



west virginia department of environmental protection

Division of Water and Waste Management
601 57th Street, SE
Charleston, WV 25304
Phone: 304-926-0495 / Fax: 304-926-0463

Harold Ward, Cabinet Secretary
dep.wv.gov

March 6, 2024

RE: WV Permit No. WV0115924
Response to Public Comments

Dear Citizen,

The State of West Virginia, Department of Environmental Protection, Division of Water and Waste Management is proposing to reissue the West Virginia National Pollutant Discharge Elimination System (NPDES) General Water Pollution Control Permit for Stormwater Associated with Construction Activities (CSW GP). The General Permit will authorize discharges to surface waters of the state for land disturbance operations during development of residential, commercial, or industrial sites. It is proposed that this General Permit be issued for a five (5) year term.

The Director of the Division of Water and Waste Management retains authority to require any owner/operator to apply for and obtain an individual WV/NPDES Permit. This authority will be exercised when the Director determines that such an individual permit will better protect the receiving water.

A virtual public hearing to take official comments on the Draft General permit was held on Monday, January 29, 2024 from 6 to 8 p.m. Seventy-seven (77) citizens attended the public hearing. According to 47 CSR 10 Section 12.3.6, the public comment period was extended 10 additional days to Friday, February 9, 2024. Over the comment period, written comments were received from fifty-one (51) commenters. All comments submitted by this time, including those provided at the hearing, have been added to the official record for the Draft General Permit and considered by the agency.

Every attempt has been made to ensure that all issues and concerns relevant to the 2024 WV/NPDES General Permit for Stormwater Associated with Construction Activities (CSW GP) were considered and addressed. While all comments are reviewed, it is beyond the purview of the DWWM to respond to comments that are not related to the CSW GP. DWWM has reviewed and considered all comments received and has prepared a Response to Public Comments.

This General Permit will be reissued March 6, 2024. Notice is hereby given of your right to appeal the terms and conditions of this permit registration of which you are aggrieved to the Environmental Quality Board by filing a NOTICE of APPEAL on the form prescribed by such Board, in accordance with the provisions of Section 21, Article 11, Chapter 22 of the Code of West Virginia within thirty (30) days after issuance of this permit registration.

Promoting a healthy environment.

Thank you for your interest and comments on the WVDEP Construction Stormwater General Permit. If you have any further questions or concerns, please do not hesitate to contact Rick Adams of my staff at 304-926-0499 ext. 43763 or by email at rick.d.adams@wv.gov.

Sincerely,

Jeremy W. Bandy
Director

JWB/rda

Enclosure

Response to Public Comments
Permit No. WV0115924

Comments are listed and sorted by permit section and/or page number. Multiple comments were provided on some sections. Those comments have been summarized and, in some cases, similar comments have been listed together. Comments are shown in *italics* with the agency response below in **bold**.

- 1.) *Page 1, second paragraph. Use of the term “Clearing” or “Land Clearing.” We do not believe that the description of construction activities found on page 1 of the Permit, should include “clearing” within the activities that are considered construction, and therefore are regulated under the Permit. Clearing refers to removal of trees and brush by cutting them off above the soil level, and by itself does not involve earth disturbance. Grubbing is shallow digging, such as would occur when vegetation is completely removed, root and all. Grubbing should be considered land-disturbing, but not clearing.*

Clearing will be removed from pg. 1 of the second paragraph. Clearing will also be removed from pg. 41 Definition 8. "Construction Activity". Construction activities are disturbing operations such as grubbing, grading, filling and excavation operations during site development for residential, commercial or industrial purposes.

- 2.) *Page 2, second paragraph from the bottom. Reference 11.11.1 should be repaired to actual reference.*

Reference to 11.11.1 has been corrected.

- 3.) *Page 2, Language in last paragraph seems to be written to bypass the public comment period for projects larger than 100 acres or lasting longer than a year. Are all projects now going to be covered for the duration of the CGP?*

Language in the last paragraph on page 2 has been revised to reference minor projects. Minor projects receive coverage for the duration of the CGP.

- 4.) *Section I.C. (pg 5) Expand Use of Enhanced Best Management Practices*

In item I.C.1., Section I.C. Water Quality of the draft permit, it is stated:

“Enhanced BMPs shall be used on projects discharging to all waters of the state except for those classified as Tier 1 streams (other than 303(d) listed). For discharges to sediment-related TMDL waters, the permittee shall use enhanced BMPS as defined in Appendix C of this General Permit.”

We request that enhanced Best Management Practices (BMPs) be required for projects discharging to all waters of the state. It is critical that all of our rivers and streams, including Tier 1 waters, are protected from water quality degradation and able to support their designated uses. Erosion and sedimentation impacts from construction activities are one of the top threats to water quality in the state, regardless of the designation of the water body. Indeed, it is noted in the Fact Sheet, Rationale, and Information for NPDES Permits for Stormwater Discharges Association with Construction Activity, “By volume, sediment is the number one pollutant in the State’s waters. One of the largest sources of sediment is construction activities. DEP records show, on average, approximately 600 construction projects each year from 2019 through 2023.”

In addition to preventing further water quality degradation, requiring enhanced BMPs for projects that discharge to all waters of the state will reduce the burden of implementing additional controls when standard BMPs are ineffective (see Section III.C. Implement Additional BMPs To Protect Water Quality). Utilizing enhanced BMPs for all projects will allow WVDEP to shift from a reactive enforcement model to a proactive enforcement model, further prioritizing the protection of our water resources.

To safeguard existing water quality, facilities are mandated to install, operate, and maintain Best Management Practices (BMPs). The Construction Stormwater General Permit (CSW GP) has stricter BMPs requirements in place to safeguard Tier 2 and 3 waters from construction site stormwater runoff. Stricter BMPs also apply to the sites that discharge to the water with Total Maximum Daily Loads (TMDLs) established for sediment-related pollutants of concern. It's important to note that most Tier 1 waters are already listed on the 303(d) list and/or have TMDLs, so they automatically require enhanced BMP controls. For the remaining Tier 1 waters, the Agency deems the general BMP sufficient, as evidenced by its requirement in a previous permit. However, the Director holds the authority to assess its effectiveness and mandate upgrades or installation of enhanced BMPs if it falls short of protecting water quality.

5.) Section I.C. (pg 5) Project Requirements for projects Discharging to Tier 3 Waters

We request that the permit include specific application requirements for projects that discharge to Tier 3 waters. More specifically, we recommend that projects discharging to Tier 3 waters have the same requirements as large construction projects, including:

- *Application Form, to include template for the sign*
- *Stormwater Pollution Prevention Plan*
- *Groundwater Protection Plan*
- *Pre-Construction Drainage Map*
- *During Construction Drainage Map showing the proposed location of all drainage structures and associated access routes*
- *Post Construction Drainage Map*
- *Annual Progress Map if permitted for longer than one year*
- *Detailed Site Plan (Maps) showing Limits of Disturbance and Receiving Waters*
- *Design Details for:*
 - o *Sediment basins, road, cut and fill cross sections, and other engineer structural design calculations*
 - o *Other control to include post-development stormwater management plans required by local governments*

These requirements, combined with the current requirements of enhanced BMPs, public notice advertisement, and increased inspection frequency for projects that discharge to Tier 3 waters would greatly enhance how WVDEP maintains and protects our outstanding national resource waters.

Minor construction projects discharging into Tier 3 streams require most of the same requirements as large projects other than design details for:

- o **Sediment basins, road, cut and fill cross sections, and other engineered structural design calculations; and**
- o **Other controls to include post-development stormwater management plans required by local governments**

These design details don't apply since minor construction projects have drainage areas of less than 3 acres.

- 6.) Page 5 et al, References to WV State Code Chapter 22, article 11 should be noted to be from "WV State Code" otherwise what Chapter 22 Art 11 is being referenced? Possibly use "hereinafter"?

WV State Code has been noted on all references

- 7.) Page 5 et al, References to Legislative code (ex. WC 47 C.S.R., 47CSR, 47 C.S.R., C.S.R. 47-26) should be consistent throughout the permit. There are several ways used and it creates confusion.

References to Legislative codes are now consistent throughout the General Permit.

