



VIRGINIA SOIL AND WATER CONSERVATION BOARD GUIDANCE DOCUMENT ON STORMWATER NONPOINT NUTRIENT OFFSETS

(Approved July 23, 2009)

Summary:

The purpose of this document is to provide guidance for implementing the new stormwater nonpoint nutrient offset program provisions of the Virginia Stormwater Management Act authorized by §10.1-603.8:1 of the Code of Virginia enacted during the 2009 Session of the General Assembly and to explain how the program may be utilized to address the required phosphorus load reductions for permits issued under the Virginia Stormwater Management Program [See Attachment 1 for copy of legislation: Chapter 364 of the 2009 Virginia Acts of Assembly (HB2168)].

This guidance document provides:

- Procedures for generating and selling stormwater nonpoint nutrient offsets in Virginia's Chesapeake Bay watershed tributaries;
- Procedures for authorizing the use of offsets in relation to a regulated construction activity;
- Methods by which a permit issuing authority will determine whether an offset may be used;
- Definitions;
- Reporting requirements; and
- Roles and responsibilities for the parties.

The Department of Conservation and Recreation will implement this program in the Chesapeake Bay Watershed in coordination with the Department of Environmental Quality (DEQ) and localities. Additional authorities regarding this program may be found in Appendix I.

Electronic Copy:

An electronic copy of this guidance in PDF format is available on the Regulatory TownHall under the Virginia Soil and Water Conservation Board at <http://townhall.virginia.gov/L/GDocs.cfm>.

35 **Contact Information:**

36

37 Please contact the Department of Conservation and Recreation’s Division of Soil and Water
38 Conservation at SWMESquestions@dcr.virginia.gov or by calling (804) 786-2064 with any
39 questions regarding the application of this guidance.

40

41 Questions specifically regarding the certification of offsets should be referred to the Department
42 of Environmental Quality’s Division of Water Quality Programs. Contact information may be
43 found on the Department’s nutrient trading webpage at
44 <http://www.deq.virginia.gov/vpdes/nutrienttrade.html>.

45

46 **Disclaimer:**

47

48 This document is guidance and sets forth standard operating procedures for the Virginia Soil and
49 Water Conservation Board, the Department of Conservation and Recreation, regulated entities,
50 offset generators and brokers, local governments, and the general public regarding
51 implementation of the stormwater nonpoint nutrient offset program. This guidance provides a
52 general interpretation of the applicable Code and Regulations but is not meant to be exhaustive
53 in nature. Each situation may differ and may require additional interpretation. Additionally,
54 stormwater nonpoint nutrient offsets not directly discussed in this guidance document or
55 applicable DEQ guidance documents may be available for consideration. Interested parties
56 should contact the appropriate DEQ and DCR personnel to discuss.

57

58 **Nonpoint Nutrient Offset Program**

59

60 **I. Background:**

61

62 Managing stormwater from construction activities is a key component to improving water quality
63 in Virginia’s waters, along with managing pollution from sources such as agriculture, air
64 deposition, sewage treatment plants, and industrial facilities. In situations where required
65 reductions are not practicable on-site, a stormwater nutrient offset program may be a tool
66 available to assist a developer in achieving the Board’s required nutrient reductions.

67

68 Specific conditions and exceptions for this program include:

69

- The permit issuing authority is granted discretion whether to allow the use of offsets to meet the necessary water quality control requirements.

70

- Offsets shall not be utilized to address water quantity control requirements.

71

- Offsets cannot be used in contravention of local water quality-based limitations:

72

- consistent with determinations made pursuant to subsection B of §62.1-44.19:7 (related to TMDLs developed to protect and restore water quality in impaired waters);

73

- contained in a municipal separate storm sewer system (MS4) program plan approved by DCR; or

74

- as otherwise may be established or approved by the Virginia Soil and Water Conservation Board.

75

76

- Stormwater nonpoint nutrient offsets may not be acquired in a different tributary than the tributary in which the development project is located and where an offset is available, shall be within the same or adjacent eight digit hydrologic unit code. (See definition of “tributary” and “eight digit hydrologic unit code”)

77

78

79

80

81

82

83

- 84 ▪ Prior to commencement of the construction activity in accordance with the appropriate
85 state permit, all offsets must be protected in perpetuity and specified supporting
86 documents incorporated into the Stormwater Pollution Prevention Plan.
- 87 ▪ No permit issuing authority may grant an exception to, or waiver of, postdevelopment
88 water quality requirements in accordance with the Stormwater Management Act and
89 VSMP permit regulations unless off-site options (including offsets) have been considered
90 and found not available.
- 91 ▪ Upon authorization for a construction activity to acquire stormwater nonpoint nutrient
92 offsets by the permit issuing authority in accordance with Stormwater Management Act
93 and attendant regulation requirements, offsets may only be obtained from those certified
94 under the Chesapeake Bay Watershed Nutrient Exchange Program by DEQ.

95
96 **II. Definitions:**

97
98 Only for the purposes of this guidance, the following terms are defined as follows:
99

100 "Best management practice (BMP)" or "BMP" means both structural or nonstructural practices
101 and other management practices used to prevent or reduce the pollution of surface waters and
102 groundwater systems from the impacts of construction activities. Such practices are designed in
103 accordance with standards and specifications provided on the Virginia Stormwater BMP
104 Clearinghouse (<http://www.vwrrc.vt.edu/swc/index.html>) or in the Virginia Stormwater
105 Management Handbook (http://www.dcr.virginia.gov/soil_and_water/stormwat.shtml#pubs).

