



DEQ's 2022 Flood of Stormwater-Related Guidance for VA - Part I

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The Virginia Department of Environmental Quality (DEQ) is poised to unleash in 2022 a flood of new stormwater-related regulatory actions and related procedural and technical guidance for development projects and construction activity in Virginia. First out of the sluice was initial guidance from DEQ in March and April addressing solar farm project stormwater management planning, as described in our March and April 2022 alerts found [here](#) and [here](#). The volume is now growing due to several key but much broader initiatives launched by DEQ. Based on the variety and scope of these efforts, the landscape of Virginia's construction stormwater discharge permit program will be transformed over the next six to nine months. In many respects, these changes are likely to be welcomed by all stakeholders, though the ultimate impacts may not be clear until the initial swell of agency action recedes.

This Part I of a three-part article addresses DEQ's proposed new Guidance Memo No. 22-2011, dated July 1, 2022 (Proposed Procedures Memo), setting forth new procedural guidance for DEQ's review of erosion and sediment control plans (ESC Plans) and construction stormwater management plans (SWM Plans). Part II will address DEQ's proposed Guidance Memo 22-2012, "Stormwater Management and Erosion & Sediment Control Design Guide," which is being proposed in tandem with the Proposed Procedures Memo. Part III will discuss other pending and planned regulations and guidance addressing other stormwater-related program elements.

As to the Proposed Procedures Memo, its main objectives are to streamline and standardize DEQ's review of ESC Plans and SWM Plans (either, individually, a "Plan?"). In practice, the new procedures should help to ensure that Plan submissions are administratively complete with all required elements and to allow DEQ limited staff resources to focus on reviewing more technically complicated ESC and SWM Plans. Notice of a 30-day public comment period for the Proposed Procedures Memo was provided in the August 1, 2022 *Virginia Register* and on the Virginia Regulatory Town Hall. Comments are due by August 31, 2022, with a proposed effective date of September 1, 2022 (assuming no adverse comments).

For a Plan to be eligible for the streamlined review process by DEQ, several conditions must be met:

- DEQ administers the Virginia Erosion and Sediment Control Program (VESCP) or the Virginia Stormwater Management Program (VSMP) for the locality in which the construction activity is located;
- A professional engineer licensed in Virginia must have prepared, signed and placed his or her seal on the Plan;
- The Plan is prepared in accordance with DEQ's proposed Guidance Memo, 22- 2012, Stormwater Management and Erosion & Sediment Control Design Guide;
- A complete and accurate Plan Submission Checklist is submitted with the Plan package; and
- A person certified as a Dual Combined Administrator for erosion and sediment control and stormwater management must pre-review, sign, date, and include his or her certificate number on, the Plan Submission Checklist.

Within 15 days of DEQ's receipt of a Plan with a completed, signed and sealed Plan Submission Checklist, DEQ should review the Plan package for completeness (i.e., whether all of the Plan Submission Checklist items are accounted for in the package as indicated by the Dual Combined Administrator's signature). If DEQ finds during that 15 day period that the Plan package is complete, DEQ will notify the applicant of its completeness determination, and the Plan will be deemed approved 60 days from the date that such finding is communicated to the applicant unless DEQ chooses to audit the Plan. If, instead, DEQ relies upon the professional engineer's and Dual Combined Administrator's certifications as to Plan package completeness and does not notify the construction stormwater discharge permit applicant of DEQ completeness determination within 15 days of its receipt of the Plan package, then the Plan will be deemed to be approved 60 days from the date of DEQ's receipt of the package. Note that the 15 day completeness review and the 60-day technical review periods are established by regulation, so these timelines are not new. What is new is the ability of the applicant to have assurance that its Plan is deemed complete or approved if DEQ fails to act within the prescribed periods. This in turn offers greater certainty to the regulated community and their engineering teams as to the process and timing of project approval.

That said, the Proposed Procedures Memo has some teeth for those Plan packages that do not initially measure up, or if the engineer builds a record of incomplete submissions despite signing them. First, during the 60-day period, DEQ may audit a Plan for technical sufficiency (the "Audit Period?"). Plans will be selected for such auditing based on staff workload and "project risk level (by looking at project disturbance area, [the] percentage of disturbed land with higher risks for erosion, and the percentage of impervious cover.?" If DEQ finds deficiencies, DEQ will alert the applicant of same, and the applicant must address such deficiencies. (Such deficiencies may also be noted during any site inspection.)

Second, if DEQ finds "a trend of deficiency?" for Plans reviewed by the same Dual Combined Administrator, DEQ may "suspend, revoke or refuse to grant or review the certification?" and no longer accept Plans reviewed by that Dual Combined Administrator for the streamlined review process unless he or she retakes all of the related certification classes and receives a new certification number. A

?trend of deficiency? is defined as: ?a) Five incomplete review checklists, and/or; b) Three plan reviews which generate comments that are deemed significant enough to require resubmission in lieu of plan approval.? Furthermore, in such cases, ?[f]or professional engineers, DEQ will notify the Virginia Department of Professional and Occupational Regulation (DPOR) for their review.?

It is important to note that the Proposed Procedures Memo applies only to ESC Plans and SWM Plans submitted to DEQ when it is the VESCP Authority under the VESCP Regulations (9VAC25-840) or the VSMP Authority under the VSMP Regulations, respectively. Nearly all localities in Virginia administer their own VESCP, and most of the urban and suburban localities administer their own VSMP. Therefore, Plan submissions to such local VESCP Authorities and VSMP Authorities will not be subject to the Proposed Procedures Memo. Indeed, many of the urban and suburban localities in Virginia have their own, sometimes very complex, procedures for review of ESC Plans and SWM Plans. Even so, it seems that localities acting as VESCP Authorities or VSMP Authorities could elect to adopt the final adopted form of the Proposed Procedures Memo for their own use, so long as in doing so their own programs are no less stringent than program requirements set by state VESCP and VSMP regulations and the final adopted version of the Proposed Procedures Memo.

The Proposed Procedures Memo sets out a potential new framework for ensuring timely review and approvals of ESC Plans and SWM Plans that should allow DEQ to focus its resources on more complex projects while also ensuring that such Plans when submitted are indeed complete and are ready for technical review as needed. In turn, this approach could provide comfort to applicants that their project?s ESC Plan and SWM Plan and related permitting timelines are more reliable, but it may also force applicants and their engineers to push their project planning farther along at the time of submission of these Plans to clear the completeness review. This could also put applicants and their engineers more on their toes from the start, but it may also mean they finish the Plan review gauntlet more quickly.

Virginia Department of Environmental Quality, Guidance Memo No. 22-2011 (*Proposed*), ?Streamlined Plan Review for Construction Stormwater Plans and Erosion and Sediment Control Plans submitted by a Professional Engineer and reviewed by a Dual Combined Administrator for Erosion and Sediment Control and Stormwater Management,? 38:25 VA.R. 2680 (August 1, 2022). See also *Virginia Regulatory Town Hall* at <https://townhall.virginia.gov/L/comments.cfm?GDocForumID=1900>

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