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Application of ESC, SWM, & VWP to Recreational Trails

1 message

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Thu, Aug 22, 2019 at 10:09 AM

To: Spearhead Trails Director <director@spearheadtrails.com>

Cc: "Williams, Sara (TIC)" <sara.williams@tic.virginia.gov>, Stephen Lawson <slawson@bigstonegap.org>, H E jr mcclellan <hemcclellan@centurylink.net>, Jack McClanahan <jrmccclanahan@comcast.net>, Janet Settle <janet@settleandassociates.com>, "bcampbell@terratecheng.com" <bcampbell@terratecheng.com>, "Bradley C. Ratliff" <brad@ratliffaw.net>, Kite Jeffery gbb46794 <jeff.kite@deq.virginia.gov>, McCroskey Jason oen37962 <jason.mccroskey@deq.virginia.gov>, Hurst Jeffrey vno79457 <jeffrey.hurst@deq.virginia.gov>, Mark Trent <mark.trent@deq.virginia.gov>, Jimmy McElrath <mcelrath_j@wisecounty.org>, Anthony Justus <anthonyrjustus@outlook.com>, Kenneth Dunford <kdunford@tazewellcounty.org>, Tim Miles <timmiles1@verizon.net>, crakes@dickensonva.org, grady.peters@vaswcd.org

Dear SRRA Board of Directors, Mr. Lindsey, and County Erosion and Sediment Control authorities,

Good morning! Based on recent activities, the Southwest regional office of the Virginia Department of Environmental Quality believes there is confusion regarding when the Erosion and Sediment Control law, Stormwater Management Act, and Virginia Water Protection, laws and regulations apply to the establishment or construction of recreational trails.

Please find the attached correspondence which formalizes the application of these laws and regulations related to your activities. Recent incidents where the law and regulations have allegedly not been followed have highlighted the need for this type of correspondence.

Please feel free to contact me should you have any questions.

Best,
Kelly

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**DEQ Spearhead Recreational Trails Law and Reg Clarification 8 22 2019.pdf**

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Commonwealth of Virginia

VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY

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August 22, 2019

Southwest Regional Recreation Authority
502 Front Street
Coeburn, VA 24230

Re: Applicability of Virginia Erosion and Sediment Control, Virginia Stormwater Management Program, and Virginia Water Protection, laws and regulations to recreational trail development in Southwest Virginia

Attn: Southwest Regional Recreational Authority Board of Directors and Executive Director, Shawn Lindsey

The Virginia Department of Environmental Quality's (DEQ) Office of Water Permitting and Office of Stormwater Management has engaged with the Southwest Regional Recreation Authority (SRRA) concerning the development and use of recreational trails in the Spearhead Trails system. Through our collaboration, DEQ believes we should formalize our position on a number of issues related to providing the maximum amount of environmental protection and clarifying our regulatory authority.

Erosion and Sediment Control

Per §62.1-44.15:51 et seq. and 9VAC25-840 et seq. of the Code of Virginia and the Virginia Administrative Code, erosion and sediment control planning and implementation are required for any activity meeting the definition of land-disturbance not otherwise exempted in §62.1-44.15:51.

As described in the Erosion and Sediment Control law (§62.1-44.15:51), land-disturbance is defined in part as:

“Land-disturbing activity” means any man made change to the land surface that may result in soil erosion from water or wind and the movement of sediments into state waters or onto lands in the Commonwealth, including, but not limited to, clearing, grading, excavating, transporting, and filling of land...”

For SRRA, this means:

1. SRRA must submit erosion and sediment control plans and obtain approval from the Virginia Erosion and Sediment Control Program (VESCP) authority, which is usually the local government, for any land-disturbing activity totaling 10,000 square feet or greater.

2. Since most SRRA activities are linear in nature, the 10,000 square feet threshold must be calculated cumulatively over the course of the entire planned project even if the land-disturbing activity is non-contiguous. Additionally, all land-disturbing activities ancillary to the construction of recreational trails, including but not limited to, the construction of trailheads, parking areas, facilities, and camping areas, must also be included when calculating if a proposed project meets the 10,000 square feet threshold. However, areas of proposed land-disturbance covered under another active state or federal permit (i.e. Department of Mines, Minerals, & Energy) can be excluded from the cumulative area of land disturbance.
3. SRRA should submit erosion and sediment control plans well in advance of planned construction activities but no less than 60 days prior to anticipated construction commencement.
4. Routine maintenance, further described in the Stormwater Management section of this letter, is not an exemption under the erosion and sediment control law and regulations.
5. The erosion and sediment control requirements apply throughout the period of the land-disturbing activity or construction and not to the operation of the trails once construction is complete. However, SRRA is responsible for repairing areas of erosion occurring from failures after construction is complete or that may be deemed an erosion impact area. An erosion impact area is define as “*an area of land not associated with current land-disturbing activity but subject to persistent erosion resulting in the delivery of sediment onto neighboring properties or into state waters* (§62.1-44.15:51.)
6. SRRA must comply with all requirements in the Erosion and Sediment Control law and regulations when planning, constructing, and completing land-disturbance projects.
7. SRRA may apply to DEQ to operate under Annual Standards and Specifications under the Erosion and Sediment Control law and regulations. However, the SRRA board will need to consider the cost-benefit of adopting and operating a program which meets all the law and regulation requirements verses the long-term project based needs.

