



**STATE OF TENNESSEE
DEPARTMENT OF ENVIRONMENT AND CONSERVATION
DIVISION OF WATER POLLUTION CONTROL
401 CHURCH STREET
L & C ANNEX 6TH FLOOR
NASHVILLE TN 37243-1534**

Addendum to Rationale
Including
Record of Comments and Responses
(Notice of Determination)

**General National Pollutant Discharge Elimination System (NPDES)
Permit for Discharges of Storm Water Associated
with Construction Activities**

Permit No. TNR100000

May 23, 2011

Administrative Record

The permit rationale (or fact sheet) dated September 21, 2010, sets forth the Division of Water Pollution Control's (division's) basis for permit conditions to be applied statewide for the issuance of the new Tennessee National Pollutant Discharge Elimination System (NPDES) General Permit for Discharges of Storm Water Associated with Construction Activities (CGP). The CGP is intended to authorize storm water point source discharges to waters of the State of Tennessee from construction activities that result in the disturbance of one acre or more of total land area.

The current CGP expired on May 30, 2010. On September 21, 2010, the division issued Public Notice #PH 10-017, which announced the public hearings, which were conducted at the following dates and locations:

Date	City	Location	Time
October 27, 2010	Nashville, TN 37243	401 Church Street 17 th Floor L&C Tower Conference Room 17 "B"	12:00 P.M. Central Time
November 10, 2010	Chattanooga, TN 37402	Chattanooga EFO Auditorium 540 McCallie Avenue	12:00 P.M. Eastern Time
November 17, 2010	Knoxville, TN 37921	3711 Middlebrook Pike	12:00 P.M. Eastern Time
December 1, 2010	Jackson, TN 38305	1625 Hollywood Drive	12:00 P.M. Central Time
December 8, 2010	Bartlett, TN 38134	Bartlett Station Municipal Center 5868 Stage Road	12:00 P.M. Central Time

On September 21, 2010, the division issued Public Notice #MMX-018, which announced its intent to issue the CGP. Copy of the draft CGP permit was made available in an electronic format on the division’s web site at http://tn.gov/environment/wpc/stormh2o/draft/tnr100000_cgp_draft.pdf. The proposed NPDES permit was drafted in accordance with the provisions of the Federal Water Pollution Control Act, the Tennessee Water Quality Control Act, and other lawful standards and regulations. The division received comments through December 20, 2010. This Notice of Determination (NOD) serves as the division’s response to questions, comments and issues that were raised at the hearing and/or submitted during the subsequent comment period.

Comments and Responses

Part/Section	Comment
General	All planting aspects (buffers, permanent stabilization, final stabilization) should require native vegetation only.

Response:

The division always encourages construction site operators to use native vegetation for stabilization purposes. The final permit, for example, in sub-section 3.5.3.2, states (emphasis added): “*Permanent stabilization with perennial vegetation (using native herbaceous and woody plants where practicable) or other permanently stable, non-eroding surface shall replace any temporary measures as soon as practicable.*” However, mandating native vegetation for all temporary and permanent stabilization is beyond the regulatory scope of this permit.

Part/Section	Comment
General	All documents required to be available to the Director must also be made available to the public upon request.

Response:

All documents, except for those considered attorney-client privileged information, are available to the public upon request.

Part/Section	Comment
General	Define the term “initial permittee.”

Response:

The phrase “initial permittee” was replaced with the phrase “site-wide permittee.” The “site-wide permittee” is defined as “*typically owner/developer, or primary permittee who applied for coverage at project commencement*” (see page 4 of the final permit).

Part/Section	Comment
General	The division must explain how general permit coverage complies with the State's anti-degradation statement.

Response:

The antidegradation policy in Tennessee Rules, Chapter 1200-4-3-.06 requires that degradation of existing water quality be prevented unless necessary for economic and social benefit. The division believes that existing water quality will not be degraded by the issuance of this permit. The stormwater discharges authorized by this permit have been on-going since the federal regulations requiring an NPDES permit were adopted. The goal of the permit is a net reduction in pollutant loadings over the five-year permit term. This permit will reduce the current level of pollution discharged from construction activities. Stormwater discharges are highly variable in nature and difficult to control due to topography, land use and weather differences (e.g., intensity and duration of storms). The permit does not set numeric discharge limits. However, through an adaptive management process, the permittees are required to regularly review and refine their construction practices and EPSC measures to eliminate, or at a minimum, minimize discharge of pollutants. Therefore, the issuance of this permit will protect and improve existing water quality and is consistent with the division's antidegradation policy.

Part/Section	Comment
1.2.4	This section allows for mixing of other permitted discharges with stormwater discharge, which contradicts a statement in sub-part 1.3 - Limitations on Coverage.

Response:

Section 1.2.4. Other NPDES-permitted discharges, states:

Discharges of stormwater or wastewater authorized by and in compliance with a different NPDES permit (other than this permit) may be mixed with discharges authorized by this permit.

Sub-part 1.3, paragraph b) states:

Discharges Mixed with Non-Stormwater - Discharges that are mixed with sources of non-stormwater, other than discharges which are identified in section 1.2.4 above (Other NPDES-permitted discharges) and in compliance with section 3.5.9 below (Pollution prevention measures for non-stormwater discharges)

Section 1.2.4 describes NPDES-permitted discharges, while section 1.3 explicitly prohibits mixing of any unpermitted discharges with construction stormwater runoff. These two paragraphs are not contradictory, as they address different discharge scenarios.

Part/Section	Comment
Cover Page, 1.3 and 5.4	The permit language is confusing in regards to compliance requirements for discharges into impaired segments and/or exceptional TN waters, as well as the antidegradation statement. The permit should clarify that references to impaired streams are equivalent to references to “unavailable conditions” waters.

Response:

Special requirements, as presented in part 5.4 (Discharges into Impaired or Exceptional Tennessee Waters), apply to discharges into impaired streams and/or exceptional Tennessee waters. Clarifications in the permit language were made on the cover page, sub-part 1.3, paragraph (g) and sub-part 5.4 and the definition of “impaired waters.” In addition, the following sentences were added to sub-part 1.3, paragraphs (e) and (g) and section 5.3.2 (Discharge quality):

“Compliance with the additional requirements set forth in sub-part 5.4 is not considered as contributing to loadings to impaired waters (exceptional quality waters for paragraph g) or degradation unless the division determines upon review of the SWPPP that there is a reason to limit coverage as set forth in paragraph d) above and the SWPPP cannot be modified to bring the site into compliance.”

“Construction activity carried out in the manner required by this permit shall be considered compliance with the TDEC Rules, Chapter 1200-4-3-.03.”

Part/Section	Comment
1.3	Add at end of paragraph e): <i>“No measurable change in TSS or turbidity or visible change is permitted in the receiving impaired segment as this would be in violation of Tenn. Comp. R. & Regs. 1200-4-3-.06(2). This can be demonstrated through photographs or sampling.”</i>

Response:

TDEC Rules, Chapter 1200-4-3-.06(2) states:

(2) Unavailable conditions exist where water quality is at, or fails to meet, the criterion for one or more parameters. In unavailable conditions, new or increased discharges of a substance that would cause or contribute to a condition of impairment will not be allowed. Where impairment by habitat alteration exists, additional significant loss of habitat within the same area of influence shall not be authorized unless avoidance, minimization, or in-system mitigation can render the impact de minimis.

Suggested language does not reflect requirements from the cited paragraph, nor can it be associated with any other section of TDEC Rules, Chapter 1200-4-3. Since there is no regulatory basis for the suggested language, it will not be included in the final permit.

Part/Section	Comment
1.3	Paragraph h) prohibits discharges that are not protective of threatened and endangered species: “... or discharges or activities that would result in a “take” of a state or federal listed endangered or threatened aquatic or wildlife species deemed in need of management or special concern species, or such species’ habitat.” Does this mean that a project that would impact <u>any</u> habitat or endangered or threatened species would not be eligible for coverage under the CGP? It would be logical that this prohibition would apply to aquatic habitats only, i.e. habitats that have reasonable potential to be impacted by storm water runoff from construction sites, but the intent is not clear based on the wording in the draft permit.