- 8.) Page 5, bottom of page reference to 47 CSR. Fix to remove the space between C and S.

See Response to Comment 7.

- 9.) *Page 5, Enhanced BMPs. The Commenters ask the DEP to more carefully delimit the applicability of Enhanced BMPs. The Permit indicates that they are applicable almost everywhere, except for Tier 1 waters that are not on the 303(d) list. We see no reason why the Tier 2 waters would not be protected by regular BMPs, and there has been no justification of Enhanced BMPs for Tier 2 streams. It would benefit the regulated community if the DEP were to require Enhanced BMPs only in those locations where they were needed, such as Tier 3 streams.*

This requirement mirrors language proposed in previous permits. In compliance with Section 5.6.a of the 60 CSR Series 5 Antidegradation Implementation procedure, any regulated activity within a Tier 2 water segment must undergo the Tier 2 antidegradation review process for new or expanded activities. The Agency has mandated enhanced BMPs for Tier 2 water segments due to their high quality, as well as the Agency's responsibility to safeguard water quality. Please refer to response 12 for specific examples of enhanced BMPs.

Even if Tier 2 waters require Enhanced BMPs, it is not clear which streams are Tier 2 for purposes of this Permit, where Tier 2 streams are determined on a parameter-by-parameter basis. That being the case, which parameters are evaluated for determining whether a receiving stream is Tier 2 for purposes of Enhanced BMPs? How are permittees to know which streams are Tier 1, and which are 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. In this permit's context, sediment is deemed the primary pollutant of concern.

Moreover, it is unclear to the Commenters what Enhanced BMPs are. Condition I.C.1 requires Enhanced BMPs on all state waters except Tier 1 waters, and refers to Appendix C of the Permit. In Appendix C, "Enhanced BMPs are "activity schedules or sediment and erosion controls that are more protective of the environment than those routinely employed to qualify for coverage under this permit." This leaves permittees with no clear guidance as to what is a sufficient BMP.

See Comment Response 12.

- 10.) Page 6, fourth paragraph referring to waters of the State. State should be capitalized.

The word "state" should be capitalized only when it comes after the name of a state. This is now consistent throughout the application.

- 11.) *Page 6 "Immediate reporting", This process should be clarified and guidance provided as projects have received Notices of Violation for contacting the inspector, rather than the spill alert Telephone number. Clarify the process herein or draft a guidance document to remove confusion for both the inspection staff and the permittee.*

The permittee shall report any noncompliance that may endanger public health or the environment immediately after becoming aware of the circumstances by using the Division of Water and Waste Management's Emergency Notification Number 1-800-642-3074. A written submission shall be provided within five (5) days of the time the permittee becomes aware of the

circumstances. The written submission shall contain a description of the noncompliance and its cause; the period of noncompliance, including exact dates and times, and if the noncompliance has not been corrected, the anticipated time it is expected to continue; and steps taken or planned to reduce, eliminate and prevent recurrence of the noncompliance.

12.) I.C.1. (pg 6). *Enhanced BMPs. It is unclear to the Commenters what Enhanced BMPs are. Condition I.C.1 requires Enhanced BMPs on all state waters except Tier 1 waters, and refers to Appendix C of the Permit. In Appendix C, "Enhanced BMPs are "activity schedules or sediment and erosion controls that are more protective of the environment than those routinely employed to qualify for coverage under this permit." This leaves permittees with no clear guidance as to what is a sufficient BMP.*

Enhanced BMPs are increased site inspection and site stabilization requirements:

- **Inspection of all erosion and sediment control BMPs within disturbed areas at least once every four calendar days and within 24 hours after any precipitation event greater than 0.25 inches per 24 hours period.**
- **Repairs or maintenance to BMPs shall be performed within 24 hours, however, permittees must implement alternate BMPs prior to storm events while awaiting repair of the primary enhanced BMP.**
- **Temporary seeding and mulching within 4 days when areas will not be re-disturbed for more than 14 days.**
- **Permanent seeding and mulching within 4 days of reaching final grade.**
- **Final stabilization within 4 days after construction has been completed.**

13.) II.A.1.b. (Pg 8), Public Notice Advertisement - Item II.A.1.b., Section II.A. Applications of the draft permit, states:

"The following applications are subject to Public Notice in a local newspaper therefore, the Notarized Statement for Billing form is requirements with the application:

- *Land disturbance of more than 100 acres;*
- *Projects of 3 acres or more with a grading phase lasting one year or longer which will not meet final stabilization, as defined in Appendix C of this General Permit, by the end of the year; and*
- *Projects discharging to Tier 3 streams.*

The Director reserves the right to require advertisement for any other application type." In Appendix A, Item 13, it is stated:

"Any permittee wishing to modify his coverage for a Large Construction Activity shall submit such request at least 60 days prior to the commencement of the proposed action for modification if no public notice period is required. A modification that requires a public notice must be submitted as least 100 days prior to construction to allow for the public notice procedure.

Any permittee wishing to modify his coverage for a Minor Construction Activity shall submit such request at least 30 days prior to the commencement of the proposed action for modification if no public notice period is required. A modification that requires a public notice period must be submitted at least 60 days prior to construction to allow for the public notice procedure."

We request that all permit applications and all permit modifications require public notice advertisements. The public has a right to know and participate in the permitting processes of construction projects affecting water resources in their community, as well as any proposed modifications.

The Agency will continue requiring Public Notice for projects that disturb more than 100 acres, projects with a grading phase lasting more than 1-year and projects discharging into Tier 3 streams; however, the Director reserves the right to require advertisement for any application. DEP's Electronic Submission System's Public Query function makes all applications available to the public for easy viewing.

14.) II.A.1.b. (Pg 8), Public Notice Advertisement comments from AEP

- Readership and circulation of local newspapers is not the same as it was during previous permit cycles. Some of these newspapers are no longer in print and people are finding different ways to stay informed by using cell phones and the internet. The current public notice process adds time to receive a permit and, to date, AEP has not received any notification during the 2019 permit cycle of comments received during public notice regarding our applications. We feel that the on-site sign does generate phone calls and interest, and the DEP Public Notice Mailing List by email provides all the information needed to comment on a project. Both can be initiated when a complete application is received and would not require any additional time or costs to applicants or the DEP.
- AEP appreciates all the approaches DEP is taking with regards to environmental justice and we know that reaching all communities and making sure that citizens are aware and able to comment on projects and actions is paramount. We believe that technology has helped AEP communicate with our customers and are willing to work with DEP to provide public notice while not having to wait longer than necessary for applications to be processed.

Public Comment, hearings and effective date of permits are in accordance with West Virginia Regulation R. § 47-10-12.

15.) II.A.1.(pg 9). Major vs Minor Modifications. The Permit is unclear as to what constitutes a major modification, requiring review by the DEP before it can be implemented, and when a change is minor enough to be redlined in the field. Not every change needs prior approval by the DEP. In addition, there is a need for a description or process for using Date Change Certification forms.

Modification Types:

- Minor Modification w/\$100 fee are for adding a Co-Applicant, construction dates changes and identify existing All-Terrain Vehicle (ATV) trails to be retained by the landowner upon termination of the permit registration .
- Major Modifications w/full application fee (See Fee Schedule) whenever there is a change in design, construction, scope of operation, or maintenance of BMPs, which has the potential to adversely impact the surface waters of the State, or if the SWPPP proves to be ineffective in achieving the general objectives of controlling pollutants in stormwater discharges associated with construction activities. Construction date changes that exceed the 1-year grading phase will also require a major modification.
- SWPPP revisions may be redlined (See Modification Guidance Policy) to respond to current site conditions or to conditions not anticipated during the original design/review that do not significantly alter the design or intent of the SWPPP as approved. These will be accepted at the discretion of the permit writer or inspector,

16.) Page 12, hyperlinks to "mailto" are broken or include other words. Repair hyperlinks to allow for proper use.

Hyperlinks have been repaired.

17.) *Page 13, Repairs within 24 hours are not always feasible. Clarification should be provided as to when repairs are actually expected to be performed or what process (ie plan of corrective action with date) can be used in lieu of the 24 hour repair.*

Repairs that can't be restored within 24 hours should be noted by the Qualified Person. Permittees may implement alternate BMPs prior to storm events while awaiting repairs of the primary BMP.

