

"GENERAL PERMIT FOR EMERGENCY SITUATIONS AND WATER QUALITY IMPROVEMENT PROJECTS"

CHAPTER 4 VAC 20-395-10 ET SEQ.

PREAMBLE

Marine Resources Commission Habitat Management General Permit #6

This regulation describes the qualifications, procedures and manner of registration to qualify for a general permit for activities requiring authorization from the Marine Resources Commission when such activities involve State-owned subaqueous beds in non-tidal waterways that are necessary for emergency activities required to protect public and private property as well as public health and safety, are intended to improve water quality, are intended for waterway restoration, and are for projects that facilitate emergency response activities related to existing public utility infrastructures. It also recognizes the minimum stream size above which an individual Commission permit is required for activities not covered by this general permit.

This Regulation is promulgated pursuant to the authority contained in §§ 28.2-103 and 28.2-1207 of the Code of Virginia. The effective date of this Regulation is June 30, 2009.

**4VAC20-395-10. Purpose.**

The purpose of this chapter is to provide a general permit for activities in or on state-owned subaqueous beds whereby property owners, project sponsors under the EWP program, and/or agencies or organizations under the approval of a property owner adjacent to non-tidal waterways are granted authority to install structures to stabilize watercourses and stream banks in emergency situations, to construct facilities or conduct activities resulting in waterway restoration, which are funded, designed or implemented by authorized agencies that improve water quality (including but not limited to restoration of natural flows, habitat modifications and habitat improvements), or to conduct public utility emergency response activities related to existing public utility infrastructures located in or on subaqueous beds.

Qualification under this general permit constitutes the Commission authorization required in accordance with §§28.2-1204 and 28.2-1207 of the Code of Virginia. This general permit shall not conflict with any other federal, state, or local permitting requirements or authorization governing the proposed activity.

**4VAC20-395-20. Definitions.**

The following words and terms when used in this chapter shall have the following meanings, unless the context clearly indicates otherwise:

"Bioengineered" means an applied science that combines structural, biological, and ecological

"GENERAL PERMIT FOR EMERGENCY SITUATIONS AND WATER QUALITY IMPROVEMENT PROJECTS"

CHAPTER 4 VAC 20-395-10 ET SEQ.

concepts to construct living structures for erosion, sediment, and flood control.

"Commission" means the Marine Resources Commission.

"Commissioner" means the Commissioner of Marine Resources.

"Emergency" means a situation in which a structure, facility or property is in imminent or potential danger following a flood event or natural disaster and by definition includes those situations which qualify for assistance as part of the Department of Agriculture's Natural Resources Conservation Service (NRCS) Emergency Watershed Protection Program.

"Emergency Watershed Protection Program" or "EWP program" means the program administered by NRCS and the FS to assist sponsors, landowners and operators in implementing emergency recovery measures to relieve imminent hazards to life and property created by a natural disaster that causes a sudden impairment of a watershed. The authority for the EWP Program is given to NRCS in §216, P. L. 81-516, and §403 of Title IV of the Agriculture Credit Act of 1978, P. L. 95-334. Codified rules are set forth in 7 CFR Part 624. The FS is designated to administer the EWP program on National Forest System Lands.

"Exigency" means those situations that demand immediate action to avoid potential loss of life or property, including situations where a second event may occur shortly thereafter that could compound the impairment, cause new damage or the potential loss of life if action to remedy the situation is not taken immediately.

"FS" means the USDA Forest Service that is authorized to administer the EWP program on National Forest Service System Lands.

"NRCS" means the Natural Resources Conservation Service, which is the federal agency under the U.S. Department of Agriculture delegated to administer the Emergency Watershed Protection (EWP) Program.

"Public Utility Emergency Response Activities" means activities to address the integrity of a utility structure or necessary repairs thereto in the event of imminent danger or risk of failure.

"Waterway or Stream Restoration" means those activities normally associated with natural channel design concepts including, but not limited to, in-stream rock and log grade structures, current deflecting structures, dam removal, channel re-alignment, filling of scour holes, and bank plantings that are also intended to improve water quality.

"GENERAL PERMIT FOR EMERGENCY SITUATIONS AND WATER QUALITY IMPROVEMENT PROJECTS"

CHAPTER 4 VAC 20-395-10 ET SEQ.

**4VAC20-395-30. Authority and applicability.**

A. Prior to the enactment of §28.2-1207 C, the Code of Virginia provided no mechanism for the emergency authorization of projects requiring permits from the Marine Resources Commission that are designed to protect public or private property or safeguard public health and safety involving encroachments in, on, or over state-owned submerged beds. While the Commission has entered into an interagency Memorandum of Understanding (MOU) with the Department of Agriculture's Natural Resources Conservation Service (NRCS) to expedite permit issuance for exigency projects under the Emergency Watershed Protection Program, the process does not eliminate the need for the Commission's required public interest review and comment period. Furthermore, there was no expedited mechanism to authorize projects that are designed to improve water quality, restore waterways or streams for water quality improvement, or facilitate emergency response activities related to existing public utility infrastructures in non-tidal waterways with drainage areas greater than five square miles or with flow rates greater than five cubic feet per second where project impacts are minimal. The Commission, as stipulated in its Subaqueous Guidelines, does not assume regulatory jurisdiction in non-tidal waterways with drainage areas less than five square miles or with flow rates less than five cubic feet per second.