Response:

It is the division’s goal to assure protection of all state or federal listed threatened or endangered aquatic or wildlife species (TES) deemed in need of management or special concern species, or such species’ habitat. The division’s standard operating procedure is to check for presence of TES in one mile radius as well as 5 miles downstream from the proposed construction site. If presence of TES is confirmed, the permittee is informed of this fact via letter. The primary responsibility for administering the Endangered Species Act (ESA) is with the U.S. Fish and Wildlife Service. The division provides weekly updates to the U.S. Fish and Wildlife Service with a list of species identified, as well as with location information for all notices of intent received in our offices. State Water Quality Standards are inherently protective of all fish and aquatic life, including any TES. Discharges from construction sites that are in compliance with permit terms and conditions are in compliance with Water Quality Standards and, therefore, protective of any TES.

Part/Section	Comment
1.4.2	The phrase “ <i>or primary permittee who applied for coverage at project commencement</i> ” should be added within parenthesis in the second sentence.

Response:

The second sentence of the first paragraph in section 1.4.2 was changed to read:

“The initial, comprehensive SWPPP, developed and submitted by the site-wide permittee (typically owner/developer, or primary permittee who applied for coverage at project commencement), should address all construction-related activities from the date construction commences to the date of termination of permit coverage, to the maximum extent practicable.”

Part/Section	Comment
1.4.4	The division’s website should be included in the last sentence of this paragraph.

Response:

A complete URL for the Data Viewer(<http://www.tn.gov/environment/wpc/dataviewer/>) was included in the final permit.

Part/Section	Comment
1.5.1	The last sentence of the second paragraph should be revised to correspond with the NOI language: <i>“Correspondence with the permittee is maintained through the Site Owner or Developer listed in the NOI, not the optional contact or the secondary permittee.”</i>

Response:

The suggested change was incorporated in the final permit.

Part/Section	Comment
1.5.1	The draft permit and the permit rationale appear to stipulate that coverage under the CGP can not be obtained until all other necessary and relevant permits are obtained. The regulatory permitting process for many projects can often be complicated, with extended timeline. This requirement appears to be overly restrictive, and it could delay construction activities at a significant cost to a developer while other permits are being drafted by the division. Define <i>“certified party”</i> or remove this phrase from the section 1.5.1 of the final permit.

Response:

It was never the division’s intent to delay CGP issuance until other permits are issued, but for other permitting requirements to be adequately addressed (e.g. other permits may be pending). The phrase *“certified party”* was removed from the final permit. Also, few other corrections were made to section 1.5.1 to further clarify division’s position:

“If any Aquatic Resource Alteration Permits (ARAP) are required for a site in areas proposed for active construction, the NOC will not be issued until ARAP application(s) are submitted and deemed by TDEC to be complete. The treatment and disposal of wastewater (including, but not limited to sanitary wastewater) generated during and after the construction must be also addressed. The issuance of the NOC may be delayed until adequate wastewater treatment and accompanying permits are issued.”

Part/Section	Comment
2.1	Does the sentence: <i>“The first original primary permittee is also the initial permittee”</i> relate to transfer of responsibility at construction sites?

Response:

That sentence was not intended to relate to transfer of responsibility at construction sites, but to emphasize the special role of an initial permittee (site-wide permittee in the final permit), particularly in respect to preparation of a comprehensive Storm Water Pollution Prevention Plan. For clarification purposes, word “original” was removed from the final permit.

Part/Section	Comment
2.2.3	The last sentence of the second paragraph should be revised to say: <i>“The contractor should sign the NOI and SWPPP associated with the construction project.”</i>

Response:

The suggested change was incorporated in the final permit.

Part/Section	Comment
2.4.1	This section states, in part: <i>“The division may, at its discretion, require permittees to confirm their intent to be covered under this new general permit following its effective date through submission of an updated NOI.”</i> Why would the division ask for confirmation of a permittee’s intent to remain covered? Does this mean all or selected permittees? The division should send permittees a WRITTEN notice of the requirement and require a WRITTEN confirmation of their intent to remain covered.

Response:

This requirement is likely to be used at construction sites where construction appears to be complete, but the notice of termination has not been received by the division. Another example would be if the division is uncertain of whom is an operator at an active construction site. It is not the only requirement in the CGP for which the division retains its discretion for making a decision upon specific circumstances. Being the matter of discretion, only selected permittees will be required to submit an updated NOI. Since NOIs can be only submitted in writing, there is no need to further highlight that fact.

Part/Section	Comment
2.4.3	A deadline for submission of an NOI for new operators should be specified.

Response:

A phrase “within 30 days of the name change” was added to the first sentence of the third paragraph.

Part/Section	Comment
2.4.4	Include a stay of work while late NOI is reviewed and permit coverage is final.

Response:

The construction general permit does not authorize commencement of construction activities until notice of coverage is issued. For example, section 1.5.1 states, in part:

“The permittee is authorized to discharge stormwater associated with construction activity as of the effective date listed on the NOC. Assigning a permit tracking number by the division to a proposed discharge from a construction site does not confirm or imply an authorization to discharge under this permit.”

Furthermore, section 2.4.4 states, in part:

“When a late NOI is submitted, and if the division authorizes coverage under this permit, such authorization is only for future discharges; any prior, unpermitted, discharges or permit noncompliances are subject to penalties as described in section 7.1.2 below.”

Including “stay of work” provision in the CGP, targeting unpermitted construction sites would be meaningless. The permit terms and conditions can not extend to operators that did not obtain permit coverage. The only way “stay of work” that could be enforced is through the Tennessee Water Quality Control Act of 1977 (T.C.A. 69-3-101 et seq.). As such provision does not exist, the division does not have a regulatory authorization to issue a “stop work order” at construction sites.

Part/Section	Comment
2.6.2	This section states, in part: <i>“Commercial builders shall submit a plat map that clearly identifies the lots which the builder has purchased and for which they are applying for permit coverage.”</i> Does this mean that individual homesites must apply for coverage?

Response:

Operators at construction sites are required to obtain coverage under the general permit (see definition of “operator” in sub-part 2.1). Typically, operators at construction sites are developers and builders. In an unlikely scenario that owner of an individual homesite is also an operator, the owner is required to obtain coverage under the general permit.

Part/Section	Comment
2.6.2	This section (second paragraph) should be changed to say (emphasis added): <i>“Commercial builders shall also submit a site or plat map that clearly identifies the lots which the builder has purchased and for which they are applying for permit coverage. The site or plat map should indicate all outfalls and the location of EPSCs that will be used at each lot.”</i> Also, the division should explain why is indication of the EPSC location required.

Response:

Section 2.6.2 was modified to read:

“An excerpt (8 ½” by 11” or 11” by 17”) from the appropriate 7.5 minute United States Geological Survey (USGS) topographic map, with the proposed construction site centered, must be included with the NOI. The entire proposed construction area must be clearly identified (outlined) on this map. The total area to be disturbed (in acres) should be included on the map. The map should outline the boundaries of projects, developments and the construction site in relation to major roads, streams or other landmarks. All outfalls where runoff will leave the property should be identified. Stream(s) receiving the discharge, and storm sewer system(s) conveying the discharge from all site outfalls should be clearly identified and marked on the map. The map should also list and indicate the location of EPSCs that will be used at the construction site. NOIs for linear projects must specify the location of each end of the construction area and all areas to be disturbed. Commercial builders that develop separate SWPPPs

that cover only their portion of the project shall also submit a site or plat map that clearly indicates the lots which they purchased and for which they are applying for permit coverage and the location of EPSCs that will be used at each lot.”

Without EPSC measures indicated on the map, it would be reduced to a topographic map with outfalls. A map with EPSC measures is essential for the division’s personnel when inspecting construction sites, as well for the permittees to conduct site assessment and biweekly inspections.

Part/Section	Comment
2.6.2	Although the total disturbed area is requested in the instructions section of the NOI, this section should include the requirement for submitting the total disturbed area.

Response:

The following sentence was added to the first paragraph of section 2.6.2: *“The total disturbed area in acres should be included on the map.”*

Part/Section	Comment
3.1	The Stormwater Pollution Prevention Plan (SWPPP) should allow for the use of alternative best management practices (BMPs), which may not be included in the Tennessee Erosion and Sediment Control Handbook, whose performance has been documented to be equivalent or superior to conventional BMPs as certified by the plan designer. This provision would allow for the use of new BMPs developed by States, MS4s, consultants, and others that have not yet been included in the latest revision of the handbook.