18.) *II.G paragraph 3 (pg 13). Reference should read A.1.d not A.1.c.*

II.G paragraph 3 (pg 13) has been corrected to read A.1.d not A.1.c.

19.) *H.H (pg 13) title section should be corrected to read II. H.*

H.H (pg 13) title section has been corrected to read II. H.

20.) *H.H (ie II.H) (pg 13) reference to 1111.5 should be corrected to read "II.H.5".*

H.H (ie II.H) (pg 13) reference to 1111.5 has been corrected to read "II.H.5".

21.) *II.H.1.b. (pg 14) Post-Construction Flows. The post-construction flow limitations are inappropriate for this Permit, which protects water quality and imposes reasonable technology controls in the form of BMPs during the construction process. Post construction effects of stormwater runoff are properly addressed through the state's "reasonable use" standard, as developed through decisions of the West Virginia Supreme Court of Appeals.*

If there is post-construction peak discharge of 10% (or more) than the pre-construction peak discharges and 5 cubic foot per second or more for the 1-year, 24-hour storm it is appropriate to provide a stabilized channel at the discharge end where it enters a stream, natural depression or man-made conveyance.

22.) *Page 14, II.H.1.a, the type of file format allowed for submission with the permit application include a KMZ. Google Earth KMZ format is more easily used and viewed with free software while the formats currently listed require subscriptions and expensive applications.*

The Agency accepts Google Earth KMZ files for submission with the permit application in lieu of .shp and .dwg files.

Requirement for NOAA weather station. NOAA data for determining runoff calculations is great. These weather stations are not always available to report/record precipitation data to determine rain events. The NOAA gauges are often not representative of the project location. Is there any other rain gauge (ie Weather Underground, etc) that can be used instead?

The Agency is not aware of other reliable rain gauge information available.

23.) *Page 15, II.H.1.d, third bullet "tills" should be corrected to read "rills".*

Page 15, II.H.1.d, third bullet "tills" has been corrected to read "rills".

24.) *Page II.H.1.d, (Pgs 15-16). The road specifications in Condition II.H.1.d and elsewhere are unreasonable. It's unnecessary to provide full plan/profile/stationing/cross-sections of incidental construction activity roads where erosional features will be repaired but an established road base exists that can support construction equipment. A typical cross-section detail along with the access road alignment identified on the E&SC plans should be sufficient for temporary roads. Furthermore, it is unrealistic to bring*

individual segments of an existing access road up to the DEP specifications while the remaining sections remain in their current condition.

Alternative design criteria for access road drainage may be used when approved by the Director. Applicants may expand on road classification in their design specifications provided in the SWPPP. Types of roads and their respective appropriate BMPs will be considered during review.

25.) Page II.H.1.d. (Pgs 15-16). “New or Improved; Incidental Construction Activity; or Maintenance Only... All unpaved roads on the site shall be graveled or have other durable surface...”

The commenter remains confused with the categorization of roads which are introduced as “New or Improved; Incidental Construction Activity; or Maintenance Only.” The permit does not clearly distinguish haul roads, access roads, and other necessary corridors. Appendix C also fails to define these necessary roads. Further examination of II.H.1.d. states that, “All unpaved roads on the site shall be graveled or have other durable surface unless the application contains a statement that the affected landowner disagrees with this requirement.”

- **New or Improved** means earth disturbance is associated with the proposed construction therefore must be designed with appropriate access road specifications.
- **Incidental Construction Activity** - construction activity associated with the repair of a section of an existing road that is not anticipated. This work must be completed with appropriate controls but will not need to be located in the Limits of Disturbance (LOD) as long as disturbance is less than one half acre.
- **Maintenance** of an existing road such as addition of gravel or ditch repair is not required to be included in the LOD.

Strict interpretation of the permit language suggests that a temporary road within the construction limit of disturbance and utilized for a cut and fill operation must maintain a durable surface. For instance, a mile long haul road to remove material from Section A and deposited at Section B must be stoned as currently interpreted by this Commenter. For the record, this kind of activity may incorporate the utilization of large off-road trucks specifically designed for heavy hauling activity, and as a result, the land surface may become compacted, rutted, or covered with a fine pulverized material compromising any stone or durable road surface on a daily basis. Additionally, the route of the haul road from Section A to Section B may adjust to terrain on a daily basis. Another example suggests that an access road constructed for drilling and blasting must be stoned only to be exterminated upon execution of the blast. A third example would suggest access roads for the purpose of clearing and grubbing must be stoned. This Commenter does not believe that the Agency intends the permittee to apply a daily application of stone on a temporary haul or access road, but the language suggests this as a requirement in the current format. For clarity, this Commenter agrees that runoff from roads must be controlled, collected, and treated and the comment is not intended to deviate from that basic requirement.

This Commenter suggests expanding the classification of roads to include haul roads and access roads, expanding the definition of Incidental Construction Activity to incorporate haul roads and access roads, or reworking the Section to encapsulate temporary haul roads and access roads within the permitted limit of disturbance.

See Response to Comment 24.

26.) II.H.1.d. (Pgs 15-16). Roads, some landowners want to keep roads used during the project temporarily, and do not want to keep them permanently. The Permit should allow for this temporary permitting. In addition, parking areas and pull-outs should be allowed where needed, and may not always be areas that can be anticipated in the initial draft construction plan.

Temporary roads may be reclaimed as soon as practical after they are no longer needed for operations. Field modifications are allowed.

- 27.) *II.H.1.d.2 (Pg 16). One common issue that frequently arises is damage to a site caused by landowners and third parties that interferes with the ability to comply with the Permit. To the extent that ATV trails are accepted by landowner, or the landowner wants to take over any road or other area, the permittee should not be responsible for any further damage caused by the landowner or a 3rd party (e.g. grazing, tree harvesting, haying, etc.). ATV trails that are pre-existing should be noted in the Permit application, and returned in no worse a condition than they were in at the start of the project.*

Per language in II.H.1.d.2, The application for registration shall identify existing All-Terrain Vehicle (ATV) trails to be retained by the landowner upon termination of the permit registration. ATV trails that are not shown with the original application may be identified through a minor modification to the registration.

- 28.) *Page 16, II.H.1.d.2, State should be capitalized.*

The word “state” should be capitalized only when it comes after the name of a state. This is now consistent throughout the permit.

- 29.) *II.H.1.e.1, (pg 17) “a healthy, vigorous stand of grass or native vegetation that uniformly covers more than 70 percent of the ground...” Commenter comprehends the goal of securing more than 70 percent uniform permanent vegetative cover. However, the issue of concern is the subjective measurement of the vegetative cover where the Agency and the “qualified person” differ greatly on the quantitative assessment. The Agency has been vague on the methodology for measurement of vegetative cover and silent on the acceptance of advanced measuring methods utilizing drone technology.*

Uniform perennial vegetative cover with a density of 70% is a subjective measurement therefore the Agency must be in agreement with the applicant's “qualified person” prior to approving termination. Measuring methods utilizing drone technology can be considered during vegetative cover assessment. Generally, drones cannot differentiate between the GREEN from a hydroseeder and plants or tell the difference between temporary and permanent vegetation.

Further complicating the issue is the risk of an enforcement action for prematurely removing a temporary E&S control or submitting a Notice of Termination prior to final stabilization as opined by the Agency. As previously mentioned, the Agency has taken enforcement action without a clearly defined measurement protocol which includes assessment of dormant vegetation with an established and healthy root system.

It is the applicant's responsibility to obtain “Final Stabilization” of the entire drainage area contributing to the E&S Control structure prior to the removal of such structure. The structure can be removed or converted to a post management structure after approval of termination.

The commenter suggest specific language within the permit that clearly defines the measurement index as 100 percent with a clearly defined margin of error or to specify the measurement protocol including acceptance of alternative measurement methodologies. Acceptance of dormant vegetation (which is often observed as brown vegetation) with a healthy root system should also be included in the measurement protocol.

Determining density is a subjective measurement and cannot be defined with no margin of error.

