

DRAFT Water Quality Certification
#2021_002
Under 33 U.S.C. § 1341
For Supplemental Conditions to U.S. E.P.A.
2022 Construction General Permit



VERMONT DEPARTMENT OF
ENVIRONMENTAL CONSERVATION
WATERSHED
MANAGEMENT DIVISION

I. INTRODUCTION

On June 17, 2021, the United States Environmental Protection Agency (EPA) requested that the Department of Environmental Conservation review and grant certification under section 401 of the Clean Water Act or waive its right to certify EPA's proposed draft 2022 Construction General Permit.

Pursuant to Section 13.11 of the Vermont Water Pollution Control Permit Regulations (February 26, 1974) (VWPCPR) and the Agency of Natural Resources' Section 401 Water Quality Certification Practice (October 22, 2014), the Secretary (Secretary) of the Vermont Agency of Natural Resources (Agency or ANR) has reviewed EPA's request.

Pursuant to the VWPCPR §§ 13.11(c)-(f), the Agency provided public notice of its preliminary decision in this matter on August 14, 2021 and provided the opportunity to request a public meeting.

II. BACKGROUND

The EPA has jurisdiction over projects undertaken by Federal Operators in Vermont for purposes of permitting under the National Pollutant Discharge Elimination System (NPDES). The EPA is proposing modifications to EPA's 2017 Construction General Permit, through the issuance of EPA's draft 2022 Construction General Permit (CGP). EPA's CGP will apply to all federal facilities undergoing regulated construction activities in the State of Vermont and may affect Class A1, A2, and B waters.

The additional conditions currently proposed to those federal facilities to be regulated under EPA's forthcoming 2022 CGP include aligning the draft permit with the 2017 Vermont CGP for regulated construction activities, specific to the maximum allowable concurrent earth disturbance, stabilization schedule, inspection frequency, the use of treatment chemicals (e.g. polymers, flocculants, and coagulants), and Vermont's Agency of Natural Resources authority to inspect federal facilities regulated under EPA's 2022 CGP.

III. CONDITIONS

The Secretary has reviewed EPA's proposed modifications to the CGP, and this decision is based upon an evaluation of the information contained within the proposed general permit and other requirements of state and federal law relevant to the Agency's responsibilities under Section 401 of the federal Clean Water Act. The Agency certifies that there is a reasonable assurance that construction and operation of the projects authorized under EPA's proposed general permit and in accordance with the following conditions will not cause a violation of the Vermont Water Quality Standards (VWQS) and will be in compliance with sections 301, 302, 303, 306, and 307 of the federal Clean Water Act, 33 U.S.C. § 1341, as amended, and other appropriate requirements of state law. This Certification is granted pursuant to the following conditions being applied to all regulated activities in Vermont:

- A.** Earth disturbance at any one time is limited to five acres.
- B.** All areas of earth disturbance must have temporary or final stabilization within 14 days of the initial disturbance. After this time, disturbed areas must be temporarily or permanently stabilized in advance of any runoff producing event. A runoff producing event is an event that produces runoff from the

construction site. Temporary stabilization is not required if precipitation is not forecast and work is to continue in the next 24-hours or if the work is occurring in a self-contained excavation (i.e. no outlet) with a depth of two feet or greater (e.g. house foundation excavation, utility trenches). Areas of a construction site that drain to sediment basins are not considered eligible for this exemption, and the exemption applies only to the excavated area itself.

- C. Site inspections on active construction sites shall be conducted daily during the period from October 15 through April 15.
- D. The use of chemical treatments (e.g. polymers, flocculants, and coagulants) for the settling and/or removal of sediment from stormwater runoff associated with construction and construction-related activities requires prior written approval and an approved site and project-specific plan, from the Vermont Agency of Natural Resources. In addition, the use of cationic polymers is prohibited unless approved by the Vermont Agency of Natural Resources under a site and project-specific plan.
- E. Any applicant under EPA's CGP shall allow authorized Vermont Agency of Natural Resources representatives, at reasonable times and upon presentation of credentials, to enter upon the project site for purposes of inspecting the project and determining compliance with this Certification.
- F. The Vermont Agency of Natural Resources may reopen and alter or amend the conditions of this Certification over the life of the EPA 2022 Construction General Permit when such action is necessary to assure compliance with the VWQS.