Response:

It was never the division’s intent to restrict implementation of alternative or innovative best management practices at construction sites. The draft permit states (emphasis added): *“The design, inspection and maintenance of Best Management Practices (BMPs) described in SWPPP must be prepared in accordance with good engineering practices and **at a minimum shall be consistent** with the requirements and recommendations contained in the current edition of the Tennessee Erosion and Sediment Control Handbook.”* However, in order to clarify division’s position, the following sentence was added to the final permit:

“This permit allows the use of innovative or alternative BMPs, whose performance has been documented to be equivalent or superior to conventional BMPs as certified by the SWPPP designer.”

Part/Section	Comment
3.1	TDOT request concurrence from TDEC that the TDOT’s EPSC standard drawings, notes, specifications, etc. meet the minimum requirements and recommendations contained in the current edition of the Tennessee Erosion and Sediment Control Handbook.

Response:

The division expects the Tennessee Erosion and Sediment Control Handbook will be updated shortly after issuance of this permit. Since anticipated changes in the Handbook are not substantive, there is no reason to suspect TDOT’s current EPSC standard drawings, notes, specifications, etc. would be deemed obsolete or inadequate.

Part/Section	Comment
3.1.1	Is the licensed professional engineer or landscape architect performing the quality assurance site assessments required to take the Level I or II course? If so, this information/requirement needs to be added to this section.

Response:

The licensed professional engineer or landscape architect performing the quality assurance site assessments is not required to take the Level I or II course. The contents of site assessment requirement was changed in the final version, as described in a comment/response below.

Part/Section	Comment
3.1.1	Requirements for site assessments are too stringent. A licensed professional engineer or landscape architect should not be the only “qualified” person to perform site assessment. A number of other professionals (such as a Certified Professional in Erosion and Sediment Control (CPESC) or persons that have successfully completed the “Fundamentals of Erosion Prevention and Sediment Control Level II” course) should be deemed qualified, as shown through TDOT’s successful QA/QC program. In addition, frequency of site assessments is too restrictive and will impose unnecessary financial burden on permittees.

Response:

The requirements for site assessment as described in the draft permit within section 3.1.1 were replaced with the following language, included as section 3.1.2 – Site Assessment:

“Quality assurance of erosion prevention and sediment controls shall be done by performing site assessment at a construction site. The site assessment shall be conducted at each outfall involving drainage totaling 10 or more acres (see subsection 3.5.3.3 below) or 5 or more acres if draining to an impaired or exceptional quality waters (see subsection 5.4.1 below), within a month of construction commencing at each portion of the site that drains the qualifying acreage of such portion of the site. The site assessment shall be performed by individuals with following qualifications:

- *a licensed professional engineer or landscape architect or*
- *a Certified Professional in Erosion and Sediment Control (CPESC) or*

- *a person that successfully completed the “Level II Design Principles for Erosion Prevention and Sediment Control for Construction Sites” course.*

As a minimum, site assessment should be performed to verify the installation, functionality and performance of the EPSC measures described in the SWPPP. The site assessment should be performed with the inspector (as defined in part 10 below – Definitions), and should include a review and update (if applicable) of the SWPPP. Modifications of plans and specifications for any building or structure, including the design of sediment basins or other sediment controls involving structural, hydraulic, hydrologic or other engineering calculations shall be prepared by a licensed professional engineer or landscape architect and stamped and certified in accordance with the Tennessee Code Annotated, Title 62, Chapter 2 (see part 10 below) and the rules of the Tennessee Board of Architectural and Engineering Examiners.

The site assessment findings shall be documented and the documentation kept with the SWPPP at the site. The site assessment can take the place of one of the twice weekly inspections requirement from subsection 3.5.8.2 below.

The division may require additional site assessment(s) to be performed if site inspection by division’s personnel reveals site conditions that have potential of causing pollution to the waters of the state.”

Part/Section	Comment
3.1.2	If failures are observed during the site assessment of the EPSCs it must be reported (in a standardized format) to TDEC. Require upstream and downstream sampling of receiving waters after problem has been detected until changes have proven effective.

Response:

The purpose of the site assessment is to verify the installation, functionality and performance of the EPSC measures described in the SWPPP. The permit contains the following requirement:

“The site assessment findings shall be documented and the documentation kept with the SWPPP at the site.”

Division staff will have access to this documentation during site inspection or upon request. Additional reporting would present an unnecessary paperwork burden on the permittees. Site assessment does not have to be performed during rain events, or at times when stormwater runoff discharge occurs. Therefore, requiring upstream and downstream sampling of receiving waters as a result of failures identified during site assessment may be futile. In addition, language was added to the final permit stating that the division may require additional site assessment(s) to be performed if site inspection reveals site conditions that have potential of causing pollution to the waters of the state.

Part/Section	Comment
3.2.1	Updating all roadway projects currently underway within 6 months of the effective date of the CGP would be difficult and costly to taxpayers. The proposed CGP should apply only to contracts awarded after the effective date of the new CGP. Projects awarded before the effective date of the new CGP should be governed by the CGP in the place at the time of the award.

Response:

The division agrees with such assertion. The deadline for implementation of SWPPP changes has been changed from 6 months to 12 months. Permanent exclusion for the buffer zone requirements as stated in section 4.1.2 is retained in the final permit.

Part/Section	Comment
3.4.1	The following provisions should be included after the last sentence in paragraph (a): <i>“If applicable, the SWPPP must be modified or updated whenever there is a change in chemical treatment methods, including the use of different treatment chemical, different dosage or application rate, or different area of application.”</i>

Response:

Suggested change was incorporated in the final permit.

Part/Section	Comment
3.4.1	Add: the most recent assessment determines receiving waters are impaired by a pollutant of concern (TSS, siltation and/or habitat alteration). Add: g) a TMDL is developed for the receiving waters for a pollutant of concern (TSS, siltation and/or habitat alteration). Industrial stormwater permits discharging to segments with TMDLs "must contain effluent limits and conditions consistent with the requirements and assumptions of the WLAs..." and "the WLA should, where feasible, be translated into numeric WQBELS" in accordance with EPA's November 12, 2010 memorandum from Hanlon and Keehner (NPDES regulated construction sites are industrial activities. 40C.F.R. § 122.26(b)(14)(x)). If the translation of WLAs into numeric WQBELS is not feasible it must be demonstrated why.

Response:

The definition of “impaired waters” does contain a reference to the most recent assessment:

“Based on the most recent assessment information available to staff, the division will notify applicants and permittees if their discharge is into, or is affecting, impaired waters.”

Paragraph g), as suggested in the comment above (in bold letters) was added to the final permit.

Part/Section	Comment
3.4.1	The following provision should be included after the last sentence in paragraph (b): <i>“Where local, state or federal officials determine that the SWPPP is ineffective in eliminating or significantly minimizing pollutant sources, a copy of any correspondence to that effect must be retained in the SWPPP.”</i>

Response:

The suggested change was incorporated in the final permit.

Part/Section	Comment
3.5.1	The estimate of the percentage of impervious area before and after construction should be added to this section.

Response:

Paragraph (f) was changed to say: *”an estimate of the runoff coefficient of the site after construction activities are completed and how the runoff will be handled to prevent erosion at the permanent outfall and receiving stream, as well as the estimate of the percentage of impervious area before and after construction.”*

Part/Section	Comment
3.5.1	The wording of paragraphs (k) and (n), particularly phrases “clearly identify and outline” and “clearly marked” used in regards to identification of buffer zones in the field and SWPPPs need clarification.

Response:

No additional meaning, beyond the common sense interpretation of those terms, was intended by the division. Identification of buffer zones on the SWPPP can be accomplished by using graphical representation, in addition to narrative statements included in the plan. In the field, identification can be accomplished by using visual indicators (flags), fences, barriers, or other types of signs.

Part/Section	Comment
3.5.1	The wording of paragraph (l) is confusing. Please consider revising it.

Response:

Paragraph (l) in Section 3.5.1 of the draft permit stated:

l) for projects which will be subdivided, such as residential or commercial subdivisions and/or developments or industrial parks, the developer/owner must describe how he will prevent erosion and/or control any sediment from portions of the property that will be sold prior to completion of construction; once the property is sold, new operator must obtain coverage under this permit, and assume operational control and responsibility of that portion of the site.