- 30.) *Page 18, 11.1-1.3.b, should be corrected to read “II.H.3.b”.*

Page 18, 11.1-1.3.b, has been corrected to read “II.H.3.b”.

31.) Page 18, II.H.3.b.2. All projects should require the use of enhanced BMPs.

See Comment Response 4.

32.) Page 18, II.H.3.b.2. *Inspection/Repair Frequencies and Flexibility.* The frequency of inspections should be revised, with more stringent inspection frequencies only applied where Enhanced BMPs are required. One possibility would be giving permittees the option to use longer durations for regular inspections, with inspections required following qualifying rain events, or shorter time periods for regular inspections, without inspections following rain events. The second option might be helpful for those who can put their qualified inspectors on a regular schedule.

See Comment Response 4.

33.) II.H.3.b.2. (pg 18). We request clarification as to when precipitation events need to be inspected. We urge that inspections following rain events occur no later than the end of the next business day, if a rainfall event falls outside an ordinary business day. Subsequent repairs should be verified “during the next scheduled inspection”, and permittees should be allowed to provide inspection reports to the DEP electronically, upon request, rather than be kept onsite.

Under the CSW GP, inspection of all erosion and sediment control BMPs within disturbed areas are required within 24 hours after any precipitation event greater than 0.25 inches per 24 hours period. For any day of rainfall during normal business hours that measures 0.25 inches or greater, the total rainfall measure for that day must be recorded. WVDEP must comply with EPA's existing regulations that govern anti-backsliding regarding permit requirements.

34.) II.I.2.c.(pg 18), - Strengthen Requirements in Karst Areas. Karst areas are particularly susceptible to impacts from construction stormwater runoff for many reasons, including but not limited to, poorly understood surface and subsurface drainage patterns, increased groundwater contamination risks, and increased sinkhole formation. As such, we request that DEP better define “Karst Mitigation Plan” as referenced in Item II.I.2.c., Section II.H.5. Record Keeping. More specifically, we request that DEP require a preliminary and detailed site investigation to inform the site-specific Karst Mitigation Plan. This process is outlined in the Chesapeake Stormwater Technical Bulletin No. 1⁴. We also request that the mitigation plan be consistent with the karst-specific information presented in the Chesapeake Stormwater Technical Bulletin No. 1⁵ and Appendix C of the West Virginia Stormwater Management and Design Guidance Manual⁶.

<https://chesapeakestormwater.net/wp-content/uploads/2022/07/3300-3.pdf>

Furthermore, we request that only preferred and adequate best management practices be implemented in karst terrain, as defined in the Chesapeake Stormwater Technical Bulletin No. 1⁷. Lastly, we request that DEP add a provision under Item III.B.2.e., Section III.B. Inspections by Qualified Person to ensure that all projects in karst terrain identify, report, and remediate new sinkholes in a timely manner; and any unpermitted discharge to a new or existing sinkhole also be identified, reported, and remediated in a timely manner.

II.I.2.c. requires a GPP containing a Karst Mitigation Plan for all areas with Karst topography. Adequate design are to be considered in the GPP when making changes in areas of karst, wetlands, faults, subsidence, areas determined by the Bureau for Public Health to be delineated wellhead protection areas, or other areas determined by the Director to be vulnerable based upon geologic or hydrogeologic information.

35.) Commenters are requesting enhanced BMPs be required in karst topography regardless of the Tier of receiving stream.

All Karst areas are located above either Tier 2 or 3 streams therefore enhanced BMPs are required in karst topography.

Requirements for self-inspections” please add provisions for all areas with karst topography that ensure that all new sinkholes are identified, reported, and remediated in a timely manner and any unpermitted discharge to a new or existing sinkholes is identified, reported, and remediated in a timely manner.

Section II.I.2.c. has been rewritten to state: “A GPP containing a Karst Mitigation Plan shall be submitted with applications for registration under this NPDES General Permit for all areas with Karst topography. Include specific plans on how new and existing karst features will be identified, reported, and remediated.

36.) Page 24-26, III.B.2, Inspection Frequency. The requirement in WV for an every 4 day frequency and .25” storm events seem excessive. *It is recommended that the Agency follow the EPA General Permit and other state permit inspection frequencies that allow two options of following a longer duration with additional precipitation event inspection, or a shorter duration without a precipitation event. It is very hard for qualified persons to make it to all projects after a precipitation event and can be disruptive to scheduling and personnel management.*

See Comment Response 38

This also brings up the issue of safety. In the event roads are covered in ice, people are flooded out, etc, safety is not taken into consideration. Some language stating what to be done in the event of emergencies, natural or state declared, would be helpful.

Areas that, at the time of the inspection, are considered unsafe to inspection personnel do not have to be inspected.

Per EPA guidance regarding when precipitation inspection events must occur and has found that EPA specifies that to be business days. We request DEP follow the minimum requirements of the EPA CGP and clarify that inspections do not need to occur over weekends or on holidays and instead should occur on the next business day following a precipitation event greater than 0.25 inches per 24 hours period.

See Comment Response 33

Also 303(d) listed streams are, according to the water quality standards page, automatically considered Tier 1 Streams. Yet 303(d) and Tier 1 streams have different inspection frequencies listed in III.B.2 and III.B.2.a. Making our inspection frequency the same across the board would clarify this issue.

See Comment Response 4.

37.) Page 28, III.B.2.d, Condition III.B.2.d, which describes areas that must be inspected, includes areas that have been cleared. *For the reasons previously outlined, we urge that the word “cleared” be removed from the first bullet point, and replaced with the word “grubbed”.*

See Comment Response 1

38.) Page 28, III.B.2.g, 24 hours to complete deficiencies isn’t feasible most of the time. *It is understood that the DEP provides some leeway on this in the form of having a plan to correct within 24 hours if corrections in the timeframe are not possible, but this is not what the language says. Once again, our neighboring states have a more relaxed timeframe, providing 1-2 weeks to fix issues noted on reports.*

WVDEP must comply with EPA's existing regulations that govern Anti-backsliding regarding permit requirements.

39.) Page 28, III.C.1, SWPPP Modification. *When an inspection indicates the BMPs are ineffective at protecting waters of the state, the permittee shall immediately implement additional controls.*

- o AEP often works with our field staff and engineers to respond to site conditions and implement additional BMPs to protect water quality that we feel do not warrant formal approval by DEP unless requested so by the Director during an inspection or site visit.*
- o We point to DEP response #87 on the 2019 Permit as to how AEP interprets when we need to submit a modification for approval versus noting in the records kept at the site: "The permit affords flexibility for modification without making a formal application. Minor adjustments may be noted in the records kept at the site. The Director's field staff may approve modifications, and finally, formal modifications may be done through applications. Specially, moving to an area that drains to a Tier 3 water, extending the grading phase of a Large Construction Project beyond a year, or adding acreage so that the project will disturb 100 or more acres should be formally addressed through a modification to the registration."*
- o Examples of minor adjustments on our projects that we feel can be documented in the records on site and do not require formal modification include:*
 - Adjustments to water bars, broad-based dips, and culverts following Specification 3.35 – Access Road/Low Volume Road/Driveway to better capture hillside runoff and reduce volume of discharge.*
 - Adding or changing locations within the permit area of temporary diversions, slope drains, ditches and right of way diversions if project evaluation points do not change and permit capacity and calculation requirements are met.*

Storm Water Pollution Prevention Plans (SWPPP) for construction sites are often revised during the construction process, and this is expected as a part of the typical and desirable best management practices (BMP) implementation process. In many cases, immediate action is needed to provide adequate erosion and sediment control. As such, certain levels of revision do not require submission of a formal modification. The Agency agrees that the examples provided do not require a formal modification. The Modification Guidance Policy located at the following link will provide general guidance on when formal modifications should be requested.

<https://dep.wv.gov/WWE/Programs/stormwater/csw/Documents/Modification%20Guidance%20Policy.pdf>

40.) Page 28, III.C.1, SWPPP Modifications. *Condition III.C.2 requires a modification of the SWPPP when there is "a change in design, construction, scope of operation, or maintenance of BMPs . . ." that could affect surface waters or render the SWPPP ineffective. We request clarification that not all changes need to be addressed in formal amendments to the site registration. Some revisions to the plan are relatively modest and should be made in the field, noted for the site, and subject to review during the next inspection. We urge the DEP to clarify the situations where that can occur.*

See previous response to comment 39 and link to the Modification Guidance Policy that will provide general guidance on when formal modifications are not required.