B. This general permit provides authorization for projects that are deemed necessary in an emergency, that will result in improved water quality in waterways with drainage areas greater than five square miles or flow rates greater than five cubic feet per second, or that are public utility emergency response activities.

C. Experience has shown that the types of projects covered by this general permit (i) are necessary in emergency situations or (ii) would improve water quality while improving habitat and result in only minor impact. In addition, these types or classes of projects would normally be expected to receive an individual Commission permit following the standard public interest review.

D. This general permit is valid only for projects which result in encroachments over state-owned submerged lands in non-tidal waterways.

**4VAC20-395-40. Conditions and procedures for issuing general permits.**

- A. The Commissioner or his designee, Chief, Habitat Management Division, will oversee administration of the provisions of the general permit.
- B. To qualify for this general permit the permittee must notify the Commissioner or his designee and provide the following information in such notification:
  - 1. Name, address and telephone number of the prospective permittee;

**"GENERAL PERMIT FOR EMERGENCY SITUATIONS AND WATER QUALITY IMPROVEMENT PROJECTS"****CHAPTER 4 VAC 20-395-10 ET SEQ.**

2. Location of the proposed project, including vicinity map;
3. Brief description of the proposed project or emergency repairs, including methods of work, and the project purpose;
4. A plan view and cross section view of the proposed project or emergency repairs, including dimensions;
5. Location, and design, if applicable, of the disposal area for any excavated material; and,
6. A description of the location, extent, and type of wetlands and/or waters to be impacted by the proposed work.

C. An approved Local, State, Federal Joint Permit Application (Joint Permit Application) may be used for this notification. Otherwise, an abbreviated General Permit No. 6 Notification Form must be completed and filed in accordance with the instructions contained therein. The notification for EWP Projects shall include the damage survey report for each project site prepared by NRCS or the FS. Multiple sites in a county or city may be included in a single notification from the project sponsor for EWP projects in response to an emergency following a flood event or natural disaster. The notification shall be submitted to the Commission. The Commission will assign a processing number and forward copies to the U.S. Army Corps of Engineers and the Department of Environmental Quality for concurrent review. Copies will also be forwarded to the Department of Game and Inland Fisheries, the Department of Conservation and Recreation, and the Department of Historic Resources.

D. If the proposed project does not satisfy the conditions of this general permit, or should the Commissioner determine that the environmental impacts and the natural resource issues are estimated to be more than minimal, the permittee will be notified and the proposed project will be processed for an individual Commission permit.

E. If the project qualifies for the general permit, the Commissioner will so notify the permittee within 30 days of receipt of all necessary information. In addition, the Commission's public notice requirement shall be waived and no other fees shall be required.

F. The general permit will apply for any of the following conditions:

1. The project is part of the Emergency Watershed Protection (EWP) Program has met the conditions of the interagency Memorandum of Understanding (MOU) regarding EWP Program activities in Virginia in effect at the time, the project qualifies under the U.S. Army

**"GENERAL PERMIT FOR EMERGENCY SITUATIONS AND WATER QUALITY IMPROVEMENT PROJECTS"****CHAPTER 4 VAC 20-395-10 ET SEQ.**

Corps of Engineers Nationwide Permit Program (33 CFR Part 230) or a Norfolk District Corps of Engineers Regional Permit, and qualifies for Department of Environmental Quality (DEQ) 401 Certification. Projects that address exigency situations under the EWP Program may be initiated immediately upon submittal of notification to the Commission provided the damage survey report prepared by NRCS, and included with such notification, specifies the situation qualifies as an exigency. Only those actions reasonably necessary to address the exigency situation shall be conducted prior to receipt of notification from the Commissioner that the project qualifies for this general permit.

2. The project is for an activity conducted in response to a Declaration of Emergency by The Governor of Virginia due to the effects of natural disasters that is necessary to address immediate health and safety needs when such activity can be authorized by the Commission pursuant to an Executive Order issued in response to a natural disaster.

3. The project is for stream bank restoration, generally including bioengineered approaches and livestock crossings or for waterway or stream restorations that meets the following requirements:

a. The project has been designed, funded or implemented by one or more of the following agencies: Natural Resources Conservation Service, Department of Conservation and Recreation, Soil and Water Conservation District, Department of Game and Inland Fisheries, Department of Forestry, U.S. Fish and Wildlife Service or U.S. Forest Service.

b. The project is conducted in accordance with the terms and conditions of the binding agreement, if applicable, between the landowner and the oversight agency indicated in subdivision 3.a of this subsection with such agreement including provisions for maintenance of the project; and

c. The project qualifies under the U.S. Army Corps of Engineers Nationwide Permit Program (33 CFR Part 230) or a Regional Permit authorized by the Norfolk District of the U.S. Army Corps of Engineers, and qualifies for Department of Environmental Quality (DEQ) 401 Certification.