Stormwater Management:

Per §62.1-44.15:24 et seq. and 9VAC25-870 et seq. of the Code of Virginia and the Virginia Administrative Code, any construction activity which meets the definition of a land-disturbing activity must protect the quality and quantity of receiving state waters through planning, implementing, and complying with the provisions of the Virginia Stormwater Management Act (VSMA) unless otherwise exempted by §62.1-44.15:34.C. The provisions of the VSMA are applicable for land-disturbing activities equal to or greater than one (1) acre or smaller if part of a common plan of development. In order to conduct land-disturbing activities meeting the above referenced thresholds, SRRA must obtain and comply with a General Virginia Pollution Discharge Elimination System (VPDES) for Discharges of Stormwater from Construction Activities permit also known as the Construction General Permit (CGP).

In the Virginia Stormwater Management Act (§62.1-44.15:24), land-disturbance is defined in part as:

“Land disturbance” or “land-disturbing activity” means any man-made change to the land surface that potentially changes its run-off characteristics including clearing, grading, or excavation...

For SRRA, this means:

1. Since most SRRA activities are linear in nature, the one acre threshold must be calculated cumulatively over the course of the entire planned project even if the land-disturbing activity is non-contiguous. Additionally, all land-disturbing activities ancillary to the construction of recreational trails, including but not limited, to the construction of trailheads, parking areas,

facilities, and camping areas, must also be included when calculating if the one acre threshold has been met and a permit is needed.

2. Section §62.1-44.15:34 of the VSMA includes a provision to exempt land-disturbance associated with routine maintenance. The exemption states: *“Routine maintenance that is performed to maintain the original line and grade, hydraulic capacity, or original construction of the project. The paving of an existing road with compacted or impervious surface and reestablishment of existing associated ditches and shoulders shall be deemed routine maintenance if performed in accordance with this subsection;”*

Since many of SRRA recreational trails are usually created by utilizing existing roads, trails, and pathways, the land-disturbance associated with their re-establishment is not considered new construction or land-disturbance. However, these activities must be completed within the strict definition of the exemption. Land-disturbance to enlarge, re-route, connect, or otherwise alter the original footprint of the existing trail, road, or pathway does not meet the terms of the exemption. Thus, activities not conforming to the definition of routine maintenance must be considered a land-disturbing activity, and therefore included in the calculation of disturbed acreage for coverage under the Construction General Permit.

3. If the one acre threshold is met, SRRA must submit a stormwater management plan to the Virginia Stormwater Management Program (VSMP) authority for review and approval in order to obtain coverage under the Construction General Permit. Instructions regarding the contents required and procedures for submitting the stormwater management plan can be found at :

<https://www.deq.virginia.gov/Programs/Water/StormwaterManagement/VSMPPermits/ConstructionGeneralPermit.aspx>

4. The VSMA and regulations require protection of water quantity and quality for projects covered under the Construction General Permit. For SRRA, this means all plans and actions during and after construction must comply with all requirements of the Act and regulations. DEQ believes the continued operation and maintenance of traditional or manufactured stormwater management best management practices allowed under the regulations will be infeasible in some areas for SRRA due to the nature of the recreational trails and the lack of sustainable stabilization. Therefore, DEQ and the local VSMP authorities may consider alternatives to long-term stormwater management such as:
 - a. Perpetual erosion and sediment controls with long-term maintenance agreements,
 - b. Utilization of conserved open space to meet water quality requirements, and
 - c. Permit termination based on stabilization achieved at the end of construction.

These considerations will not apply to non-linear projects such as those associated with the construction of parking lots, cabins, and other ancillary support facilities.

5. SRRA may apply to DEQ to operate under Annual Standards and Specifications under the VSMA and regulations.

Virginia Water Protection (VWP):

The Virginia Water Protection regulations (§62.1-44.15:20 of the Code of Virginia and 9VAC25-210) prohibit the excavation of, or placement of fill within wetlands and waterways of the Commonwealth unless the activity is authorized by a permit issued by the Virginia Department of Environmental Quality

and/or the US Army Corps of Engineers under the authority of section 404 of the Clean Water Act. Therefore, any activity, which requires the placement of fill within a wetland or stream, or the excavation of material in a wetland or within a stream, must obtain a permit. Generally any cumulative impact from a project which results in wetland impacts greater than 0.1 acres or stream impacts greater than 300 linear feet require compensation to achieve no net loss of existing wetland acreage and no net loss of functions in all surface waters.

For SRRA, this means:

1. "Blading" or scraping with mechanized equipment within the boundaries of a wetland or stream is considered filling because it results in a redistribution of soils within a wetland or streambed.
2. Removal of vegetation within a wetland is not necessarily considered an impact under the VWP program, however grubbing and removal of stumps within the boundaries of a wetland is prohibited unless authorized by permit.
3. Any placement of new culverts or pipes within a wetland or stream may require permitting.

In conclusion, this letter does not describe or characterize every situation in which an activity by SRRA may fall under state or federal laws and regulations. This letter is intended to address the applicability of our water laws and regulations to situations, which we have already collaborated on or are planning.

As always, our office is available as a resource for any questions or consultations, and we welcome pre-construction meetings and discussions for any planned activities, to avoid potential regulatory missteps during the development phases of a project. Therefore, please do not hesitate to contact me at kelly.miller@deq.virginia.gov or (276) 676-4879.

Respectfully,



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Stormwater & Watershed Planning Manager
Southwest Regional Office
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cc: File
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