41.) Appendix C 37 (Pg 43). Grading. *the definition of "grading" on page 43 should be revised to remove "land clearing" as an activity that is encompassed by grading. Grading involves changes in elevation caused by soil movement; mere cutting of trees and brush does not change the land surface, does not cause soil exposure, and therefore permit coverage is not needed for land clearing.*

See comment Response 1

42.) Appendix C 37 (Pg 44). Qualified Persons. This is currently quite a broad definition of what makes a person qualified. There are numerous certifications and classes that one might take whether private or state sponsored, that would aid in ensuring projects are inspected by a truly “qualified person”. CISEC, CESSWI and CPESC are some of the private certifications, where Virginia and Kentucky both have State certifications that include testing. An additional sentence saying that a qualified person had to have at least one of these might help in ensuring proper knowledge and experience, or even that Stormwater Inspectors had to get a WV Cert if the state developed and Implemented it during the permit timeframe.

“Qualified Person” means a person who is knowledgeable in the principles and practices of sediment and erosion controls, pollution prevention, and possesses the education and abilities to assess conditions at the proposed site that could impact stormwater quality and to assess the effectiveness of proposed stormwater controls to meet the requirements of this permit.”

Qualified Persons, as defined above, are responsible for conducting site inspections throughout the permit duration. While the definition of Qualified Person appears appropriate, in practice, we have observed that site inspections from such Qualified Persons can be negligent and inadequate. For example, in the Corridor H core boring project from WV72 I/C to Parsons, regular inspections by Qualified Persons did not prove sufficient for proper implementation of the Stormwater Pollution Prevention Plan (SWPPP). This was documented in the issuance of two Notice of Violations (NOVs) that noted failures to properly implement sediment control devices. The second NOV (Violation No. W23-47-004-TJC) documented a failure to address the violations detailed in the first NOV (Violation No. W22-47-025-TJC), as well as utilization of a temporary stream crossing that was not in the approved SWPPP.

As such, we request that Qualified Persons be required to undergo training of West Virginia’s best management practices and water quality standards as they relate to stormwater management and construction activities. This training could be a partnership between the WVDEP Stormwater Program and Environmental Enforcement. Such a program would help ensure that Qualified Persons are better able to properly implement the SWPPP, to include the implementation and maintenance of stormwater BMPs and remediation of failed BMPs as needed.

The permit affords flexibility to the permittee in selecting the Qualified Person to conduct inspections which was made in response to an EPA Permit Quality Review of the stormwater programs implemented by DEP.

Note that the third bullet for Incidental Construction Activity is necessary to address “tills”. This Commenter suggests that the intentional word is “rills”. Also note that the first sentence in the second paragraph at “access road requiring” is intended to be “requiring”.

The typos tills and requiring have been corrected.

43.) II.H.3.b.9.: “All diversions constructed to final grade, including clean water diversions shall be stabilized prior to becoming functional. Internal construction diversions must be stabilized upon reaching final grade ... If necessary, diversions will be used to direct runoff to the trapping structure. Diversions to trapping structures must be stabilized as they are brought to final grade to prevent sediment laden water from leaving the site.”

This section fails to recognize that a diversion ditch brought to final grade may continue to act as an internal stormwater conveyance system for areas that remain disturbed. As a result, sediments continue to accumulate in the diversion and as currently written, requires replacement of stone, matting or other strategy for stabilization whenever the diversion becomes sediment covered prior to final stabilization. For instance, a diversion ditch installed at final grade may continue to receive sediments from additional grade work on a pad, installation of utilities or roads, or modifications to final design. As a result, the

final grade ditch continues to receive sediments and over time, the final stabilization strategy becomes compromised and must be re-installed.

Current interpretation of the permit by the Agency in the field suggests that there is no requirement to apply stone or install matting along the length of a temporary internal diversion conveying runoff to a trapping structure after each significant rain event. This Commenter hopes that similar logic can be applied to a diversion at final grade when utilized as an internal diversion conveying runoff from areas not yet stabilized to a trapping structure.

This Commenter suggests consideration of allowing diversions brought to final grade to be utilized as an internal diversion or temporary diversion to trapping structures as long as approved sediment control structures (i.e. checks/sumps) are installed within the diversion and until such time all areas controlled by the diversion are stabilized. Commentor proposes consideration of this logic might be to simply state “all clean water diversions shall be stabilized prior to becoming functional.”

The Agency agrees with the interpretation for dirty water diversions. The applicant is not expected to stabilize temporary internal diversions conveying runoff to a trapping structure until they are brought to final configuration.

Clean water diversions are immediately functional upon completion of each section of ditch and should be stabilized. The construction sequence should be clear that Clean Water Diversions will be started and stabilized at the discharge end where it enters a stream, natural depression or man-made conveyance prior to completing the remaining ditch construction.

44.) III.B.2 (Pg 24-26) Inspection Frequency

With the majority of WV's streams being Tier 2,3 or 303(d) listed; the requirement in WV for an every 4 day frequency AND .25” storm events seem excessive. KY is once a week or 14 days and storm events, VA is once every 5 business days or once every 10 business days and storm events, Ohio is once a week and storm events, even TN is twice a week. WV frequency can put stormwater inspectors in the field 7 days a week, most of the time without need or cause. It seems that having a different schedule, such as a straight at least every 4 day frequency or a once every week/2 weeks with storm events would be more sustainable and better to see true progress and new problems on the reports instead of getting on the project just because the permit says so.

See Comment Response 38.

This also brings up the issue of safety. In the event roads are covered in ice, people are flooded out, etc, safety is not taken into consideration. Some language stating what to be done in the event of emergencies, natural or state declared, would be helpful.

II.A.2. Emergency Procedures. When conducting earth-disturbing activities in response to a public emergency e.g., natural disaster, widespread disruption in essential public services), and the related work requires immediate authorization to avoid imminent endangerment to human health, public safety, or the environment, or to reestablish essential public services, authorization to discharge is conditioned that a complete and accurate application is submitted within 30 calendar days after commencing earth-disturbing activities establishing eligibility under this permit.

Also 303(d) listed streams are, according to the water quality standards page, automatically considered Tier 1 Streams. Yet 303(d) and Tier 1 streams have different inspection frequencies listed in III.B.2 and III.B.2.a. Making our inspection frequency the same across the board would clarify this issue.

See Comment Response 4.

45.) *III.B.2.g (pg 28) Correct deficiencies*

24 hours to complete deficiencies isn't feasible most of the time. It is understood that the DEP provides some leeway on this in the form of having a plan to correct within 24 hours if corrections in the timeframe are not possible, but this is not what the language says. Once again, our neighboring states have a more relaxed timeframe, providing 1-2 weeks to fix issues noted on reports.

See Comment Response 38.

46.) *Appendix A.I.2. (pg 33) "When to Apply". Deadlines for submittal. In Appendix A, Condition 2 the submittal timeframes of the permit are up to 180 days, which means it can take up to half a year to start a construction project, once the application has been submitted. Current experience shows that approvals should be issued within 45 to 60 days for large projects and 30 days for minor projects. We urge adoption of those shorter deadlines.*

II.A.1.c. and II.A.1.d. outlines the submittal timeframes. Appendix A, Condition 2 has been revised.

47.) *Appendix C 37. (pg 41) "Access Roads"*

Appendix C defines "access roads" as including those that are "used" and "maintained" by the permittee. Permittees may use and maintain roads during construction activities that are not under its control and should not be subject to Permit coverage.

See Response to Comment 25.

48.) *Fact Sheet - Item 14. Include Monitoring Requirements. In item 14 in the Fact Sheet, Rationale, and Information for NPDES Permits for Stormwater Discharges Association with Construction Activity, it is stated:*

"Monitoring is not required unless requested by the Director. Construction activities are usually of short duration, less than one year, and the pollutant associated with construction is primarily sediment. The measures used to minimize pollution for land disturbing activities are preventative, i.e., best management practices (BMPs), and are not subject to effluent limits."