This paragraph was changed in the final permit to read:

l) some construction projects, such as residential or commercial subdivisions and/or developments or industrial parks are subdivided. Subdivided lots are sometimes

sold to new owners prior to completion of construction. The original developer/owner must describe EPSC measures implemented at those lots. Once the property is sold, new operator must obtain coverage under this permit, and assume operational control and responsibility of that portion of the site.

Part/Section	Comment
3.5.2	TDEC should not require multiple erosion prevention and sediment control (EPSC) plan sheets for linear projects when there is no change to final contours. The extra sheets would impose an additional paperwork burden and serve little purpose to distinguish between the general timing of best management practices.

Response:

Multiple EPSC plan sheets are required only for multi-phase projects which implement different EPSC controls at each phase. In order to clarify this requirement, the last sentence of the second paragraph was changed (emphasis added) to state: *“One sheet showing all EPSCs that will be used during the life of the **multi-phase project implementing different EPSC controls at each phase** will not be considered complete.”*

Part/Section	Comment
3.5.3.1	Paragraph “a” of this section uses word “eliminate” and a phrase “complete elimination.” The complete elimination of erosion with construction-phase erosion prevention is unrealistic. In addition, erosion is a natural process which occurs on undisturbed sites.

Response:

Taken out of context, the quoted text appears to be overly restrictive and unreasonable. However, when read in its entirety, it is clear that division does not mandate complete elimination of sediment discharges from construction sites (emphasis added): *“The construction-phase **erosion prevention** controls shall be designed to eliminate (or minimize if complete elimination is not possible) the dislodging and suspension of soil in water.”* In addition, this sentence speaks exclusively about **erosion prevention**, not sediment control or discharges of sediment from a construction site.

Part/Section	Comment
3.5.3.1	b) Add at the end of the paragraph: If chemical treatment is used, the stormwater discharge must be completely free from of all chemical treatment components based upon discharge sampling results.

Response:

If applied properly, chemical additives (coagulants) will be bound to soil particles, precipitated in a sediment pond and are not expected to be present in stormwater runoff. The phrase “completely free” has no scientific or practical meaning. Following sentences in the final permit establish a requirement for chemical additives to be used according to manufacturer’s specifications, and for corresponding SWPPP updates:

“Proposed physical and/or chemical treatment must be researched and applied according to the manufacturer’s guidelines and fully described in the SWPPP.”

“If applicable, the SWPPP must be modified or updated whenever there is a change in chemical treatment methods, including the use of different treatment chemical, different dosage or application rate, or different area of application.”

Part/Section	Comment
3.5.3.1	e) "as necessary" should be replaced by "as recommended in the EPSC handbook"

Response:

The suggested change was incorporated in the final permit.

Part/Section	Comment
3.5.3.1	Paragraph “k” states: “Construction phasing is required on all projects regardless of size as a major practice for minimizing erosion and limiting sedimentation.” Complex projects are subject to many revisions during the construction process. The permit does not explain what level of complexity will be required in the “phasing” and what the process would be to make revisions to a proposed phasing schedule.

Response:

Construction phasing is the most effective method to minimize discharge of soil from construction sites. Phasing, although effective, can not be implemented at all construction sites to the same extent. Construction at some, particularly smaller projects, is likely to be executed in one phase. Therefore, compliance with this permit condition can be demonstrated through proper documentation in the SWPPP. Specific requirements for modification and update of SWPPP are described in section 3.4.1 of the permit.

Part/Section	Comment
3.5.3.1	Paragraph “k” states: <i>“No more than 50 acres of active soil disturbance is allowed at any time during the construction project.”</i> This arbitrary, one size fits all requirement is a significant burden and a serious financial impact, particularly on linear projects.

Response:

The limitation for a number of acres being disturbed at the same during a construction project is related to ability of permittees to effectively manage the entire site. A number of scenarios was presented to the division showing unintended negative consequences of the 50 acre limitation for linear projects. As a result, the following language (in italics) was added to paragraph k of the final permit:

“Construction phasing is required on all projects regardless of size as a major practice for minimizing erosion and limiting sedimentation. Construction must be phased to keep the total disturbed area less than 50 acres at any one time. Areas of the completed phase must be stabilized within 15 days (see subsection 3.5.3.2 below). No more than 50 acres of active soil disturbance is allowed at any time during the construction project. This includes off-site borrow or disposal areas that meet the conditions of section 1.2.2 above of this general permit. The 50 acre limitation does not apply to linear construction projects (such as roadway, pipeline, and other infrastructure construction activities) if the following conditions are met:

- Where no one area of active soil disturbance is greater than 50 acres and the various areas of disturbance have distinct receiving waters; or*
- Where contiguous disturbances amount to greater than 50 acres, but no one distinct water is receiving run off from more than 50 disturbed acres; or*
- With the department’s written concurrence, where more than 50 acres of disturbance is to occur and where one receiving water will receive run-off from more than 50 acres; or*
- Where no one area of active soil disturbance is greater than 50 acres and the various areas of disturbance are more than 5 miles apart.*

In order for a linear project to take advantage of the 50 acre rule exemption outlined in this paragraph, the contractor shall conduct monthly site assessments as described in section 3.1.2 above until the site is permanently stabilized.”

Part/Section	Comment
3.5.3.1	Off-site borrow and disposal areas at TDOT construction sites should be addressed as indicated in the Waste and Borrow Manual per the Statewide Storm Water Management Plan (SSWMP).

Response:

The following sentence was added to the final permit: *“TDOT projects shall be addressed in the Waste and Borrow Manual per the Statewide Storm Water Management Plan (SSWMP).”*

Part/Section	Comment
3.5.3.2	The requirement in the third paragraph states: <i>“Steep slopes shall be stabilized not later than 7 days after construction activity on the slope has temporarily or permanently ceased.”</i> It’s impossible to have any area stabilized with vegetation within 7 days unless sodded. Matting and hydroseed etc. all can be applied within 7 days, but until the grass comes in, it's not considered stable. Since this section does not does not stipulate permanent stabilization, it should be changed to say: <i>“...temporarily stabilized no later than 7 days...”</i>

Response:

The suggested change was made in the final permit.

Part/Section	Comment
3.5.3.2	The last paragraph under 3.5.3.2 indicates the use of native herbaceous and woody plants constitutes a “non-eroding surface”. This is false. It may have no bearing on compliance with the permit, but to make the statement that vegetation completely prevents erosion is erroneous and, leads to false assumptions about how effective BMP’s must be and to our ability to prevent any and all sediment from leaving a construction site.

Response:

The last paragraph of this sub-section (Stabilization practices) states:

“Permanent stabilization with perennial vegetation (using native herbaceous and woody plants where practicable) or other permanently stable, non-eroding surface shall replace any temporary measures as soon as practicable. Unpacked gravel containing fines (silt and clay sized particles) or crusher runs will not be considered a non-eroding surface.”

Nothing in this paragraph states or implies that perennial vegetation (native or not) completely prevents erosion. It simply provides instructions on what can be used as a permanent stabilization practice (perennial vegetation) and when should it be implemented (as soon as practicable).

Part/Section	Comment
3.5.4	<ul style="list-style-type: none"> • Revise second paragraph to state: For projects discharging to waters of the state, the SWPPP shall include a description of measures that are required to be installed in order to manage the volume and energy of all post-construction stormwater runoff to mimic pre-development. natural conditions in all receiving waters of the state. At no time may the construction activities result in a measurable change in TSS or turbidity to the impaired receiving waters as this would be in violation of the Tenn. Comp. R. & Regs 1200-4-3-.06(2). • Last paragraph, replace parenthesis with: (e.g.. there should be no change in hydrological regime of the receiving water unless it is to restore to natural conditions). This parenthetical statement is redundant to the second paragraph in the section but it is likely in the draft for emphasis.

Response:

TDEC Rules, Chapter 1200-4-3-.06(2) states:

(2) Unavailable conditions exist where water quality is at, or fails to meet, the criterion for one or more parameters. In unavailable conditions, new or increased discharges of a substance that would cause or contribute to a condition of impairment will not be allowed. Where impairment by habitat alteration exists, additional significant loss of habitat within the same area of influence shall not be authorized unless avoidance, minimization, or in-system mitigation can render the impact de minimis.

Suggested language does not reflect requirements from the cited paragraph, nor can it be associated with any other section of TDEC Rules, Chapter 1200-4-3. Since there is no regulatory basis for the suggested language, it will not be included in the final permit. The suggested requirement will apply to projects discharging to waters considered impaired by sediment or habitat alteration due to in-channel erosion.

