



STATE OF TENNESSEE
DEPARTMENT OF ENVIRONMENT AND CONSERVATION
DIVISION OF WATER RESOURCES
WILLIAM R. SNODGRASS - TENNESSEE TOWER
312 ROSA L. PARKS AVENUE, 11TH FLOOR
NASHVILLE, TENNESSEE 37243-1102

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

September 29, 2016

Administrative Record

The permit rationale (or fact sheet) dated April 28, 2016, sets forth the Division of Water Resources' (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 23, 2016. On April 28, 2016, the division issued Public Notice NOPH-TNR100000-100616, which announced the public hearings, which were conducted at the following dates and locations:

Location: 312 Rosa L. Parks Avenue
William R. Snodgrass – Tennessee Tower
Nashville Room 3rd Floor
Date: Friday, June 10, 2016
Informational Session: 1:00 PM Central Time
Public Hearing: 2:00 PM – 3:00 PM Central Time

In addition, by video conference at the following Environmental Field Offices (EFOs):

Eastern Time Zone (2:00 PM)

EFO	Location	Phone No.
Chattanooga	1301 Riverfront Pkwy, Suite 206	(423) 634-5745
Johnson City	2305 Silverdale Road	(423) 854-5400
Knoxville	3711 Middlebrook Pike	(865) 594-6035

Central Time Zone (1:00 PM)

EFO	Location	Phone No.
Jackson	1625 Hollywood Drive	(731) 512-1300
Cookeville	1221 South Willow Avenue	(931) 432-4015
Columbia	1421 Hampshire Pike	(931) 380-3371
Memphis	8383 Wolf Lake Drive, Bartlett	(901) 371-3000

On April 28, 2016, the division issued Public Notice #MMXVI-008, 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://environment-online.state.tn.us:8080/pls/enf_reports/f?p=9034:34051:15099248722872::NO:34051:P34051_PERMIT_NUMBER:TNR100000. 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 June 20, 2016. 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	References to effluent limitation guidelines in the final permit should reflect changes to the latest promulgated rules from 2014.

Response:

Part 4 of the final permit was updated to reflect in the current version of 40 C.F.R. Part 450.

Part/Section	Comment
General and Section 1.3(g), 5.4.2, and Section 5.2 of the Rationale	The division must explain how general permit coverage complies with the State's anti-degradation statement. These sections appear to impermissibly lower standards for allowing discharges into Exceptional Tennessee Waters. Section 5.4 appears to suggest, without any supporting evidence or other backup, that the supposed additional protections of design and buffer requirements equate to "no measurable degradation." TDEC should supply the science and data upon which this conclusion is based, or should commit to perform the studies required to validate such a conclusion

Response:

The permit complies with the Tennessee Antidegradation Statement, set forth at Tenn. Comp. R. & Regs. 0400-40-03-.06. The permit does not authorize discharges that would cause greater than de minimis

degradation. Section 1.3(g). New or increased discharges of pollutants to Exceptional Tennessee Waters or to waters with available parameters do not require antidegradation review unless they would cause degradation above the level of de minimis. Tenn. Comp. R. & Regs. 0400-40-03-.06(1)(b)(2), 0400-40-03-.06(3)(a), 0400-40-03-.06(1)(c)(1).

Similarly, the permit does not authorize discharges to waters with unavailable parameters that would cause measurable degradation of the parameter that is unavailable. Section 1.3(e). New or increased discharges of pollutants to waters with unavailable parameters may be authorized if they do not cause measurable degradation of the parameter that is unavailable. Tenn. Comp. R. & Regs. 0400-40-03-.06(2)(a),

Accordingly, existing water quality will not be degraded above a de minimis level (or measurably, in waters with unavailable parameters) by discharges that are in compliance with terms and conditions of this general permit.

Moreover, the stormwater discharges authorized by this permit have been on-going since the federal regulations requiring an NPDES permit for construction sites 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 pollutants discharged from construction activities. Through an adaptive management process, permittees are required to regularly review and refine their construction practices and EPSC measures to eliminate, or at a minimum, minimize the 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
1.2.1	This section states, in part: "Projects or developments less than one acre of total land disturbance may also be required to obtain authorization under this permit if: [...]"Federal Construction Stormwater requirements apply to sites one acre or greater. However, the current permit and the draft make the permit applicable to sites less than one acre at the discretion of the department. Sites less than one acre not part of a larger common plan of development should not be subject to construction stormwater permitting.

Response:

The permit is clear that sites less than one acre that are not part of a larger common plan of development are not subject to construction stormwater permitting. Under very specific circumstances, the director may determine that NPDES coverage (general or individual) may be required to protect receiving stream designated uses. These specific conditions are:

- a) the director has determined that the stormwater discharge from a site is causing, contributing to, or is likely to contribute to a violation of a state water quality standard;
- b) the director has determined that the stormwater discharge is, or is likely to be a significant contributor of pollutants to waters of the state; or
- c) changes in state or federal rules require sites of less than one acre that are not part of a larger common plan of development or sale to obtain a stormwater permit.