We request that the permit include monitoring requirements for turbidity, the primary parameter used to measure sediment and a parameter for which there are WV Water Quality Standards. Relying on preventative measures like BMPs to minimize sediment pollution does not equate to compliance with water quality standards. Indeed, BMP failures often result in water quality standard violations. For example, BMP failures during the construction of Corridor H Kerens to Parsons (WV/NPDES General Water Pollution Control Permit No. WV0115924, Registration No. WVR108594) resulted in 50 water quality violations from sediment pollution.

We understand that it is not feasible to require turbidity monitoring for all projects. As such, we recommend turbidity monitoring be required for large construction projects, projects lasting over a year, and projects discharging to Tier 3 streams. WVDEP could consider following a monitoring protocol similar to the Environmental Protection Agency's turbidity benchmark monitoring used in the 2022 Construction General Permit.

EPA finalized the Effluent Limitations Guidelines and New Source Performance Standards for the construction and development industry (i.e., the C&D rule) on December 1, 2009. The C&D rule became effective on February 1, 2010, the requirements in the C&D rule include a suite of non-numeric effluent limitations that apply to all permitted construction sites. (See 40 CFR 450.21.) The non-numeric effluent limits include requirements such as to control Erosion and Sediment.

SWPPP requirements were designed to allow maximum flexibility to develop the needed stormwater controls based on the specifics of the site. This permit requires operators of such construction sites to implement stormwater controls and develop a Stormwater Pollution Prevention Plan (SWPPP) to minimize the amount of sediment and other pollutants associated with construction sites from being discharged in stormwater runoff. The Agency deems SWPPP requirement is deemed more sufficient, as evidenced by its requirement in previous permit than requiring numeric effluent limits for sediment.

Fact Sheet - Item 15. Permit application timing. We would note that the Fact Sheet for the 2024 draft general permit references a Notice of Intent; however, there is no notice of intent in the general permit and was replaced with the Minor Construction Activity. (Condition II.A.1.d). In addition, when referencing application timeframes, the fact sheet again mentions a notice of intent that is to be submitted 15-days prior to initiating construction. This contradicts the draft general permit which states that projects from one-acre to less than three-acres in size should submit 30-days prior to construction. (Condition II.A.1.d).

The fact Sheet has been updated so that the “Notice of Intent (NOI)” and “Site Registration Application (SRA)” will be removed. The timeframe for submission of Minor Construction projects has been corrected to 30 days.

49.) *Fact Sheet - Item 17. One change AEP did notice from the 2019 permit is how projects with current authorization may retain coverage under the 2024 permit. Since no significant changes (Fact Sheet, Item 17) were made to the draft permit, AEP feels that a simple rollover certification notice should cover any existing permit until the site area has met final stabilization. The Electronic Submission System (ESS) already includes all project location maps and project timeline information, and with Enhanced BMPs already in effect there are no areas that would fall out of compliance with new requirements. A simple straight-forward certification saves applicants and DEP time and money while ensuring construction activities continue authorization to discharge until a Notice of Termination is submitted.*

Applicants will have 90 days to file a NOT or submit a signed certification of agreement to continue to abide by the terms and conditions of this reissued General Permit. Additional application fees do not apply to the certification if there are no changes to the project timeline; however, a modification will be required if the construction and stabilization dates are different from the original application.

- **Minor modification (\$100 filing fee) if the grading phase is less than 1-year or the original application went to public notice.**
- **Major modification (Full application fee) with a progress map if the grading phase has or will exceed 1-year and the original application did not go to public notice. Based on the progress map, the Agency will determine if the project will be sent to public notice.**

50.) West Virginia Code of State Rules 47CSR10-12.3 Public Hearings

Ensure Correct Comment Period Deadline in Public Notice - In the West Virginia Code of State Rules 47CSR 10-12.3., it is stated: “12.3. Public hearings.

12.3.a. The Director shall hold a public hearing whenever he or she finds, on the basis of requests, a significant degree of public interest on issues relevant to the draft permit(s). The Director also may hold a public hearing at his or her discretion whenever, for instance, such a hearing might clarify one (1) or more issues involved in the permit decision.

12.3.b. Any person may submit oral or written statements and data concerning the draft permit. Reasonable limits may be set upon the time allowed for oral statements, and the submission of statements

in writing under subdivision 12.1.b above shall automatically be extended to ten (10) days after the close of any public hearings under this section.

12.3.c. A tape recording or written transcript of the hearing shall be made available to the public upon request.”

Despite this regulatory requirement, the public notice and public hearing notice for the Construction Stormwater General Permit No. WV0115924 stated otherwise:

“A virtual public hearing has been scheduled to take official comments on the Draft General Permit. The hearing has been scheduled from 6 to 8 p.m. on Monday, January 29, 2024... Any person may submit oral or written statements concerning the Draft General Permit...Written comments on the Draft General Permit can be submitted via email to DEP.Comments@wv.gov or regular mail... The comment period closes at the conclusion of the virtual hearing. All comments submitted by this time, including those provided at the hearing, will be added to the official record for the Draft General Permit and considered by the agency.”

In the public notice for the Stormwater Construction General Permit, DEP did not follow the regulatory requirements to extend the comment period for written statements to ten days after the close of the public hearing. Instead, the public notice indicated that the comment period closed at the conclusion of the virtual hearing. The error was corrected during the public hearing, held on Monday, January 29th, where it was stated that the comment period for the proposed reissuance will be open until 5pm on Thursday, February 8th 2024.

Although the error was corrected, it was not until during the public hearing. The inability to follow regulatory requirements in the public notice was a cause of confusion for many of the community members and community-based organizations interested in preparing written comments. We request that WVDEP take care to follow the regulatory requirements in future public notices and incorporate 47CSR 10-12.3. into the WVDEP's public engagement guidelines⁸ so that information is clear and easily available to the public.

WVDEP follows 47 CSR 10-12.3 for public notice and public hearing procedures.

51.) Consistent, Transparent Public Hearing Structure

We request DEP include a question-and-answer period in all public hearings. Currently, some public hearings have question and answer periods, and some do not. For example, the public hearing held on Tuesday, December 19th, 2023 for the Core Drilling Permit Parsons-Davis, No WVR112141 MOD-2 included an informational presentation, a question-and-answer period, followed by a verbal comment period. However, the public hearing for the Stormwater Construction General Permit, held on Monday, January 29th, 2024 only included an informational presentation and a verbal comment period. This inconsistent public hearing structure is confusing for stakeholders who engage in permitting processes. Even more, denying the public the opportunity to ask questions hinders transparency and erodes trust. Transparent public engagement requires a two-way dialogue between DEP and the public. Requiring a question-and-answer period for all public hearings would increase transparency and provide an opportunity for open communications between DEP and the public on issues of significant public interest. As such, we request WVDEP require a question-and-answer period for all public hearings and incorporate that requirement into the public engagement guidelines. This will provide the public with a consistent, transparent public hearing structure, thus enhancing public engagement.

See Response to Comment 14.

52.) Permit changes that were previously approved

The previous Permit was issued in January of 2019. On June 10, 2019, the Environmental Quality Board issued an order (the "Order") requiring the inclusion of several revisions to the previous version of the Permit. The revisions in the Order represented terms mutually agreed upon by the DEP and the parties who had taken the appeals.

The U.S. Environmental Protection Agency ("EPA") objected to certain terms that were negotiated with DEP, however, there were many negotiated changes that EPA did not object to and that nevertheless were not amended into the 2019 permit. There is no reason that the changes negotiated and agreed to in 2019, and found in the Board's Order, should not be made now, in 2024. Those changes that EPA did not object to are re-presented as comments, below.

