be deleted because information regarding contaminated soils is not known or available before the application is prepared. At minimum, delete the 1st sentence and insert "In the event contaminated soils are identified during construction activity, a soil handling plan shall be developed and implemented prior to further removal or disposition of contaminated soils". In the 2nd sentence, it's not clear what is meant by saying "Contaminated soil is not suitable for waste ….." The word "waste" should be removed, or clarification should be provided regarding what is meant by that wording.

Response 44: DWWM reviewed the section and agreed that the language needed clarification. G.5.e.1.B.2. now reads "When contaminated soils are encountered a soil handling plan shall be provided. Contaminated soil is not suitable material for borrow or fill unless approved by the Director."

Comment 45: G.4.e.1.C. – Compliance with outlet markers will be very difficult and a hindrance. In addition, the WVDEP should not dictate contour spacing—plans are already required to be prepared with good engineering practices and the agency specifying a spacing requirement is unnecessary.

In addition, the suggestion to provide equipment spreads in project shapefiles and other information necessary to describe the project in detail is contradictory. Project will be described narratively and alignment sheets are submitted.

A generic shapefile of the project LOD should be enough to put into the mapping program. No other information should be publicly available.

Also, the agency should recognize adjustments to center line may be made during construction.

Please provide a shapefile or mapping of the Chesapeake Bay drainage basin?

Response 45: Regarding outlet markers, DWWM agrees and G.5.e.1.C. has been revised. The wording "the location of the outlet marker for the stormwater discharge points(s)," has been revised to state "the location of stormwater discharge points(s)…"

Anything greater than 5' contour lines on slopes for linear projects would not be adequate to show change of slope and flow patterns in many instances. To design appropriate controls this relationship must be correctly interpreted, therefore DWWM disagrees with the suggestion in the comment concerning DWWM dictating contour spacing.

G.5.e.1.C.1. says "Applicants for permit coverage for non-linear projects may request approval to submit site maps indicating ten-foot contours, provided the entire project to be permitted under the Larger Common Plan of Development definition does not exceed 5 acres."

G.5.e.1.C. states that equipment spreads must be shown on site maps. DWWM agreed with the comment that such information, if necessary, could be supplied narratively, therefore the requirement was stricken. The section has a comprehensive list of map requirements. The phrase

"and any other information necessary to describe the project" is necessary, though DWWM does not anticipate its frequent use. An example of "other information" that might be requested is the location of a landslide that occurs subsequent to initiation of construction.

A generic shapefile has no projection therefore cannot be used properly on DWWM mapping.

All information must be available to the public with the exception of trade secrets or information that might compromise the permittee such as sensitive financial information.

Adjustments to center line may be made during construction. See Response 8.

DWWM will incorporate this and other pertinent information to our Mapping Applications. In the interim, DWWM will provide a shapefile of the Chesapeake Bay drainage basin upon request.

Comment 46: G.4.e.1.D.1. – In the 1st sentence, suggest changing the words "as of" to "covered by."

In addition, it is unnecessary and unreasonable to require temporary roads to be designed for 10-year, 24-hour precipitation events and 2-year, 24-hour precipitation events. Those requirements should not apply to temporary roads, and as such,

Commenters requests that WVDEP provide clarity on what it considers to be a haul road, which definition will not include temporary roads.

Please delete "The maximum pitch grade shall not exceed 15%" to allow for flexibility in designing roads in difficult circumstances using best engineering practices.

Also, please revise to allow temporary roads to be left for landowner use with gravel surface when requested by landowner.

Please clarify that the permittee is not required to maintain and reclaim ATV trails or other roads that are used by others during the term of the permit.

Response 46: Road construction, both temporary and permanent, change the natural drainage patterns therefore can dramatically change the hydrologic conditions of the watershed. Roads that are improperly designed, constructed and stabilized can cause significant erosion and produce vast quantities of sediment.

Temporary roads left in place for landowners' use are not temporary.

Alternative design criteria for access road drainage may be approved by the Director where the design criteria of this section are demonstrated to be impractical or unnecessary.

DWWM does not have authority to authorize erosion on ATV trails or elsewhere without BMPs and BMP maintenance.

Comment 47: G.4.e.2.A.2.m. - Please include language to allow alternative approaches due to topography and right-of-way constraints, but still providing positive drainage.

Response 47: DWWM agreed that alternative approaches might be suitable in certain situations. The following language has been included for flexibility, "The Director may approve other methods of positive drainage control for trenching activities." (See G.5.e.2.A.3.a)

Comment 48: G.4.e.2.A.2.o. -- In the first sentence please delete the word "cleared" and substitute "grubbed" which is the first time that the earth is disturbed requiring erosion control devices.

Response 48: DWWM approached this comment cautiously as soils are sometimes disturbed during "clearing" activities. The DWWM revised the section but did not concede that grubbing is necessary before sediment controls are needed. The permit now reads "Erosion control devices including Pipeline Right-of-Way diversions/slope breakers shall be installed as the ROW is grubbed or prior to the disturbance or exposure of soils to the elements, and maintained…" (See G.5.e.2.A.3.c.)

Comment 49: G.4.e.2.C.ii. -- Please delete this provision as a general permit to manage and control stormwater is not an appropriate vehicle for controlling fugitive dust which is not a water quality issue.