Part/Section	Comment
1.2.2	TDOT's waste and borrow policy is routinely reviewed and updated to meet construction contracting requirements. Therefore, TDOT suggests removing "TDOT projects shall be addressed in the Waste and Borrow Manual per the Statewide Stormwater Management Plan (SSWMP)" and revising it to say "TDOT waste and borrow policy."

Response:

Section 1.2.2. was changed accordingly.

Part/Section	Comment
1.3	Do limitations contained in paragraph (h) with respect to "take" of state-listed aquatic species apply to sediment management as described in the CGP?

Response:

Any discharge of pollutants, including sediment, regulated by this NPDES General Permit is subject to prohibitions of the Endangered Species Act (ESA). However, there has been no substantive change in the intent of this paragraph or level of protection required to comply with the ESA. No changes will be made in the final permit as a result of this comment.

Part/Section	Comment
1.3	How is a QLP to know if a new or proposed mining operation is proposed instead of issuing coverage under the CGP? The City has issued notice of coverages for grading activities and recently, TDEC has informed site owners that coverage under individual mining permits is required.

Response:

All applications and NOIs to obtain coverage under an individual or one of our General NPDES Permits are published on the Department's database (DataViewer). A link to the dataviewer is: <http://tn.gov/environment/article/tdec-dataviewers>.

Part/Section	Comment
1.3	A citation or the definition for measurable degradation for parameters should be included.

Response:

A definition from Tenn. Comp. R. & Regs. 0400-40-03-04(11) was added to part 10 of the final permit:

"Measurable Degradation," as used in the context of discharges or withdrawals
– Changes in parameters of waters that are of sufficient magnitude to be detectable by the best available instrumentation or laboratory analyses.

(Note: Because analytical techniques change, the Department may consider either the most sensitive detection method needed to comply with state standards or any biological, chemical, physical, or analytical method, conducted in

accordance with U.S. EPA approved methods as identified in 40 C.F.R. part 136. Consistent with T.C.A. § 69-3-108, for scenarios involving cumulative, non-measurable activities or parameters that are managed by a narrative criterion, the Department will use mathematical models and ecological indices to ensure no degradation will result from the authorization of such activities, consistent with the state's mixing zone policy.)

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	Utilities typically have easements or right of ways and frequently do not notify the operator, review the SWPPP or follow it when removing earth for construction of utilities. The CGP should clarify the Site operator's responsibility for disturbance by such utilities and related entities including how those activities should be addressed in the NOI and the SWPPP.

Response:

We encourage open and productive communication between permittees, contractors, utility crews and any other business entity involved in a site development. While acknowledging that such cooperation is always the most productive and cost-effective way to conduct construction activities on a site, we do not find regulatory basis to require or enforce utilities notifying the operator of their activities. Such notification should be defined within contracts, rather than this general NPDES permit.

Part/Section	Comment
1.4.3	Section 1.4.3. states: "Checks for the appropriate fee should be made payable to Treasurer, State of Tennessee." Can TDEC begin accepting online payments in an effort to make this process quicker and more efficient for applicants? Many builders and developers have posed this question since fees for other permits issued by the Division of Water Resources can be paid online but CGP fee payments cannot.

Response:

Section 1.4.3. was modified to state: "Checks for the appropriate fee should be made payable to Treasurer, State of Tennessee. Electronic payment methods, if made available by the State of Tennessee, are deemed acceptable."

Part/Section	Comment
1.4.5	Please clarify that the CGP does not permit the qualified local program (QLP) MS4 to administer a program any more stringent than the "equivalent" of the CGP as stated in 1.4.5.

Response:

Section 1.4.5 (Permit Coverage through Qualifying Local Program) is very clear in its intent to provide framework for coverage "[...] *equivalent to coverage under this general permit may be obtained from a qualifying local erosion prevention and sediment control MS4 program.*" It is not intent of this general permit to limit jurisdiction or program administration on a local level beyond, at a minimum, being equivalent to this CGP.

Part/Section	Comment
1.5.1	The requirement that artificial person be registered with the Secretary of State (SOS) is not possible for general partnerships and some other entities. General partnerships may register their statement of authority but are not required to. This requirement imposes an obligation not required by statute and thus the department has no authority to require it. Moreover, there is no online search capability or online ability to register partnerships online. The need to have properly recorded corporations or limited liability to comply with required corporate form is not to facilitate TDEC recordkeeping but to maintain liability protection for the entity.

Response:

The Tennessee Water Quality Control Act requires that each person obtain a permit prior to discharging pollutants to waters of the state. The permit should be issued in the correct legal name of the person (whether an individual, government body, or corporate entity) so that whoever is responsible for discharging pollutants has permit coverage. For a business to be a "person" it must be a real corporate entity. And, for a business to lawfully operate in Tennessee, it must be in good standing with the SOS.