- 1. Allowable Discharges. The DEP should replace the text from Section I.F with language from Section G.2 of the 2012 permit, which is similar to that in the 2022 federal construction stormwater permit, that specifically provides coverage for certain non-stormwater discharges:*

All discharges authorized by this permit shall be composed entirely of stormwater, except as follows:

Discharges from emergency firefighting activities, fire hydrant flushing; waters used to wash vehicles, provided there is no discharge of soaps, solvents, or detergents used for that purpose; waters used to control dust; potable water sources, including uncontaminated waterline flushing; landscape irrigation; lawn watering; routine external building washdown which does not use detergents; pavement washwater provided spills or leaks of toxic or hazardous materials have not occurred (unless all spilled material has been removed) and where detergents are not used, provided that such pavement wash waters may not be discharged directly into any surface water, storm drain inlet, or stormwater conveyance, unless the conveyance is connected to a sediment basin, sediment trap, or similarly effective control; uncontaminated air conditioning condensate; uncontaminated, non-turbid discharges of groundwater or springs; foundation or footing drains where flows are not contaminated with process materials such as solvents that are combined with stormwater discharges associated with industrial activity; and other construction dewatering activities that are treated by an appropriate control.

This permit does not authorize the conveyance, diversion, channeling, directing or otherwise allowing the discharge of stormwater into a sinkhole without an Underground Injection Control Permit.

- 2. Control Permit*

Notices of Intent for Minor Construction Projects. Small construction projects should be permitted under an expedited application and approval process. We urge the DEP to allow sites that are greater than 1 acre but less than 3 acres, that will be completed in less than a year from the start of earth disturbance, and that do not discharge into or upstream of a Tier 3 water, to register under a Notice of Intent ("NOI") that would be easier to qualify for than the present Minor Construction Permit found at II.A.1.d

The NOI could be submitted, along with a Stormwater Pollution Prevention Plan ("SWPPP") and Groundwater Protection Plan ("GPP"), 15 days before beginning earth disturbance, with the DEP providing its written confirmation of coverage via email, or otherwise in writing, within 10 days of submission. If no response from the DEP is received, construction could proceed 15 days after submitting the NOI, provided that the permittee provides notice by email or otherwise to the DEP prior to commencing earth disturbance. The NOI would not be subject to public notice other than notification on the

DEP website and signage at the site of the construction project. Each NOI would be effective for a period of one year from the date that earth disturbance commences, and could be closed out with a report to the DEP once the site is stabilized. The permittee would not have to wait for a closeout inspection in order to terminate coverage, but would document that stabilization had been achieved.

If earth disturbance and stabilization under a NOI could not be practicably completed within one year, the permittee would have to file for an extension 30 days before the completion of the one year period from date of first earth disturbance, at which time the DEP could require an application for a minor construction project, pursuant to II.A.1.d.ii, or impose additional conditions on the permittee. Permit coverage would continue until the Minor Construction Project permit is issued.

The following language, which is drawn from the revision that was agreed to in 2019, is one possible change that could be made as Section II.A.1.d of the permit

II.A.1.d. Minor Construction Projects

II.A.1.d.i. Projects disturbing more than one acre but less than three acres that do not discharge to or upstream of Tier 3 waters, and will be completed within 12 months, shall submit the Notice of Intent Form (NOI) at least 15 days prior to initiating earth disturbance. The DEP shall provide its written confirmation of coverage via email or otherwise, within 10 days of submission of an NOI. If no response from the DEP is received, construction can proceed 15 days after submitting the NOI, provided that the permittee provides notice by email or otherwise to the DEP prior to commencing earth disturbance. Permit coverage for any project authorized through an NOI automatically terminates at the end of 12 months from the date of issuance of the site authorization to the NOI registrant. Any person authorized under an NOI that cannot complete all required work prior to the automatic termination must file an application for coverage as a minor activity 30 days prior to the termination date. All permit terms and conditions must be complied with, provided however, that because the permit authorization terminates automatically, no Notice of Termination (NOT) is required.

II.A.1.d.ii. A project that disturbs one to less than three acres but will not complete construction and post-construction activities within 12 months must file an application as set forth below.

Projects disturbing 1 to less than 3 acres of land but not qualifying to use the NOI other than single-family homes as explained in Part II.A.1 .e. below, shall submit an application containing the following:

- *Application form, to include template for the sign*
- *Stormwater Pollution Prevention Plan*
- *Groundwater Protection Plan*
- *Pre-Construction Drainage Map*
- *Temporary Drainage Structure Maps*
- *Site Plan (Map) showing Limits of Disturbance and Receiving Waters*
- *Typical Design Details*

Applications for Minor Construction Projects that do not qualify for a NOI shall be due 30 days before the anticipated date earth disturbance is to begin. For Large Construction Projects, permit registration applications would be submitted 45 days in advance of earth-disturbing activities.

Similarly, the time periods for consideration of Permit modifications in Appendix A, Section 13 should be revised to more reasonable time limits, similar to the following:

13. Permit Modification

This permit may be modified, suspended, or revoked by the Director in whole or in part during its term in accordance with the provisions of Chapter 22, Article 11 of the Code of West Virginia.

Any permittee wishing to modify his registration for a Large Construction Activity shall submit such request at least 45 days prior to the commencement of the proposed action for modification.

Any permittee wishing to modify his registration for a Minor Construction Activity shall submit such request at least 30 days prior to the commencement of the proposed action for modification.

Any permittee wishing to modify his registration under a NOI shall submit such a request at least 15 days prior to the commencement of the proposed action for modification.

3. *Groundwater Protection Plans. We urge the DEP to revise Section II.I.1 of the Permit, and other relevant portions of the Permit, to allow for GPPs to be submitted with an application in an incomplete form, and then for updates to the GPP to be submitted as the plan is changed. In many situations, the identity of the person who will be performing the construction work will not be known at the time Permit coverage is requested. As long as the GPP is updated as information becomes known, with a complete GPP provided at least 10 days before beginning earth disturbance activities, the DEP will have sufficient time to review the changes and respond to the applicant with any objections or changes. If no response is received from the Director, the Operator could begin earth disturbance as planned. A copy of the GPP would be maintained at the site of the construction activity and available for review by the Director upon request. This could be accomplished with the adoption of the following, or substantially similar, language in Section II.I.1:*

GPPs shall be prepared in accordance with the requirements of 47 C.S.R. 58 (Groundwater Protection Regulations). GPPs shall be submitted using a template provided by the DEP, and shall only include the information available at the time of application. It is understood that some aspects of the GPP, such as the type of tanks and equipment that contractors will be using at the construction project, may not be known at the time the GPP is submitted with the Notice of Intent or Application. In that event, the GPP should be submitted with the Notice of Intent or Application with as much information as possible when originally submitted, and updated thereafter as additional information comes available. A complete GPP must be submitted to the Director at least 10 days before commencing earth disturbing activities, with the DEP providing a response within 5 days of the submission, and a copy of the GPP shall be retained on the construction site and available for review by the Director upon request.

4. *Graphical Representation of Stormwater Project Features. The requirements for graphical representations should be changed to allow illustrations in a format other than ArcGIS Shapefile (.shp) or AutoCAD Drawing (.dwg). The Permit requires use of ArcGIS Shapefiles or AutoCAD drawings, which are more resource-intensive than may be needed in some circumstances, such as providing updates on minor changes to a site plan. In addition, the cost of acquiring ArcGIS Shapefiles or AutoCAD can be significant. We understand that the DEP may be concerned that*

allowing other types of illustration may not provide sufficient clarity or information, but we encourage the DEP to leave open the possibility of using other formats, such as Google Earth KML format. This could be done by amending Section II.H.1.a and other relevant locations to state the following, or something substantially similar: "The project shall be illustrated in an ArcGIS Shapefile (.shp) or AutoCAD Drawing (.dwg), unless the Director allows use of some other means of illustrating the site or project."