Response 49: DWWM disagreed with this commenter. Dust can become a sediment issue when rain washes it from the surface into receiving streams.

Comment 50: G.4.e.2.C.vi. -- 1st paragraph following the word "onsite" insert ", or made available within 24 hours," for flexibility where construction activities may have ceased or been suspended.

Response 50: DWWM agreed with the commenter that record-keeping on site after project completion is not always possible. The section was revised to read, "Inspection and maintenance records must be kept onsite for review by the Director during active construction. After construction is complete, the permittee shall make the records available within 24 hours of a request from the Director." (See G.5.e.2.C.6.)

Comment 51: G.4.e.2.D. -- In the 2nd sentence following the words "including procedures" insert ", unless the application contains a statement that information regarding rain events will be obtained from a National Oceanic Atmospheric Administration weather station representative of the site," to clarify that either option is available as provided in G.4.e.1.C.

Response 51: DWWM agreed that the alternative provided in G.5.e.1.C. had been left out of G.5.e.2.D. and corrected the omission.

Comment 52: G.4.e.2.D.ii. -- If this section is not deleted as requested above, please delete "acting under the direction of the professional." to allow qualified individuals to provide this service. Further, there is not definition of "critical potential slope failure" and the term is too vague to understand or enforce. Again, the same requirement is not included in General Permit No. WV0115924 and should not be included here.

Response 52: DWWM found the comment to be reasonable based on the fact that restoring an area should eliminate the potential for landslides. The section now reads, "All critical potential slope failure areas shall be inspected by a Registered Professional Engineer or other qualified person acting under the direction of the professional at least once every 7 calendar days and within 24 hours of any rain event of greater than 0.25 inches of rain per 24-hour period.

After the slope has been stabilized, regular inspection frequencies may resume and the Qualified Person may again conduct inspections."

A definition has been included for "critical potential slope failure".

Comment 53: J. - 1st paragraph – In the 3rd sentence, the wording "native vegetation" should be changed to "other vegetation" since it's not entirely clear how "native vegetation" would be defined.

Response 53: DWWM disagreed with the comment. Though permittees are required to seed and mulch disturbed areas, specific plants are not required. Sediment could be controlled in part when or if volunteer or native perennial plants grow and thrive on the site.

Comment 54: J. - 3rd paragraph on page 28 - In the last sentence delete the words "not conducted within the time frames prescribed herein" and insert "by the Director." Also, Commenters request that a "qualified person" be added to the list of persons permitted to submit stabilization certification for purposes of a NOT.

Response 54: DWWM disagreed with the suggestion in the comment, which did not include a justification. DWWM found the existing language to be clear.

DWWM disagreed that the stabilization certification should be prepared by anyone other than a professional engineer or professional land surveyor. The Director routinely conducts final inspections. Due to workload, a remedy was sought that would allow more timely closure of permits as the final inspection was a point of contention. Permits could not be closed until DWWM's limited field staff had time to inspect.

By agreeing to inspections by non-DWWM staff, the Director is broadening the pool of inspectors. Final inspections are deliberately limited to persons who hold a professional certification from a duly authorized state board that has examined their qualifications. The Director can report an improper stabilization certification from a professional to the respective Board and a review of the individual's actions can be conducted by that Board. Relinquishing final inspections is a serious matter and the Director has determined that professionals should conduct those inspections in lieu of his own staff. Again, this is due to workload. There are not enough DWWM inspectors to conduct timely inspections of active construction sites as well as stabilized sites.

Comment 55: J. - 1st paragraph on page 29 – The wording "individual application" should be changed to just "application" by deleting the word "individual" to avoid confusion that it could be referring to an individual permit rather than this general permit.

Response 55: DWWM agreed that clarification was needed to differentiate the approved application from an application for individual permit. The word "individual" has been replaced with "approved".

Comment 56: Appendix A, Page 33, 2nd paragraph under "Inspection Report" – Requiring that "each inspection report must be signed in accordance with C.6." (i.e. per 47 C.S.R. 10 § 4.6) is unnecessarily stringent for routine inspection reports. This sentence should be revised to read "Each inspection report must be signed by the individual performing the inspection."

Response 56: 47 C.S.R. 10 § 4.6. explains that signatory authority may be delegated. After selecting a Qualified Person to conduct inspections, the permittee would authorize that person to sign the reports. Delegation must made in writing by the responsible person and submitted to the Director. The Qualified Person would then be authorized to sign the reports and the DEP would be notified of the name of the Qualified Person.

Comment 57: G.4.e.2.A.i.c. - Please delete "(uniform perennial vegetative cover with a density of 70%)" because germination of seeding and cover are different things. Language should be added that if seeding has germinated, cover is not required in those areas. Please acknowledge and clarify known non-growing season(s)/timeframes because the non-growing season is the reason for the use of temporary mulching as a stabilization measure.

Response 57: For clarity, the permit now reads: "Areas where the seed has failed to germinate adequately within 30 days after seeding and mulching must be reseeded immediately, or as soon as weather conditions allow. Reseeding and re-mulching must be done until a uniform perennial vegetative cover with a density of 70% is attained." (See G.5.e.2.A.1.c.)

The section already contained a qualifier, "or as soon as weather conditions allow" which is all that is necessary to address the comment's concern over non-growing seasons.