In a memo dated August 26, 2014, Mr. Robert J. Martineau, Jr., TDEC Commissioner stated:

"To achieve greater efficiencies and consistencies as we move to a business environment that utilizes more electronic information, it is important we have a standard definition of

the “customer,” or legal entity, with whom TDEC is transacting business. In many program areas this is already very simple and straight forward. For example, state park employees clearly know who are their customers. However, in areas like our environmental regulatory programs, the true legal entity is not always apparent.

Divisions do not currently define and identify customers in their applications and databases in a consistent and standard way across the department. That reality has led to customer duplication within TDEC’s various programs and systems and prevents us from being able to connect and report consolidated data by entity. It is important that we have a way to connect all related sections of an entity to the real legal entity while fully recognizing that each program area has their own unique needs and requirements and may deal with different sections of the legal entity.”

Using business registration with the Tennessee Secretary of State, Division of Business Services and the corresponding SOS numbers is the most effective way to confirm identity of permit applicants, particularly with respect to any necessary civil enforcement action. However, we do recognize that certain entities are not required to register with the SOS. Accordingly, the reference to “artificial entities” has been changed to state, in part:

*“The division reserves the right to deny coverage to artificial entities (e.g., corporations or partnerships, **excluding entities not required to register with the Tennessee Secretary of State**) that are not properly registered and in good standing with the Tennessee Secretary of State, Division of Business Services.”*

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). Section 1.5.1 is intended to 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
1.5.1	In an effort to improve NOI processing efficiency and provide quicker coverage notification, publish subsequent primary operators' coverage information on TDEC's dataviewer instead of mailing an NOC.

Response:

The suggested change was made to the final permit. For new operators seeking subsequent coverage under an existing tracking number, the division will not issue an NOC. New operators are covered under the permit when their permit record is published on TDEC's dataviewer ([http://environment-online.tn.gov:8080/pls/enf_reports/f?p=9034:34001:0:::~](http://environment-online.tn.gov:8080/pls/enf_reports/f?p=9034:34001:0:::)) as "active" and with an effective date.

Part/Section	Comment
2.1	Can a contractor begin work on already permitted site once an updated, signed NOI has been submitted to TDEC but before a "NOC with contractor added" has been prepared?

Response:

Yes.

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. The City needs TDEC to require permittees to confirm their intent to be covered under this new general permit through the submission of an updated NOI for all TDEC issued permits in Bristol.

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 who 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
2.6.2	Suggest deleting "The map should also list and indicate the location of EPSCs that will be used at the construction site." EPSC measures are shown on the separate, staged EPSC plan included with the NPDES permit application.

Response:

The suggested change was made to the final permit.

Part/Section	Comment
2.6.3	The Division should at a minimum prepare and send any deficiency letter within 10 days of receipt. Also, If the Division denies coverage under the general permit the denial letter must provide a notice of right to appeal subject to 69-3-105(i).

Response:

The bill of rights for permit applicants (Tenn. Code. Ann. § 69-3-141 (b)(4), states:

“Permit applicants shall have the right to timely completeness determinations for their applications. Permit applicants shall have the right to know exactly how their applications are incomplete and what further information is needed to make their applications complete. Absent extraordinary circumstances, the commissioner shall notify the applicant within thirty (30) days of any permit application deficiencies, or determine that the application is complete;”

While “as soon as possible” remains our internal goal with continuous focus on good customer service, the above-quoted statute defines our legal responsibilities. The following language is incorporated in a template letter which used to communicate appeal rights associated with the division’s denial:

“Please be advised that a petition for permit appeal may be filed, pursuant to T.C.A. Section 69-3-105, subsection (i), by the permit applicant or by any aggrieved person who participated in the public comment period or gave testimony at a formal public hearing whose appeal is based upon any of the issues that were provided to the commissioner in writing during the public comment period or in testimony at a formal public hearing on the permit application. Additionally, for those permits for which the department gives public notice of a draft permit, any permit applicant or aggrieved person may base a permit appeal on any material change to conditions in the final permit from those in the draft, unless the material change has been subject to additional opportunity for public comment. Any petition for permit appeal under this subsection (i) shall be filed with the Technical Secretary of the Water Quality, Oil and Gas Board within thirty (30) days after public notice of the commissioner's decision to issue or deny the permit. A copy of the filing should also be sent to TDEC's Office of General Counsel.”

Compliance with all applicable administrative rights and due process for all applicants, including applicable appeal rights, continues to be our permanent commitment.

Part/Section	Comment
2.6.3	The Division should require that a Notice of Intent & Stormwater Pollution Prevention Plan (SWPPP) Checklist (see Appendix D) be submitted with the SWPPP.

Response:

A complete NOI, SWPPP and application fee are already required to obtain coverage under this general permit. Requiring a Notice of Intent & Stormwater Pollution Prevention Plan (SWPPP) Checklist would add unnecessary paperwork burden for applicants. Our position remains that the checklist is a beneficial tool, but it should not be required in order to obtain permit coverage.

Part/Section	Comment
2.7	If a site straddles a county line of counties that are in different EFO service areas, the operators shall send NOIs to each EFO. The application fee should be submitted to the EFO that provides coverage for the majority of the proposed construction activity.