5. *Removed Substances. We propose revising the first paragraph of Appendix B, Section I.5 to require adherence to 33 CSR 1, rather than leave permittees uncertain as to whether they need the DEP's approval to dispose of contaminated media, using the following language, or something similar:*

Spills and releases must be cleaned up expeditiously, and contaminated media must be properly disposed in accordance with all applicable requirements of 33 CSR 1

6. *Record Retention. The Commenters propose revising Sections II.H.5 and Part IV to clarify record keeping requirements. The Permit's record keeping requirement is unnecessary for construction stormwater permittees because projects authorized under the Permit are not authorized to undertake an ongoing, long-term discharge, but instead authorize only discrete construction projects. After project completion, there is no need for the permittee to keep records. Accordingly, we believe that records required to be submitted to the DEP should be retained by the DEP, with the permittee only being required to retain those records pertaining to the project not required for submission to the DEP. This could be done by amending Sections II.H.5. and Part IV — Requirements After Construction to provide for the DEP to keep such records as it deems advisable.*
7. *Technical revisions related to mapping, engineering information, and roads. There are several changes that would improve provisions of the Permit related to applications, SWPPPs and other information required to be prepared, retained or submitted to the WVDEP. Specifically, Section II.H.1. could be amended to clarify that a description of major grading phases is required, rather than a schedule of such phases, which may be impossible to predict. This could be done by adopting language substantially similar to the following:*

The SWPPP shall contain a description of the nature of the construction activity, including a projected or planned timetable for major activities such as: cut and fill plans, proposed road construction or upgrades, grading plans, and a narrative of the pollution prevention techniques proposed to be implemented before, during and after construction. The narrative shall also include a description of planned major grading activities and stabilization measures.

The current requirement that maps submitted with a SWPPP, GPP or application must have a North arrow to allow for proper review could mean unnecessary adjustments to maps that are not drafted with a northern orientation. This could be changed by amending Section II.H.1.a. of the Permit by adopting the following: "Site maps shall contain a North arrow, with a minimum of five-foot topographical contours."

The information and the scope of mapping required in Section II.H.1.b. is excessive for minor construction projects. The required data and mapping should be limited to information that is necessary for the DEP to perform its evaluation, subject to requests for additional information where needed. In addition, the requirement for the submittal of cross-sections depicting cut and fill areas of one acre or more should be unnecessary given the other required information that will be submitted to the agency, including the

information required by Section II.H.1.a.1. This could be accomplished with language substantially similar to following:

II.H.1.b. The map shall be accompanied by a description of an estimate of the total area of the site, the part of the site that is expected to undergo excavation or grading, and the estimated total amount of excavation by cut and fill as well as a general description of where excavated material will be placed on the site.

Where a Minor project (less than 3 acres), or a project not designed by a professional engineer, contains cut and fill areas, the agency reserves the right to request additional information on a case-by-case basis to assure that slip potential is sufficiently limited.

The road specifications set forth in Section II.H.1.d. of the Permit, should be amended by reducing the overly prescriptive requirements in Best Management Practices ("BMPs") therein. This could be done by amending Section II.H.1.d with language similar to the following:

II.H.1.d. Each road or access road shall be classified as either permanent or temporary and categorized as Construction Activity — New or Improved; Incidental Construction Activity; or Maintenance Only. Construction requirements of this section apply to newly constructed roads (i.e., those constructed after the effective date of this Permit), and mere use of a road without improvement by land disturbance is not subject to the Permit, as long as that use is consistent with its original purpose.

Each newly constructed access road shall be designed with the following specifications:

- Stone access entrance and exit drives.
- Parking areas to reduce the tracking of sediment onto public or private roads.
- All unpaved roads on the site shall be graveled or have other durable surface or shall implement BMPs chosen to effectively control sediment and erosion. Unpaved roads shall be stabilized in accordance with II.H.1.d.1.
- The maximum slope for an access road shall be reasonably designed taking into consideration all site factors, including but not limited to, topography, soil type, other construction activity, etc. Slopes in excess of 20% shall be described in the site plan drawings.
- The surface shall pitch toward the ditch line at a minimum slope of 2%. A road located in an area that doesn't have hillside runoff may be crowned with a slope from the center line.
- A ditch shall be provided on the inside of any road having hillside runoff, with ditch relief culverts and/or water bars spaced according to grade and installed wherever necessary to insure proper drainage of runoff water beneath or through the access road.
- Ditch lines shall be capable of passing the peak discharge of a 10-year, 24-hour precipitation event.
- Ditch relief culverts shall be capable of passing the peak discharge of a 2-year, 24-hour precipitation event.
- Sediment control shall be provided at the inlet by sumps, rock checks, or equal structure and the slope at the outlet end shall be protected with an apron of rock riprap, a water energy dissipater, or other similar structure.
- Alternative design criteria for access road drainage may be used, but only when approved by the Director.

should be updated as appropriate based on site conditions, and updates should be approvable by a field inspector and not require modification of the registration. The registration modification language in Section III and Appendix A, No. 13 of the Permit (and in other parts of the Permit as necessary to effectuate this change) should be revised to reflect this, by incorporating language substantially similar to the following:

PART III. REQUIREMENTS DURING CONSTRUCTION

During construction, the permittee is required to:

** * **

- Update the SWPPP/GPP with the revised or additional controls and retain the updated SWPPP/GP on site;*
- Submit modifications to the approved plans when necessary to reflect the addition of controls outside of the existing LOD, or significant revisions to the SWPPP/GPP where the Director has requested a modification in writing, and*

** * **

III.C.2. The permittee shall update the SWPPP, using forms provided by DWW, whenever there is a change in design, construction, scope of operation, or maintenance of BMPs, which has the potential to adversely impact the surface waters of the State, or if the SWPPP proves to be ineffective in achieving the general objectives of controlling pollutants in stormwater discharges associated with construction activities. Should conditions warrant, the Director may request changes to the SWPPP during a field inspection. The Director may request, review and approve such updates or require the permittee to apply for a modification to the approved application when necessary to reflect the addition of controls outside of the existing LOD, or significant revisions to the SWPPP where the Director has requested a modification in writing.

The permittee shall update the GPP whenever there is a change in design, construction, operation, or maintenance of BMPs which could reasonably be expected to have an impact on the potential contamination of groundwater. The Director may review and approve such updates or require a modification when necessary to reflect the addition of controls outside of the existing LOD, or significant revisions to the GPP where the Director has requested a modification in writing.

- 9. Definition of "access road." The "access road" definition in Appendix C should be modified to make clear that active working areas where vehicles may travel are not access roads, and to limit the scope of what areas within a road right-of-way are considered to be part of an access road. This could be accomplished by adopting language substantially similar the following:*

"Access Road" means surface road bed area within a right-of-way for purposes of travel by land vehicles and/or equipment used in Construction activities. A road consists of the area within the right-of-way that includes the roadbed, shoulders, adjacent parking and side areas, approaches, adjacent ditches, and other adjacent or contiguous related structures. The term includes access roads constructed, reconstructed, or improved for use in all construction operations, provided, however, this term does not include general areas of construction activities, or the active construction area for cut and fill activities, where vehicles travel but are not areas specifically designated for travel to and from the construction site.

- 10. Installation of erosion and sediment controls. The Commenters believe that Section II.F should*

be revised for clarity regarding erosion and sediment controls. Such controls should be installed in accordance with a permittee's NOI or approved application prior to land disturbance associated with the project's construction activities. This could be incorporated into the Permit by adopting language substantially similar to and with the same substantive meaning as the following:

11.F. INSTALLATION OF EROSION AND SEDIMENT CONTROLS After receiving approval from the Director and before beginning construction activities, the permittee shall install erosion and sediment control BMPs in accordance with the approved registration. BMPs shall be in place and functional prior to land disturbance associated with the authorized construction activities. For registrations proposed to be completed in multiple phases, the BMPs for each phase must be constructed and functional prior to land disturbance beginning in that phase associated with the authorized construction activities. Erosion and sediment control BMPs shall be implemented in accordance with standard procedures set forth in the BMP Manual, however, other BMPs may be used if equally protective of water quality.

The United States Environmental Protection Agency (EPA) has specifically objected to incorporating language modifications proposed by the Environmental Quality Board (EQB) Settlement Agreement. These proposed changes were submitted on multiple occasions but were ultimately rejected by the EPA. According to 47 CSR 10 renewing or reissuing a permit, interim limitations, standards, or conditions must be at least as stringent as the final limitations, standards, or conditions in the previous permit. As you are aware, this permit is similar in terms of permit conditions to the previously issued permit in 2019. In furtherance of the timely issuance of the permit, the Agency, having engaged in comprehensive discussion with the United States Environmental Protection Agency (EPA), has reached an agreement to reissue the previously issued permit.