IV. BASIS FOR CONDITIONS MORE STRINGENT THAN EPA'S PROPOSED GENERAL PERMIT; STATEMENT OF EXTENT TO WHICH EPA'S GENERAL PERMIT CAN BE MADE LESS STRINGENT

The Secretary is authorized to implement a construction stormwater permit program consistent with federal NPDES standards pursuant to 10 V.S.A. §§ 1263 and 1264. The conditions proposed by the Secretary in subsections III. A- D are consistent with Vermont's 2017 Construction General Permit 3-9020 and are deemed necessary by the Secretary to ensure compliance with the Vermont Water Quality Standards (VWQS). The conditions proposed by the Secretary in subsections III. E-F allow for the Secretary to inspect regulated federal facilities to ensure compliance with the VWQS and affords the Secretary the opportunity to reopen and alter or amend the conditions of this Certification as determined to be necessary to assure compliance with the VWQS. The Secretary's justification for the conditions proposed in subsections III. A-D follow below.

- Condition A is necessary to ensure larger concurrent areas of disturbance are managed under an individual permit.
- Condition B is necessary to prevent unnecessarily protracted periods of unstabilized areas of earth disturbance associated with construction activity. EPA's proposed General Permit is inconsistent with Vermont's 2017 CGP specific to the duration a construction site may be disturbed and unstabilized as a result of construction activity. Instead, under EPA's proposed General Permit stabilization requirements do not commence until a permittee has ceased construction activities or if the construction activity in areas of earth disturbance will be inactive for a period exceeding 14 calendar days.
- Condition C is necessary to address the higher risk of discharges associated with construction activities that take place outside the growing season.
- Condition D is necessary based on potentially adverse effects associated with the use of treatment chemicals. The Secretary has determined that the conditions in EPA's proposed 2022 Construction

General Permit may not be made less stringent without the potential for violating Vermont's Water Quality Standards.

V. APPEALS

Pursuant to 10 V.S.A. Chapter 220, an aggrieved person shall not appeal this permit unless the person submitted to the Secretary a written comment during the applicable public comment period or an oral comment at the public meeting conducted by the Secretary. Absent a determination to the contrary, an aggrieved person may only appeal issues related to the person's comments to the Secretary as prescribed by 10 V.S.A. § 8504(d)(2).

Right to Appeal to Environmental Division. Any appeal of this permit must be filed with the clerk of the Environmental Division of the Superior Court within 30 days of the date of the decision. The notice of appeal must specify the parties taking the appeal and the statutory provision under which each party claims party status; must designate the act or decision appealed from; must name the Environmental Division; and must be signed by the appellant or the appellant's attorney. In addition, the appeal must give the address or location and description of the property, project, or facility with which the appeal is concerned and the name of the applicant or any permit involved in the appeal. The appellant must also serve a copy of the notice of appeal in accordance with Rule 5(b)(4)(B) of the Vermont Rules for Environmental Court Proceedings. For further information, see the Vermont Rules for Environmental Court Proceedings available at www.vermontjudiciary.org. The address for the Environmental Division is: 32 Cherry Street; 2nd Floor, Suite 303; Burlington, VT 05401 Telephone #: 802-951-1740.

VI. EFFECTIVE DATE & EXPIRATION

This certification shall become effective on the date of signing, and the conditions of this Certification shall become conditions of the federal permit (33 U.S.C. § 1341(d)).

Dated this ____ day of _____, 2021

Peter Walke, Commissioner
Department of Environmental Conservation

By _____
Peter LaFlamme, Director
Watershed Management Division