Response:

Paragraph 1 of sub-part 2.7 was modified to read:

“If a site straddles a county line of counties that are in different EFO service areas, the operators shall send the NOIs to each EFO. The and the application fee should be submitted to the EFO that provides coverage for the majority of the proposed construction activity.”

Part/Section	Comment
3.1	In Section 3.1 and other locations the permit requires at a minimum BMPs be consistent with the requirements and recommendations contained in the current edition of the Tennessee Erosion and Sediment Control Handbook (the Handbook). The Handbook is not a rule duly promulgated by the Board of Water Quality, Oil and Gas, and was not adopted in accordance with the Uniform Administrative Procedures Act. The Permit should provide that the Handbook is guidance only, and the permittee may use any other generally accepted engineering practices.

Response:

The Stormwater Pollution Prevention Plan (SWPPP) allows 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.

It was never the division’s intent to restrict implementation of alternative or innovative best management practices at construction sites. The 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, during the previous permit term, 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.”

Furthermore, the permit states:

“The handbook is designed to provide information to planners, developers, engineers, and contractors on the proper selection, installation and maintenance of BMPs.”

There is nothing in the permit or the permit rationale that states or implies that the Tennessee Erosion and Sediment Control Handbook should be perceived as a promulgated rule.

Part/Section	Comment
3.1.1	<p>“The narrative portion of the SWPPP shall be prepared by an individual who has a working knowledge of erosion prevention and sediment controls, such as a Certified Professional....”</p> <p>- Suggest removing the language “such as” because this implies that other courses are acceptable as equivalent to CPESC and Level II. If the language is left as is, how is equivalency reviewed and/or determined?</p>

Response:

Although unlikely, it is possible that other courses or certifications may become recognized as providing a ‘working knowledge of erosion prevention and sediment controls’ during the term of this permit. The equivalency criteria will be evaluated on a case-by-case basis, if necessary.

Part/Section	Comment
3.1.1	<p>Requirements for site assessments are not stringent enough. A licensed professional engineer or landscape architect should be the only qualified person to prepare the narrative portion of the SWPPP.</p>

Response:

The CGP requires that 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 and stamped by a licensed professional engineer or landscape architect. However, there is no regulatory requirement for the narrative portion of the SWPPP to be prepared by a licensed professional engineer or landscape architect.

Part/Section	Comment
3.1.2	<p>As a result of site assessment, changes are sometimes made to the SWPPP. This section should refer to the SWPPP as “field SWPPP” instead of “submitted SWPPP.”</p>

Response:

We recognize that SWPPP can and should be routinely updated. Such updates may happen before site assessment is conducted. Therefore, changing the wording to “field SWPPP” may be more accurate, while not taking away from the receiving stream protection. The requested change was made in the final permit.

Part/Section	Comment
3.1.2	The language added to the contents of a Site Assessment will be hard to document and prepare in the field. The current language allowing use of the inspection form to determine compliance is sufficient to provide quality assurance.

Response:

The amount of documentation required to complete site assessment is minimal. In those instances where SWPPP deficiencies were found, language included in the CGP is reasonable and adequate. No changes were made in the final permit as a result of this comment.

Part/Section	Comment
3.1.2	<p>The site assessment is written as a one-time only inspection that occurs within the first 30 days of disturbance within the outfall meeting the qualifying drainage areas. If deficiencies are noted, there is no requirement for a follow up assessment. Should this section be reworded to focus more on the structural BMPs intended to be installed within these qualifying drainage areas and described as a visual “as built” assessment? In addition, if structural BMPs (or equivalent EPSC measures) are not constructed or construction is in progress at the time of the site assessment, then recommend or require that follow up monthly assessment(s) are required until the BMPs are constructed per plan.</p> <p>Replace- “The site assessment can take the place of one of the twice weekly inspections requirement from subsection 3.5.8.2 below”-With- “The site assessment can take the place of one of the twice weekly inspections required from subsection 3.5.8.2 below if the entire site is inspected during the assessment.”</p>

Response:

The proposed changes are included in the final permit.

Part/Section	Comment
3.2.1	Updating all projects (particularly roadway projects) currently underway within 3 months of the effective date of the CGP would be difficult and costly to developers and 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 in part with this comment. The deadline for implementation of SWPPP changes has been changed from 3 months to 12 months.

Part/Section	Comment
3.3.1	Can TDEC accept electronic signatures in an effort to make this process quicker and more efficient for applicants? Many builders and developers have posed this question since other permits issued through the Division of Water Resources can be submitted electronically and CGP permits still require original signatures..

Response:

The division agrees with this comment. Section 3.3.1 was modified to state: “All signatures must be original. Electronic signatures are deemed equivalent to original signatures. A SWPPP that does not bear an original signature or an electronic signature will be deemed incomplete.”