Section 3.5.8.2, paragraph e, describes additional requirements for dealing with inadequate EPSCs:

“Based on the results of the inspection, any inadequate control measures or control measures in disrepair shall be replaced or modified, or repaired as necessary, before the next rain event, but in no case more than 7 days after the need is identified.”

Part/Section	Comment
3.5.7, 3.5.8.2(e)	Is there a distinction between maintenance referenced at 3.5.7 and the circumstances listed 3.5.8.2(e)? If not, should the language be changed to be consistent regarding the timing allowed for correction?

Response:

Phrase “*if possible*” was removed from paragraph 3.5.8.2(e) in order to make these two permit requirements consistent.

Part/Section	Comment
3.5.8.1	This section requires that inspectors complete the “Fundamentals of Erosion Prevention and Sediment Control Level I” course. Section 5.16 of the Rationale notes that the new permit does not recognize equivalency to this course. However, Section 5.22 of the Rationale contains equivalency language. A clarification for the equivalency of training requirements should be provided.

Response:

The new permit does not recognize equivalency to this course. Therefore, all site inspectors must complete the “Fundamentals of Erosion Prevention and Sediment Control Level I” course.

Part/Section	Comment
3.5.8.2	The final permit should include a provision to suspend inspections during times of extreme drought or dry weather (economic issues and concerns), similar to the suspension or delay options available in the event of winter weather.

Response:

Phrase “ *or due to extreme drought*” was added to paragraphs (a) and (i) of sub-section 3.5.8.2.

Part/Section	Comment
3.5.9	This section states that the “ <i>Volume of non-stormwater component(s) of the discharge must be included in the design of all impacted control measures.</i> ” These non-stormwater components (e.g. foundation drains, dewatering, waters used to wash vehicles, dust control, waterline flushing, etc.) are impossible to quantify. If the intent is to have someone on site to amend the SWPPP on a very regular basis so as to permit a contractor to de-water a trench or wash a vehicle, perhaps it can be accomplished. But there is no way we can anticipate how much water will be released when new waterlines are flushed, or how often a contractor will wash vehicle. It would be better if TDEC provided some arbitrary number (e.g. 5% increase in sediment basin storage volume) or something like that. The fallacy is that such activities generally don’t take place during or even immediately after a rain event.

Response:

The sentence was changed to say “*Estimated volume of non-stormwater component(s) of the discharge must be included in the design of all impacted control measures.*”

Part/Section	Comment
3.5.10	Add as an opening paragraph: If a TMDL for sediment or habitat alteration or other construction relevant pollutants has been finalized prior to the permittee 's submittal of the NOI the SWPPP must demonstrate consistency with any site-specific conditions or requirements, including wasteload allocations, in the TMDL applicable to the permittee 's discharge to the impaired stream segment. (Adapted from State of Georgia, Department of Natural Resources. EPD Permit GAR 100001). Industrial stormwater permits discharging to segments with TMDLs "must contain effluent limits and conditions consistent with the requirements and assumptions of the WLAs..." in accordance with EPA's November 12, 2010 memorandum from Hanlon and Keehner. This includes the requirement "the WLA should, where feasible, be translated into numeric WQBELS." TDEC has a history of demonstrating the feasibility of this in industrial, mining, sewage treatment, and other NPDES permits. If the translation of WLAs into numeric WQBELS is not feasible it must be demonstrated why.

Response:

Paragraph a) in section 3.5.10 was changed to read (emphasis added):

*“a) identification of whether the discharge is identified, either specifically or generally, in an approved TMDL and any associated **wasteload** allocations, **site-specific** requirements, and assumptions identified for the construction stormwater discharge.”*

Part/Section	Comment
3.5.8.2 (g)	Alternative inspection forms should be allowed.

Response:

The following sentence was added to paragraph (g):

“Alternative inspection form may be used as long as the form contents and the inspection certification language are, at a minimum, equivalent to the division’s form (Appendix C) and the permittee has obtained a written approval from the division to use the alternative form.”

Part/Section	Comment
4.1.1	Clarify phrases “Control stormwater discharges” and “total stormwater volume.” Volume as proposed in the proposed CGP is to control soil erosion. Volume does not necessarily cause erosion. Erosion can be caused by high velocities or the non-erosive manner in which you transport the stormwater volume around or through the construction area. Is it TDEC’s intent that the difference between pre and post-development volumes be kept on site and released at a lower flow rate?

Response:

Both stormwater volume and velocity are important factors in design, installation and maintenance of EPSC measures at construction sites. Ignoring stormwater volume (achieved by controlling the peak flow rate) could have serious detrimental consequences for EPSC effectiveness, as well as the receiving stream geomorphology. In addition, the division’s 2000, 2005 as well as the latest CGP have the

following requirement, related to the same issue: “*All permittees are encouraged to limit the amount of post construction runoff, if not required by local building regulations or local MS4 program requirements, in order to minimize in-stream channel erosion in the receiving stream.*”

Part/Section	Comment
4.1.2	The 2005 CGP provided an exemption for buffer requirements at construction sites that have been pre-approved before the effective date of the permit. Similar exemption should be provided to the inclusion of a water quality buffer is a result of the federal effluent limitation guidelines (40 CFR 450).

Response:

Inclusion of a water quality buffer is a result of the federal rule (40 CFR 450 - Construction and Development Point Source Category), which became effective on February 1, 2010. An exception to the buffer requirement was provided to construction sites pre-approved prior to February 1, 2010:

“4.1.2.2. Pre-Approved Sites

Construction activity at sites that have been pre-approved before February 1, 2010, are exempt from the buffer requirements of section 4.1.2 above. Evidence of pre-approval for highway projects shall be a final right-of-way plan and for other construction projects, the final design drawings with attached dated, written approval by the local, state or federal agency with authority to approve such design drawings for construction.”

Part/Section	Comment
4.1.2	The inclusion of a water quality buffer on all streams and the requirement of a minimum of 30 feet will pose a political nightmare for many MS4 managers, especially if MS4 previously adopted a 25 feet buffer.

Response:

Inclusion of a water quality buffer is a result of the federal rule (40 CFR 450 - Construction and Development Point Source Category). The proposed buffer is the same as in the recently reissued general permit for MS4s. For more details about buffers, see comments/responses below.

Part/Section	Comment
4.1.2	This section seems to indicate that waters are to be identified on a USGS quad map or as determined by the director. Quad maps have never been a reliable source for determining where state waters exist. Nobody should rely on the quad map for anything other than the most preliminary evaluation of where waters exist. Shouldn't this provision state that waters are to be determined by a jurisdictional determination per the new law?

Response:

Phrase “on a 7.5-minute USGS quadrangle map, or as determined by the director” was replaced with the phrase “using methodology from Standard Operating Procedures for Hydrologic Determinations (see rules to implement a certification program for Qualified Hydrologic Professionals, TN Rules Chapter 0400-40-17).”

Part/Section	Comment
4.1.2	For new development on previously undeveloped land, a 30-foot buffer must be mandatory with no averaging and exceptions solely for utility line crossings, road crossing, or other activities such as those falling under General ARAP requirements. On previously undeveloped land permittees have no reason not to preserve the buffer and must be required to work with the footprint of their development outside of these important zones. The buffer can not be used to create a channel or drainage way for the construction stormwater discharge.

Response:

The benefits of a water quality buffer are widely recognized, but there is no evidence that imposing uniform 30-foot buffer would create additional protection for receiving streams. Allowing for buffer width averaging provides flexibility in permit implementation without compromising water quality. The existing permit language does have a limitation for a minimum width. It is limited to 30 feet if receiving stream is considered “exceptional or impaired,” or 15 feet if the receiving stream is with available conditions for a pollutant of concern:

“The 60-foot criterion for the width of the buffer zone can be established on an average width basis at a project, as long as the minimum width of the buffer zone is more than 30 (15) feet at any measured location.”

The buffer is not the only location where formation of channels is discouraged, as detailed in the section 3.5.4 of the permit:

“Velocity dissipation devices shall be placed at discharge locations and along the length of any outfall channel to provide a non-erosive velocity flow from the structure to the receiving stream so that the natural physical and biological characteristics and functions of the stream are maintained and protected (e.g., there should be no significant changes in the hydrological regime of the receiving water). The SWPPP shall include an explanation of the technical basis used to select the velocity dissipation devices to control pollution where flows exceed pre-development levels. The Tennessee Erosion and Sediment Control Handbook provides measures that can be incorporated into the design or implemented on site to decrease erosive velocities. An Aquatic Resources

Alteration Permit (ARAP) may be required if such velocity dissipation devices installed would alter the receiving stream and/or its banks.”