4. The project is necessary to conduct public utility emergency response activities related to existing public utility infrastructures. Such projects may be initiated immediately upon submittal of notification to the Commission provided such notification contains a certification from the owner/operator responsible for the utility infrastructure that the integrity of the utility structure is in imminent danger or risk of failure. Only those actions reasonably necessary to address the imminent danger or risk of failure shall be conducted prior to receipt of notification from the Commissioner that the project qualifies for this general permit.

"GENERAL PERMIT FOR EMERGENCY SITUATIONS AND WATER QUALITY IMPROVEMENT PROJECTS"

CHAPTER 4 VAC 20-395-10 ET SEQ.

5. The project is for the replacement of a previously existing and previously serviceable structure or facility located on state-owned submerged land that has been damaged or lost due to a flood event or natural disaster.

G. Upon a determination that a proposed project could significantly impact water quality, aquatic resources or other properties, the Commissioner may determine that this general permit does not apply and require that an individual Marine Resources Commission permit be processed.

H. This general permit does not authorize any channelization; levee construction; or water withdrawal. This general permit does not authorize any projects that will impede the migration or other movements of aquatic life.

I. All proposals in non-tidal waterways that are (i) necessary in an emergency, or (ii) will result in improved water quality, or (iii) are for waterway or stream restoration activities or (iv) will facilitate emergency response activities related to existing public utility infrastructures that encroach in, on or over State-owned subaqueous land and which meet the criteria in sections F.1 through F. 5 above are hereby approved subject to the following conditions:

(1) This permit grants no authority to the Permittee to encroach upon property rights, including riparian rights, of others.

(2) The duly authorized agents of the Commission shall have the right to enter upon the premises at reasonable times, for the purposes of inspecting the work being done pursuant to this permit.

(3) The Permittee shall comply with the water quality standards established by the Department of Environmental Quality and all other applicable laws, ordinances, rules and regulations affecting the conduct of this project. The granting of this permit shall not relieve the Permittee of the responsibility of obtaining any and all other permits or authorizations required for this project.

(4) The permit shall not affect or interfere with the right vouchsafed to the people of Virginia concerning fishing, and fowling in and from the waters not included within the terms of this permit.

(5) The Permittee shall, to the greatest extent practicable, minimize adverse impacts of the project on adjacent properties and wetlands and upon the natural resources of the Commonwealth.

"GENERAL PERMIT FOR EMERGENCY SITUATIONS AND WATER QUALITY IMPROVEMENT PROJECTS"

CHAPTER 4 VAC 20-395-10 ET SEQ.

(6) This permit may be revoked at any time by the Commission upon the failure of the Permittee to comply with the terms and conditions hereof or at the will of the General Assembly of Virginia.

(7) The issuance of this permit does not confer upon the Permittee any interest or title to the beds of the non-tidal waters impacted.

(8) All structures authorized by this permit which are not maintained in good repair shall be completely removed from State-owned bottom within 30 days after receiving notification by the Commission or its designated representatives.

(9) The Permittee, excepting local governments and Federal Agencies, agrees to indemnify and save harmless the Commonwealth of Virginia from any liability arising from the establishment, operation or maintenance of said project. Applicable Federal Law shall apply to Federal Agencies. Applicable Virginia law shall apply to localities.

(10) This permit authorizes no claim to archaeological artifacts which may be encountered during the construction or operation of the project. If, however, archaeological remains are encountered, the Permittee agrees to notify the Commission, who will, in turn, notify the Virginia Department of Historic Resources. The Permittee further agrees to cooperate with agencies in the recovery of archaeological remains if deemed necessary.

(11) This General Permit and Commission notification shall be retained by the Permittee for the life of the project as evidence of authorization.

(12) Projects authorized under this general permit shall be completed within one year from the date of notification. Upon proper request by the permittee, the permit may be extended to allow completion of the work authorized.

FORMS

Local, State, Federal Joint Permit Application, NAO FM 1065/VMRC 30-300 (rev. 2008).

\* \* \* \* \*

"GENERAL PERMIT FOR EMERGENCY SITUATIONS AND WATER QUALITY IMPROVEMENT PROJECTS"

CHAPTER 4 VAC 20-395-10 ET SEQ.

This is to certify that the foregoing is a true and accurate copy of the chapter passed by the Marine Resources Commission, pursuant to authority vested in the Commission by §28.2-103 of the Code of Virginia, duly advertised according to statute, and recorded in the Commission's minute book, at meeting held in Newport News, Virginia on April 28, 2009.

COMMONWEALTH OF VIRGINIA  
MARINE RESOURCES COMMISSION

BY: *Steven G. Bowman*  
Steven G. Bowman  
Commissioner

Subscribed and sworn to before me this 5<sup>th</sup> day of May, 2009

*Virginia S. Chappell*  
NOTARY PUBLIC