Part/Section	Comment
3.3.3	In many sites SWPPP changes are minor (adding a second row of silt fence) and are not noted on the SWPPP. Language should be added to the paragraph to state, "Minor changes to the SWPPP need not be noted on the current version of the SWPPP. Minor changes include refinements or enhancements to existing BMPs that do not require engineering design changes."

Response:

It has never been our intent for every activity at the construction site to be fully documented in the SWPPP. The permittee should be capable of showing how improvement to the SWPPP effectiveness were identified and implemented at 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. Similarly, a disturbed site of 1.1 acres that is primarily a proposed parking lot does not need two plan sheets. Suggest changing this section to allow more flexibility in the development of EPSC plan sheets.

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.*” It is our experience that showing two separate EPSC sheets (one for the initial land disturbance, or grading, stage and one for the final grading stage) even for small projects encourages good planning and enhances receiving stream protection.

Part/Section	Comment
3.5.3.1	Reference(s) to “cationic chemical treatment” in the CGP should be replaced with “anionic chemical treatment” or not specify a charge on the polymer used.

Response:

We agree with this comment and the change was made in the final permit not to specify the charge of polymer to be used.

Part/Section	Comment
3.5.3.1	It should not be required that chemical treatment be approved before NOI is submitted. In addition, conditions at a site may dictate that chemical treatment may be necessary after the construction activities commenced.

Response:

If an applicant knows that chemical treatment will be used, chemical treatment information should be submitted with an NOI and the SWPPP. However, if chemical treatment is deemed necessary after the construction activities commenced, the chemical treatment must be researched and applied according to the manufacturer’s guidelines and fully described in the SWPPP. The final permit does not require prior approval by the division’s EFO staff prior to submittal of the NOI and SWPPP.

Part/Section	Comment
3.5.3.1	The section appears merely to recommend phasing of construction, instead of requiring it, as was done in the 2011 Permit. (“Construction phasing is recommended on all projects regardless of size as a major practice for minimizing erosion and limiting sedimentation.” (emphasis added)) Phasing must be required; merely recommending phasing is unacceptable. As the Kentucky Erosion Prevention and Sediment Control Field Guide (http://www.kutc.ku.edu/pdf/esc_guide.pdf ; page 3) notes, “The cheapest erosion and sediment controls are the most effective. For example, limiting the amount of bare soil by phasing your project and preserving existing vegetation are less expensive and work better than installing large storm water control basins or ponds.”

Response:

Construction phasing is indeed the most effective method to minimize discharge of soil from construction sites. Phasing, although effective, cannot be implemented at all construction sites to the same extent. Construction at some, particularly small 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.

It must be emphasized that multiple EPSC plan sheets are required for multi-phase projects which implement different EPSC controls at each phase. Specifically, the permit states: “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.” It is our experience that showing two separate EPSC sheets (one for the initial land disturbance, or grading, stage and one for the final grading stage) even for small projects encourages good planning and enhances receiving stream protection. That, in itself, does

not require “phasing” for small construction sites (e.g., lot level construction within a subdivision, 1.1 acre parking lot, etc.).

Part/Section	Comment
3.5.4	<ul style="list-style-type: none">• Since the Construction General Permit is only for construction and not post construction, the description in the SWPPP of post construction stormwater measures should be limited to BMPs that require disturbance of soil to construct and install. Since post construction stormwater management is not a part of the construction general permit no other requirements or recommendations should be imposed in this section.• Add a new paragraph in lieu of all others as follows: This permit does not address post construction stormwater measures. Post construction stormwater requirements are not part of this permit; rather, they are the responsibility of the MS4. Pursuant to Public Chapter 1007, Acts of 2016, MS4s have discretion to select measures necessary to reduce the discharge of pollutants to the maximum extent practicable. In addition, the MS4 cannot require post construction measures in excess of federal requirements without approval of the local governing authority.

Response:

40 C.F.R. § 122.26 states in part (emphasis added):

(ii) An operator of an existing or new storm water discharge that is associated with industrial activity solely under paragraph (b)(14)(x) of this section or is associated with small construction activity solely under paragraph (b)(15) of this section, is exempt from the requirements of §122.21(g) and paragraph (c)(1)(i) of this section. Such operator shall provide a narrative description of:

(A) The location (including a map) and the nature of the construction activity;

(B) The total area of the site and the area of the site that is expected to undergo excavation during the life of the permit;

(C) Proposed measures, including best management practices, to control pollutants in storm water discharges during construction, including a brief description of applicable State and local erosion and sediment control requirements;

(D) Proposed measures to control pollutants in storm water discharges that will occur after construction operations have been completed, including a brief description of applicable State or local erosion and sediment control requirements;

(E) An estimate of the runoff coefficient of the site and the increase in impervious area after the construction addressed in the permit application is completed, the nature of fill material and existing data describing the soil or the quality of the discharge; and

(F) The name of the receiving water.

Based on this comment, and the verbiage in the federal rules, the following changes were made in first two paragraphs of the section 3.5.4 - Stormwater management:

“The SWPPP shall include a description of any measures that will be installed during the construction process to control pollutants in stormwater discharges that will occur after construction operations have been completed, including a brief description of applicable State or local erosion and sediment control requirements.”