Part/Section	Comment
4.1.2.1	Add the italicized language to number 2: “If an area with an existing land use is proposed to be converted to another use or the impervious surfaces located within the buffer area are being removed, <i>replaced, or reused</i> buffer zone requirements shall apply.”

Response:

Suggested language would make it impossible for an existing structure to be rebuilt if located within the buffer zone, and it will not be included in the final permit.

Part/Section	Comment
4.1.2.1	Existing "land uses" can not include agriculture. For example, if the buffer's existing use is cropland, this use does not prevent the permittee from establishing the appropriate vegetated buffer.

Response:

Nothing prevents a permittee from preserving, rehabilitating or enhancing an existing buffer zone, as described in first paragraph of section 4.1.2: “*Rehabilitation and enhancement of a natural buffer zone is allowed, if necessary, for improvement of its effectiveness of protection of the waters of the state.*” However, there is no regulatory basis to mandate establishing a water quality buffer, regardless of what an existing land use may be.

Part/Section	Comment
4.1.3	The first and second sentence of this paragraph, referencing 14 and 15 days for initiating and completing stabilization is confusing. Requirement for completion of stabilization of disturbed areas should be as follows: -within 3 days of initiating soil stabilization for construction sites that may discharge to impaired waters or waters subject to a Total Maximum Daily Load (TMDL) -within 7 days of initiating soil stabilization for all other construction sites.

Response:

The proposed schedule is overly restrictive, and would present an unnecessary burden on permittees. In addition, maintaining compliance with proposed requirement for “TMDL sites” (3 days) would be practically impossible without paving the construction site. First two sentences of section 4.1.3 were revised for clarification:

“Stabilization of disturbed areas must, at a minimum, be initiated immediately whenever any clearing, grading, excavating or other earth disturbing activities have temporarily or permanently ceased on any portion of the site, and will not resume for a period exceeding 14 calendar days. Soil stabilization (temporary or permanent) of those of disturbed areas must be completed as soon as possible, but not later than 14 days after

the construction activity in that portion of the site has temporarily or permanently ceased.”

Part/Section	Comment
4.1.3	Add at the end of the paragraph: Impervious stabilization techniques are not allowed. Channels (i.e. drainage ditches, wet weather conveyances) can never be lined with permanent impervious materials as they result in increased erosion downstream and permanent loss of aquatic habitats.

Response:

Stabilization practices are already addressed in sub-section 3.5.3.2 of the permit (emphasis added):

*“Stabilization practices may include: temporary seeding, permanent seeding, mulching, geotextiles, sod stabilization, vegetative buffer strips, protection of trees, preservation of mature vegetation, and other appropriate measures. **Use of impervious surfaces for final stabilization in lieu of a permanent vegetative cover should be avoided where practicable.** No stabilization, erosion control or sediment treatment measures are to be installed in a stream without obtaining a Section 404 permit and an Aquatic Resources Alteration Permit (ARAP), if such permits are required and appropriate.”*

A prohibition for use of impervious surfaces for stabilization would not be appropriate. For example, it could be interpreted as restricting use of natural materials such as limestone, granite or marble for landscaping purposes. Furthermore, impervious surfaces can be declared as future designated “parking areas” or “recreation areas,” making enforcement of such rigid requirement practically impossible.

Part/Section	Comment
4.1.4	The meaning of the second paragraph is unclear: “ <i>Discharges from dewatering temporary sediment basins are prohibited unless managed by controls providing equivalent level of treatment.</i> ”

Response:

This sentence is was adopted from the federal rule (40 CFR 450 - Construction and Development Point Source Category), and it was related to the numeric effluent limitation for turbidity. Considering that the numeric limitation for turbidity was vacated, the sentence was removed from the final permit.

Part/Section	Comment
4.1.7	This section prohibits discharges from basins or impoundments unless an outlet structure that withdraws water from at, or near the surface is utilized. It should be noted that 40 C.F.R. § 450.21(f) provides: “[w]hen discharging from basins and impoundments, utilize outlet structures that withdraw water from the surface, unless infeasible .” The Environmental Protection Agency (EPA) explained its reasoning for including the “unless infeasible” language: “ <i>For certain controls, EPA included “unless infeasible” to recognize that there may be some sites where a particular control measure cannot be implemented, thus allowing flexibility for permittees.</i> ”

Response:

The phrase “*unless infeasible*” was added to section 4.1.7.

Part/Section	Comment
5.3.1	Include a requirement for any work causing or contributing to pollution of the receiving waters to cease until it has been demonstrated through sampling the pollution will no longer result from the activity.

Response:

Sub-part 7.3 of the CGP already includes language as commenter suggested:

“Need to Halt or Reduce Activity Not a Defense

It shall not be a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of this permit.”

Part/Section	Comment
5.3.2	Paragraph c) in this section should be deleted or substantially modified, as it is vague and ambiguous. Certainly differing color contrast could be an indication of violations of the SWPPP; however, whether and to what extent it is “objectionable” is purely subjective with no empirical or scientific basis. Further it is not necessarily a measure of poor water quality particularly depending upon the frequency and duration. There are no applicable water quality criteria for which to base such an (sic) narrative effluent limitation. The only reference in Tennessee’s water quality criteria to objectionable color is for recreational uses. The CGP should delete this paragraph entirely since a violation of water quality standards are prohibited elsewhere in subpart 5.3.

Response:

Paragraph c) states: “*The stormwater discharge must not cause an objectionable color contrast in the receiving stream.*” The division agrees that a degree of subjectivity exists in this permit requirement. However, same can be said for all narrative criteria included in the Water Quality Standards (e.g. there shall be no toxics in toxic amounts). As commenter correctly stated, it often is not an indication of violations of a SWPPP, but it a great indication of EPSC effectiveness. The Water Quality Standards do not require a water quality criterion to be applicable for protection of more than one designated use for it

to be enforceable. As the commenter did not provide any reasonable alternative to the proposed language, it will be retained in the final permit.

Part/Section	Comment
5.4.1	Define “proximity” as used in context of special design requirements to describe the location of a construction project in relation to impaired or exceptional TN waters. Proximity should be replaced with a more definitive term or measurement.

Response:

The division is in agreement that replacing the word proximity with a more definitive term or measurement would eliminate any subjectivity in permit interpretation. However, due to variability in receiving stream conditions, slopes, erodible materials, sizes of disturbed areas etc. it would be arbitrary to establish such definition across the state without being overly protective in some instances and not protective enough in others. The division’s staff is available to consult with applicants if any doubt exists in interpreting what “proximity” means at a specific proposed construction site.

Part/Section	Comment
5.4.1	Add: h) At no time may the construction activities result in a measurable change in TSS or turbidity to the impaired receiving waters as this would be in violation of Tenn. Comp.R. & Regs 1200-4-3-. 06(2). This can be demonstrated by submitting sampling results or photo documentation.

Response:

TDEC Rules, Chapter 1200-4-3-.06(2) states:

(2) Unavailable conditions exist where water quality is at, or fails to meet, the criterion for one or more parameters. In unavailable conditions, new or increased discharges of a substance that would cause or contribute to a condition of impairment will not be allowed. Where impairment by habitat alteration exists, additional significant loss of habitat within the same area of influence shall not be authorized unless avoidance, minimization, or in-system mitigation can render the impact de minimis.

Suggested language does not reflect requirements from the cited paragraph, nor can it be associated with any other section of TDEC Rules, Chapter 1200-4-3. Since there is no regulatory basis for the suggested language, it will not be included in the final permit.

Part/Section	Comment
5.4.1	Paragraph (b) of this section states: “The SWPPP must be prepared by a person who, at a minimum, has completed the department’s Level II Design Principles for Erosion Prevention and Sediment Control for Construction Sites course.” This requirement is not practical and may be impossible for out-of-state firms who submit SWPPPs.

Response:

This requirement is limited to activities associated with discharges to impaired or exceptional streams. It is intended to function as a pro-active measure in ensuring that related SWPPPs have been prepared per

Tennessee specific permit requirements. Although there are other state or private training programs on SWPPP development, they may not provide adequate Tennessee-specific content.