For projects discharging to waters with unavailable parameters for siltation and habitat alterations due to in-channel erosion, the SWPPP shall include a description of measures that will be installed during the construction process to control pollutants and ~~any increase in the volume of stormwater discharges that will occur after construction operations have been completed~~ the increase in impervious area after the construction addressed in the permit application is completed, the nature of fill material and existing data describing the soil or the quality of the discharge.”

Part/Section	Comment
3.5.8.1 and Definitions	<ul style="list-style-type: none"> Clarify the section. Suggest removing alternative options to TDEC Level I and stating that in order to perform inspections you must have Level I regardless of other certifications held. Having a PE or LA does not necessarily mean that you have a background and understanding of the CGP and EPSC inspection, installation and maintenance requirements. In the past, Level I and II were not always required; however, these levels of training became required as a result of the lack of compliance during previous permits. The inspector list should have 4 bullets, the 4 bullet being an individual who has an active certification by completing the "Fundamentals of Erosion Prevention and Sediment Control Level I" course. This section should be reworded such that any of the four bulleted individuals can perform the inspections

Response:

The new permit does recognize equivalency to Level I course for certain categories of professionals. The paragraph has been rewritten to avoid any confusion:

“Twice weekly inspections can be performed by:

- a) a person with an valid certification from the “[Fundamentals of Erosion Prevention and Sediment Control Level I](#)” course,*
- b) a licensed professional engineer or landscape architect,*
- c) a Certified Professional in Erosion an Sediment Control (CPESC), or*
- d) a person who has successfully completed the “Level II Design Principles for Erosion Prevention and Sediment Control for Construction Sites” course.”*

<p>Part/Section 4.1.2</p>	<p>Comment</p> <ul style="list-style-type: none"> • The requirement to retain existing forested areas located in the buffer is not a measure related to water quality treatment for sheet flow runoff and should be deleted. • Omit the language in the third paragraph "[w]here it is not practicable to maintain a full water quality buffer," since the permittee should be able to select an equivalent BMP regardless of whether or not a riparian buffer is practical if it is equivalent. • With the expansive definition provided to "stream" how do the buffer requirements apply to lakes, wetlands and other non-linear surface waters? • In the final paragraph add a sentence as follows. Requirements for permanent stormwater buffer zones must be consistent with Public Chapter 1007, Acts of 2016.
<p>Part/Section 4.1.2</p>	<p>Comment</p> <p>This section provides that buffers are “required to protect waters of the state that are not wet weather conveyances (e.g., perennial and intermittent streams, rivers, lakes, wetlands)”... There is no justification based on environmental science or engineering for failing to include wet weather conveyances. Once sediments and contaminants reach any surface watercourse they are likely to continue into larger waters. Wet weather conveyances are just as likely as streams to be responsible for transporting sediments and contaminants into larger waters. A second concern is this: Inasmuch as the Draft Permit is an NPDES permit, and TDEC must protect waters of the United States, the Draft Permit must be revised to require buffers on all “waters of the United States” in addition to those protected under Tennessee law.</p>
<p>Part/Section 4.1.2</p>	<p>Comment</p> <p>This definition’s first sentence is identical to Chapter 1200-04-03 in General Water Quality Criteria. This is the rule that creates the standard operating procedure for hydrologic determinations. Hydrologic determinations are only determining those water resources that are not wet weather conveyances and the training is strictly for streams: not wetlands, springs, ponds etc. Making “stream” a term recognized by the state to include other non-linear types of water resources is confusing. Suggest that if you are referring to other water resources call them water resources or some other term besides stream.</p>

Response:

Buffers are required by 40 C.F.R. § 450.21, which requires EPSCs to:

“(6) Provide and maintain natural buffers around waters of the United States, direct stormwater to vegetated areas and maximize stormwater infiltration to reduce pollutant discharges, unless infeasible;”

TDEC is required to implement federal effluent limitations guidelines in its NPDES permits. Tenn. Code Ann. § 69-3-108(g)(1); Tenn. Comp. R. & Regs. 0400-40-05-.09(b)(1). Accordingly, the permit is revised to require buffers around streams and any wet weather conveyances specifically determined by the Corps of Engineers or EPA to constitute waters of the United States. However, the integrity, quality, and extent of natural riparian zones surrounding wet weather conveyances are typically much poorer than adjacent to streams, so the buffers will be 15 feet. This permit does not require permittees to seek federal

jurisdictional determination. This provision applies only if the federal jurisdictional determination has been made or the permittee has chosen to obtain a federal jurisdictional determination.

Under the Tennessee Water Quality Control Act, streams include all surface waters that are not wet weather conveyances, so the buffer requirement applies to wetlands, lakes, and other non-linear surface waters.

In accordance with the federal regulation, the permit provides flexibility to implement alternatives where preserving natural buffer is not feasible. The equivalent BMPs must provide for equivalent water quality protection as a natural riparian zone. The permittee must document why the existing buffer could not be preserved and document BMP equivalency with respect to pollutant removal, structural integrity, and habitat protection.

Water quality buffers as identified in this permit are temporary, and apply during the construction period. Chapter 1007, Acts of 2016, pertains to permanent, post-construction stormwater management practices required under municipal separate stormwater sewer system (MS4), and therefore is not applicable to this general permit.

Part/Section	Comment
4.1.2	In the second sentence, the word “may” should be replaced with the word “must”, as per the following: “Where it is not practicable to maintain a full water quality riparian buffer, BMPs providing equivalent protection to a receiving stream as a natural water quality riparian buffer may must be used at a construction site.”

Response:

The suggested change was made in the final permit.

Part/Section	Comment
4.1.5	This section seems unclear and contradictory. The first sentence’s use of the word “should” suggests that soil analysis is optional, but the second sentence uses the word “shall.” We believe that soil analysis is very beneficial and must be required, and TDEC should be commended for including it. TDEC should resolve this apparent ambiguity in favor of mandatory soil analysis. A reference to the Basic Test by the UT Agriculture Extension should be used in limiting application of fertilizer at construction sites. Documentation of required soil analysis be maintained onsite with the SWPPP.

Response:

The suggested changes have been included in the final permit.

Part/Section	Comment
5.1	<ul style="list-style-type: none"> • Subparagraph (a) should also include reference to notifying the local emergency planning committee "where applicable." • Subparagraph (b) should clarify that this notification is in addition to any follow up notifications required by federal law.

Response:

Paragraph a) was revised to state:

“a) the permittee is required to notify the National Response Center (NRC) (800-424-8802), the Tennessee Emergency Management Agency (emergencies: 800-262-3300; non-emergencies: 800-262-3400) and the local emergency planning office (where applicable) in accordance with the requirements of 40 CFR 117 or 40 CFR 302 as soon as he or she has knowledge of the discharge;”

The phrase “in addition to any follow up notifications required by federal law” was added to the beginning of paragraph b).

Part/Section	Comment
5.3.1	<p>The permit language change adds additional requirements by removing the term "results in a violation" to "cause or contribute" to a violation. This standard is difficult to show and the clearer requirement of "results in" should be retained. The language "The stormwater discharge must not cause an objectionable color contrast in the receiving stream" is too subjective and is not based upon a standard measurement. Whether the stream exhibits a darker color as a result of a stormwater discharge is not objectionable unless it violates water quality standards or constitutes pollution. The existing language should be omitted in its entirety as objectionable color is a recreational use covered by subparagraph 5.3.2 a).</p>

Response:

It has not been our intent to add any additional requirements by removing “results in a violation” from the new permit. Any changes related to protection of receiving stream designated uses were in response to changes in our general water quality criteria. The division agrees that a degree of subjectivity exists in this permit requirement. However, the same can be said for all narrative criteria included in the Water Quality Standards (e.g., there shall be no toxics in toxic amounts). For example, color contrast is often 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.

Part/Section	Comment
5.4.1	A reference to the “field SWPPP” should be included in this section, since it may not be known whom the inspector may be at the time of the initial SWPPP submission. A sediment basin clean-out marker often gets damaged by the volume of water or sediment, and we have found is rarely used in practice. We recommend removing this requirement and using sound professional judgment regarding sediment basin capacity.

Response:

The requested wording change was made in the final permit.

Part/Section	Comment
5.4.1	A requirement for a sediment trap for outfalls draining 3.5 to 4.9 acres was not documented in the rationale. This can have effect on design and cost of construction projects.

Response:

This requirement was changed to a recommendation, based on the Tennessee Erosion and Sediment Control Handbook.

Part/Section	Comment
5.4.1	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> ” This requirement is not practical and may be impossible for out-of-state firms who submit SWPPPs.

Part/Section	Comment
5.4.1	Suggest returning to requirement of Level II only without the alternate options of PE or LA. Also contradicts Section 3.1.1. where it requires that SWPPP narrative be prepared by a CPESC or Level II. Regarding EPSC measure design, Tennessee has specific and sometimes different standards than surrounding states. Attending the TDEC Level 2 course ensures exposure to many of the TN specific design standards. As stated at the June 10, 2016 public hearing, EPSC design continues to be one of the most common deficiencies noted by TDEC when reviewing NOI/SWPPP submittals. The TDEC Level 2 course provides a unique opportunity for design professionals and plan reviewers to become more familiar with TN-specific design standards and procedures. Becoming a CPESC does not provide this same level or detail of instruction. In fact, the CPESC course content specifically excludes design instruction for hydrologic/hydraulic/structural design that is reserved for engineers and landscape architects.

Response:

We recognize that Level II Design Principles for Erosion Prevention and Sediment Control for Construction Sites course provides Tennessee-specific content, and plan to continue support for that course in the future. We also must recognize that the rules of the [Tennessee Board of Architectural and Engineering Examiners](#) mandate practice only within a subject matter expertise. Strict adherence to the rules should ensure full protection of surface waters in Tennessee.