Part/Section	Comment
5.4.1	<p>Paragraph (b) of this section states: <i>“The SWPPP must be prepared by a person who, at a minimum, has completed the department’s Level II Design Principles for Erosion Prevention and Sediment Control for Construction Sites course.”</i></p> <p>Additional time should be provided for permittees and consultants to obtain this certification.</p>

Response:

Following language was added to paragraph b): *“This requirement goes in effect 24 months following the new permit effective date. A copy of the certification or training record for inspector certification should be included with the SWPPP.”*

Part/Section	Comment
5.4.2	<ul style="list-style-type: none"> • For new development on previously undeveloped land, the 60-foot buffer must be mandatory with no averaging and exceptions solely for utility line crossings, road crossing, or other activities such as those falling under General ARAP requirements. On previously undeveloped land permittees have no reason to not preserve the buffer and must be required to work with the footprint of their development outside of these important zones. • Second paragraph needs clarification. Is this an "out" from buffer requirements if a BMP equivalent to sediment loading reduction of a natural stream buffer is implemented? What purpose does this paragraph serve? • ARAP coverage should not be used as a means of getting out of buffer requirements. The third paragraph seems to encourage permittees to obtain an ARAP just to enter the buffers of waters of the state.

Response:

Buffer averaging was already addressed in response to comment on section 4.1.2. Examples provided in the permit (buildings, parking lots, roadways, utility lines and on-site sanitary sewage systems) make no mention of “undeveloped land” being a candidate for an exception. Second paragraph states:

2. *If an area with an existing land use is proposed to be converted to another use or the impervious surfaces located within the buffer area are being removed buffer zone requirements shall apply.*

There is no hidden “exception” in the above paragraph. On contrary, this paragraph demands that buffer zone be established if “buildings, parking lots, roadways, utility lines and on-site sanitary sewage systems” (or other impervious surfaces) are removed during construction. ARAPs can not be used as a tool to avoid buffer requirements.

Part/Section	Comment
5.4.3	This section references a June 16, 2005, date. This should be revised.

Response:

Although not likely, it is still possible for some active construction projects to have started before June 16, 2005 (issuance date of the previous general permit). Those projects will remain excluded from the design storm requirements of section 5.4.1 a) and e) and the buffer requirements in section 5.4.2.

Part/Section	Comment
5.4.3	A definition of "pre-approved" must be provided. Does this entail already received permit coverage? If the site has somehow been approved, but permit coverage is more than six months away, the permittee in no way should be exempt from any permit requirements. No permittee, pre-approved or otherwise, can be exempt from e) in 5.4.1. Individual permit coverage must be mandated when a permittee is causing or contributing to water quality impairments.

Response:

Section 5.4.3 clearly identifies the term "pre-approved": *"Evidence of pre-approval for highway projects shall be a final right-of-way plan and for other construction projects, the final design drawings with attached dated, written approval by the local, state or federal agency with authority to approve such design drawings for construction."*

Paragraph e) in section 5.4.1 states:

"e) In the event the division finds that a discharger is complying with the SWPPP, but contributing to the impairment of receiving stream, then the discharger will be notified by the director in writing that the discharge is no longer eligible for coverage under the general permit. The permittee may update the SWPPP and implement the necessary changes designed to eliminate further impairment of the receiving stream. If the permittee does not implement the SWPPP changes within 7 days of receipt of notification, the permittee will be notified in writing that continued discharges must be covered by an individual permit (see subpart 7.12 below). To obtain the individual permit, the operator must file an individual permit application. The project must be stabilized immediately until the SWPPP is updated and the individual permit is issued. Only discharges from earth disturbing activities necessary for stabilization are authorized to continue until the individual permit is issued."

Nothing in section 5.4.3 indicates exception from requirements listed in paragraph e) or precludes the division from enforcing its requirements.

Part/Section	Comment
6.2.1	The location of the SWPPP is identified under item (d) as an item to be included on the notice posted near the main entrance of the construction site. The last paragraph of this section also contains a list of items/information to be retained in an appropriate location on-site. The statement “a) the location of the SWPPP if the site is inactive or does not have an on-site location to store the plan (see section 3.3.3 above)” does not apply here and should be deleted. The parenthetical statement “(see section 3.3.3 above)” should be inserted at the end of item (d) in the first paragraph.

Response:

Suggested changes were incorporated in the final permit.

Part/Section	Comment
7.4	Remove " <i>minimize or.</i> " It is the responsibility of the permittee to take all reasonable steps to prevent violations.

Response:

Sub-part 7.4 states:

“Duty to Mitigate

The permittee shall take all reasonable steps to minimize or prevent any discharge in violation of this permit that has a reasonable likelihood of adversely affecting human health or the environment.”

This is a standard language in all NPDES permits. The language does not relieve permittees from responsibility associated with violating terms and conditions of the permit. The division recognizes that situations exist where violations of permit terms and conditions may be unavoidable. The language imposes an expectation on permittees to mitigate causes and minimize impacts of violations from adversely affecting human health or the environment.

Part/Section	Comment
7.7	Why is “ <i>the director or the operator of a large or medium MS4</i> ” referenced in this section?

Response:

This requirement is related to section 1.4.4 of the permit, which states, in part: “*Permittees who discharge stormwater through an NPDES-permitted municipal separate storm sewer system (MS4) who are not exempted in section 1.4.5 below (Permit Coverage through Qualifying Local Program) must submit a courtesy copy of the notice of coverage (NOC), and at project completion, a copy of the signed notice of termination (NOT) to the MS4 upon their request.*”

Part/Section	Comment
7.14	Eliminate second paragraph as it is not relevant.

Response:

Second paragraph of sub-part 7-14 states:

“Proper operation and maintenance also includes adequate laboratory quality assurance and quality control procedures. Proper operation and maintenance requires the operation of backup or auxiliary facilities or similar systems, installed by a permittee, when determined by the permittee or the division to be necessary to achieve compliance with the conditions of the permit.”

The division disagrees that this paragraph is irrelevant. Even the reference to *laboratory quality assurance* may be necessary if permittee conducts any analytical measurements to, for example, evaluate effectiveness of EPSC controls implemented at the site. Finally, this is standard permit language included in all NPDES permits in Tennessee.

Part/Section	Comment
8.1	The requirement to submit notices of termination (NOTs) within 30 days of final stabilization is overly subjective and penalizes those who strive for more than minimal vegetative cover. Final stabilization is subject to individual judgment. If missing the 30 day deadline is a violation of the permit, this would penalize those who conservatively wait to ensure that vegetative cover is better than 70%. A possible additional unintentional consequence of this language is to be “certain” of the final stabilization beginning date by using rock, concrete, etc., thus increasing the impermeable surfaces resulting from construction activity. The burden of continuing to comply with inspections, etc., required by the permit conditions should incentivize submitting NOTs when final stabilization is achieved without having to make a failure a violation of the permit. The following statement should be considered for the final permit: <i>‘The permittee shall submit the Notice of Termination (NOT) form when construction activities have been completed, the site has been stabilized, and temporary controls have been removed. The NOT should be submitted prior to equipment demobilization to ensure that the site is adequately stabilized. Signs notifying the public of the construction activity shall be in place until the NOT has been submitted. Permittees who abandon the site and fail to submit the proper Notice of Termination will be in violation of this permit.’</i>

Response:

Permit requirements for termination of coverage was completely revised in the final permit, and does include elements of language suggested in the comment above.

Part/Section	Comment
8.1	<p>Could language be added to reflect what TDEC will do when it does receive an NOT, similar to the language used for what TDEC will do upon receipt of the NOI? Along those lines, does TDEC want to use the word "accepted" when referring to an NOT? It is our understanding that TDEC does not warrant that a permittee is proper for termination (although there are circumstances in which TDEC may return the NOT because they have reason to believe that the permittee has not met the criteria for submitting an NOT), but only that they have received the NOT. The uses of the word accept or acceptance may lead to an argument to the contrary.</p>

Response:

Several changes were made in sub-part 8.1 in order to clarify permittee requirements when it comes to termination of permit coverage. The words “*accept*” and “*acceptance*” were replaced in the final permit with words that do not imply division’s concurrence is necessary to terminate general permit coverage.