Part/Section	Comment
5.4.1 and 5.4.2	Please define or provide more explanation of “equivalent measures” and “equivalent BMPs”.

Response:

The phrase “equivalent measures” is only used on the Notice of Termination (NOT) form, in the context of defining reason(s) for termination of permit coverage:

“Stormwater discharge associated with construction activity is no longer occurring and the permitted area has a uniform 70% permanent vegetative cover OR has equivalent measures such as rip rap or geotextiles, in areas not covered with impervious surfaces.”

“Equivalent control measures” and “equivalent BMPs” used throughout the permit are referring to any combination of EPSC measures that may be implemented to prevent discharge of silt from an active construction site in lieu of a sediment retention basin.

Part/Section	Comment
7.7.1	Signatory requirements of this section should be expanded to include “or their designee” to allow delegation of authority, similar to the signatory requirements of a corporation.

Response:

The clarification note of this section has been moved to the bottom of the section, and reworded to include municipal, state, federal, or other public agency officers:

“NOTE: The division does not require specific assignments or delegations of authority to responsible corporate or municipal, state, federal, or other public agency officers. The division will presume that these officers have the requisite authority to sign permit applications unless the entity has notified the director to the contrary. Procedures governing authority to sign permit applications may provide for assignment or delegation to applicable positions rather than to specific individuals.”

Part/Section	Comment
8.1	The Division must notify the permittee within five days of receipt that the NOT was received and notify the applicant within 10 days of any needed changes to their NOT submittal. If termination is denied, the Division must offer the applicant the opportunity to appeal the decision in accordance with TCA 69-3-105(i).

Response:

The bill of rights for permit applicants, Tenn.Code Ann. § 69-3-141(b)(4), states:

“Permit applicants shall have the right to timely completeness determinations for their applications. Permit applicants shall have the right to know exactly how their applications are incomplete and what further information is needed to make their applications complete. Absent extraordinary circumstances, the commissioner shall

notify the applicant within thirty (30) days of any permit application deficiencies, or determine that the application is complete;”

While “as soon as possible” remains our internal goal with continuous focus on good customer service, the above quoted statute defines our legal responsibilities, albeit not with respect to permit terminations. Compliance with all applicable administrative rights and due process for all permittees, including applicable appeal rights, continues to be our permanent commitment.

Part/Section	Comment
8.1.1	Language describing extension of permit coverage combined with requirements for termination of developer and builder coverage had created a situation where a number of permit coverages tracked in the database does not match a number of active construction sites. The new CGP should have a provision for such coverages to be administratively terminated.

Response:

The following sentence was added to section 8.1.1. Termination process for primary permittees: *“If the NOT was not submitted five years following the “estimated end date” (as identified on the NOI), the division can terminate the CGP coverage.”*

Part/Section	Comment
10 (Definitions)	The definition of “inspector” should be updated to include P.E., P.L.A., CPESC or TDEC Level II to perform the inspections per previous section changes.

Response:

The requested change has been made in the final permit.

Part/Section	Comment
10 (Definitions)	The statutory definition of "stream" at TCA 69-3-103(40) does not expressly include lakes (other than impoundments of streams), wetlands, and other non-linear surface waters. The permit should clarify the water features that are protected at any given requirement. For example, the riparian buffer zone is measured from a stream bank. It is not clear that such buffer was intended for wetlands on non linear surface waters. It is also not clear what is meant by non linear surface waters as there is no regulatory definition.

Response:

The statutory definition of stream is:

(38) *Stream means a surface water that is not a wet weather conveyance;*

Wet weather conveyance is defined as:

“Wet weather conveyances” are man-made or natural watercourses, including natural watercourses that have been modified by channelization, that meet the following:

- a) *The conveyance carries flow only in direct response to precipitation runoff in its immediate locality.*
- b) *The conveyance's channels are at all times above the ground water table.*
- c) *The flow carried by the conveyance is not suitable for drinking water supplies.*

Hydrological and biological analyses indicate that, due to naturally occurring ephemeral or low flow under normal weather conditions, there is not sufficient water to support fish or multiple populations of obligate lotic aquatic organisms whose life cycle includes an aquatic phase of at least two months. (Tennessee Rules, Chapter [0400-40-3-.04\(3\)](#)).

In order to avoid any confusion, besides the definition for the wet weather conveyance, the CGP contains the following definition for the "stream":

"A "Stream" is a surface water that is not a wet weather conveyance. Therefore, as used in this permit, "stream" includes lakes, wetlands and other non-linear surface waters."

Considering the above, the final permit does not have to be changed as a result of this comment.

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 considered by the division, but not included in this document.

The division will continue to work with task force groups for Qualifying Local Programs and stakeholders interested in further revisions and possible modification of this permit, if necessary. Any such modifications (other than minor modifications) would be subject to further public comment.

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: 9/29/2016



Vojin Janjić
Manager, Water-Based Systems Unit