Part/Section	Comment
8.1.1	<p>Add the following italicized language in the fourth paragraph: Compliance with this permit is required until the complete NOT form is submitted and approved by the Department. The Division would benefit from a process ensuring termination of coverage is not effective until the permittee has received approval of the termination, whether for a change in ownership/operator or final stabilization of the site.</p> <ul style="list-style-type: none"> • Change "received" to "approved" in a) on page 40, and add the following language after c): Permit coverage remains in place until the permittee requesting termination has been notified in writing by the Department that the NOT was approved. • If Division employee does not conduct a final inspection, require documentation in the form of inspection reports (Section 3.1.1) and photo documentation to prove the site achieved the definition of "final stabilization" be submitted by the permittee before the NOT is approved. • We recommend the Division make clear that all permit requirements transfer to any new owner or operator in the event of bankruptcy or sale. At which time an NOT from the previous owner(s) and an NOI from the new owner(s) are mandated. This ensures if a permitted site temporarily or indefinitely halts work, responsibility remains with a liable party.

Response:

The permittees are required to submit a certified NOT form, just like in the previous permit. This procedure has been effective. Requiring an “*approval*” of a NOT form or additional photographic documentation in addition to permittee’s certification would only add more paperwork to the process and tie up division’s resources. The division has the right to deny termination of coverage under this general permit upon receipt of the NOT, as stated in the last paragraph of section 8.1.1.

Bankruptcy is addressed in sections 2.4.3 and 8.1.2 of the final permit:

“If the transfer of ownership is due to foreclosure or a permittee filing for bankruptcy proceedings, the new owner (including but not limited to a lending institution) must

obtain permit coverage if the property is inactive, but is not stabilized sufficiently. If the property is sufficiently stabilized permit coverage may not be necessary, unless and until construction activity at the site resumes.”

“If any permittee files for bankruptcy or the site is foreclosed on by the lender, the permittee should notify the division of the situation so that the division may assess the site to determine if permit coverage should be obtained by any other person or whether other action is needed.”

Part/Section	Comment
9	This part requires that a determination on water status be conducted by someone who is certified in Tennessee as a stream/wetland delineator. Language that would allow the permittee to assume a stream is present (rather than a wet weather conveyance) in order to expedite the permit process in lieu of a formal delineation should be considered.

Response:

The following sentence was added to part 9 of the final permit:

“The permittee can make an assumption that streams/wetlands are present at the site in order to expedite the permit process.”

Part/Section	Comment
10 (Definitions)	The permit should clarify what constitutes a violation of the permit when a rainfall event exceeds the design storm by volume or intensity and sediment runoff occurs. Failures of properly designed, installed and maintained best management practices, including engineered controls should not be considered violations of the permit if the storm event exceeds the design storm.

Response:

Specific circumstances required to make enforcement decisions makes it impossible to speculate on TDEC’s future actions or permit compliance. Therefore, it is impossible to predict outcomes of storm events that exceed the design storm.

Part/Section	Comment
10 (Definitions)	The permit defines the design storm event by volume and intensity, but does not clarify what engineered controls apply to the applicable design storm.

Response:

Applicable engineering controls can not be provided in the permit since it is impossible to predict combination of all factors influencing the EPSC design at various construction sites. Besides the storm event by depth and intensity, some of the factors to be taken into consideration are soil types, site slope, existing vegetative cover, buffer zones, receiving stream type, outfall location and design etc. Permittees should refer to the Tennessee Erosion and Sediment Control Handbook for further information.

Part/Section	Comment
10 (Definitions)	The definition of “final stabilization” would lead one to believe that a 10 acre site that has been totally cleared of vegetation and subsequently has 7 non-contiguous acres covered with sod has successfully satisfied the requirements to be considered finally stabilized. Please clarify what is considered a “large bare area”?

Response:

The definition of “final stabilization” was changed to read:

“Final Stabilization” means that all soil disturbing activities at the site have been completed and one of the three following criteria is met:

- a. A uniform (e.g., evenly distributed, without large bare areas) perennial vegetative cover with a uniform density of at least 70 percent of the (preferably) native vegetative cover for the area has been established on all unpaved areas and areas not covered by permanent structures, and all slopes and channels have been permanently stabilized against erosion, or*
- b. Equivalent permanent stabilization measures (such as the use of riprap; permanent geotextiles, hardened surface materials including concrete, asphalt, gabion baskets, or Reno mattresses) have been employed, or*
- c. For construction projects on land used for agricultural or silvicultural purposes, final stabilization may be accomplished by returning the disturbed land to its preconstruction agricultural or silvicultural use.*

“Large bare areas” is part of an example in the definition above. The phrase should not be taken out of context of the complete example: *evenly distributed, without large bare areas*. Simply stated, bare areas should not stand out upon completion of stabilization or have potential to cause erosion. Uniform density of 70% was included upon recommendation of EPA Region 4.

Part/Section	Comment
10 (Definitions)	Using the word <i>background</i> in the definition of “final stabilization” can create a problem in the implementation process. The division may not always know what a condition of site was PRIOR to construction activity. The intent of the language was to provide “credit” for sites where non-erodible areas existed prior to construction; however, it can be misused without having additional requirements to document “background” conditions.

Response:

The word “*background*” was removed from the definition.

Part/Section	Comment
10 (Definitions)	A third criterion (subsection c:) should be added to this definition: <i>“For construction projects on land used for agricultural or silvicultural purposes, final stabilization may be accomplished by returning the disturbed land to its preconstruction agricultural or silvicultural use.”</i>

Response:

Suggested language was added to the final permit.

Part/Section	Comment
10 (Definitions)	The definition for “impaired waters” should be set up to protect waters identified as impaired, not merely those listed on the 303(d) list. "One or more of its" should be added between "support" and "classified uses." Specify that "impaired waters" includes those waters on the state's Section 303(d) List, those segments which are Water Quality Limited in accordance with 40 C.F.R. §§ 130.2(j), and those waters determined to not be meeting the state's water quality standards using the Division's most recently conducted monitoring and/or sampling

Response:

It has been division’s intent not to mandate additional protections only to 303(d) listed streams, but to all waterbodies not supporting designated uses due to siltation or habitat alteration. In order to clarify this point further, the definition for “impaired waters” in the final permit was modified as following:

“Impaired waters” (unavailable conditions waters) means any segment of surface waters that has been identified by the division as failing to support one or more classified uses. For the purpose of this permit, pollutants of concern include, but are not limited to: siltation (silt/sediment) and habitat alterations. Based on the most recent assessment information available to staff, the division will notify applicants and permittees if their discharge is into, or is affecting, impaired waters. Resources to be used in making this determination include biennial compilations of impaired waters, databases of assessment information, updated GIS coverages (<http://tnmap.tn.gov/wpc/>), and the results of recent field surveys. GIS coverages of the streams and lakes not meeting water quality standards, plus the biennial list of impaired waters, can be found at <http://tn.gov/environment/wpc>.

Part/Section	Comment
10 (Definitions)	Considering that 3:1 is the industry norm for all curb-and-gutter roads and most side projects, the steep slope requirement should be changed to 35% instead of 20%. In addition, this section states that designers of EPSC measures at sites with steep slopes must pay “special attention” to requirements in the SWPPP. Please clarify.

Response:

The definition of a steep slope was changed to “35% grade or greater.” Also, the word “special” was removed from the definition.

Part/Section	Comment
Appendix A (NOI Form)	Contractor name, address, phone number and e-mail should be required on the NOI form, just like it's required for the Site Owner or Developer.

Response:

Requested changes were made on the NOI form.

Part/Section	Comment
NOT Form	Notice of Termination (NOT) form should be modified to include county name.

Response:

County was added to the NOT form.

Determination

In conclusion, the comments included in this notice of determination document were compiled based on their relevance to the permit content, intent and interpretation of this general permit, rather than implementation of the permit conditions (e.g. penalty evaluations, appropriateness of various enforcement measures, development of TMDLs, etc.). Those questions or comments that became a moot point as a result of the changes made in the final permit were not included in this document.

The division intends to continue its work with task force groups for Qualifying Local Programs and stakeholders interested in further revisions and possible modification of this new permit, if necessary.

The division's decision on this matter is to issue a General NPDES Permit for Storm Water Discharges Associated with Construction Activity, Permit No. TNR100000.

DATE: May 23, 2011



Vojin Janjić
Manager, Permit Section