106
107 "Board" means the Virginia Soil and Water Conservation Board.

108
109 "Broker" or "Offset Broker" means a "person" that facilitates the exchange of nutrient offsets
110 between an authorized buyer and an operational offset generating facility owner with certified
111 offsets available for acquisition.

112
113 "Buyer" means a person that is considering acquiring offsets and that is seeking authority from
114 the permit issuing authority for use of a nonpoint nutrient offset to satisfy the phosphorus load
115 reductions of VSMP construction permits.

116
117 "Chesapeake Bay Watershed Nutrient Credit Exchange Program" means the program
118 administered by DEQ pursuant to §62.1-44.19:12 et seq. under which the nutrient reductions of
119 an offset generating facility are certified as eligible stormwater nonpoint nutrient offsets.

120
121 "DCR" means the Virginia Department of Conservation and Recreation.

122
123 "DEQ" mean the Virginia Department of Environmental Quality.

124
125 "Directly discharge to" means the direct conveyance of stormwater from a land disturbing
126 activity into state waters. For purposes of both concentrated discharges through pipes, ditches,
127 MS4s, or other conveyances and sheet flow, the direct discharge is located where the stormwater
128 first enters a state water, either on or off-site.

129
130 "Eight digit hydrologic unit code" means a watershed unit defined by the United States
131 Geological Survey and established in the most recent version of Virginia's 4th Order National

132 Watershed Boundary Dataset. Boundaries for such watershed units may be found on DCR's
133 website at <http://www.dcr.virginia.gov/lr6.shtml>.

134
135 "Impaired water" means a water contained in the current 303(d) Report on Impaired Waters in
136 Virginia published by DEQ that does not meet water quality standards and is impaired by one or
137 more pollutants.

138
139 "Letter of Preliminary Authorization" means a letter sent by the permit issuing authority to the
140 buyer in accordance with §10.1-603.8:1 (i) acknowledging the permit issuing authority's
141 satisfaction of the buyers's demonstration pursuant to §10.1-603.8:1(D) (see Part III, Section B
142 Component 6), (ii) stipulating that the offsets being proposed must be secured in perpetuity, (iii)
143 noting any preliminary specific requirements concerning the acquisition, and (iv) indicating the
144 permit issuing authority's preliminary consent for the use of an offset to meet the buyer's
145 required nonpoint nutrient reductions pending submittal of a final plan and calculations that is
146 based on the approved site design and BMPs.

147
148 "Letter of Final Authorization" means a letter sent by the permit issuing authority to the buyer in
149 accordance with §10.1-603.8:1 (i) indicating the permit issuing authority's consent for the use of
150 an offset to meet the buyer's required nonpoint nutrient reductions, (ii) stipulating that the offsets
151 being proposed must be secured in perpetuity and outlining SWPPP requirements (see Part III,
152 Section D), (iii) specifying the number of pounds of phosphorus approved for use, and (iv)
153 noting any specific requirements concerning the acquisition (such as geographic location
154 constraints).

155
156 "Maximum extent practicable" or "MEP" means thoroughly considering the use of BMPs in
157 alternative site designs in order to demonstrate to the satisfaction of the permit issuing authority
158 that an offset should be allowed for the construction activity. To fully meet this standard, there
159 is an expectation for alternative site designs and calculations to be provided to the permit issuing
160 authority, as well as narrative discussing the options considered. MEP necessarily involves the
161 use of good engineering practices and professional judgment and interaction between the buyer,
162 his professional, and the permit issuing authority. The method for demonstrating MEP is more
163 fully described in Part III, Section B, Component 6, of this guidance.

164
165 "Municipal separate storm sewer" means a conveyance or system of conveyances otherwise
166 known as a municipal separate storm sewer system or "MS4," including roads with drainage
167 systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm
168 drains:

- 169 1. Owned or operated by a federal, state, city, town, county, district, association, or other
170 public body, created by or pursuant to state law, having jurisdiction or delegated
171 authority for erosion and sediment control and stormwater management, or a designated
172 and approved management agency under § 208 of the CWA that discharges to surface
173 waters;
174 2. Designed or used for collecting or conveying stormwater;
175 3. That is not a combined sewer; and
176 4. That is not part of a publicly owned treatment works.

177
178 "Nonpoint nutrient offset" means nutrient reductions certified as nonpoint nutrient offsets under
179 the Chesapeake Bay Watershed Nutrient Exchange Program (§62.1-44.19:12 et seq.) by DEQ
180 and secured in perpetuity.

181
182 “Offset generating facility” means a property that has generated nutrient offsets which DEQ has
183 certified under the Chesapeake Bay Watershed Nutrient Exchange Program.
184

185 "Permit issuing authority"¹ pursuant to § 10.1-603.8:1 (A) means the Virginia Soil and Water
186 Conservation Board, DCR, or a locality that is delegated authority by the Board to issue, deny,
187 revoke, terminate, or amend stormwater permits under the provisions of the Virginia Stormwater
188 Management Act and includes any locality that has adopted a local stormwater management
189 program. For the purposes of allowing offsets, local stormwater management programs refers to
190 those localities located within Tidewater Virginia as defined by the Chesapeake Bay Preservation
191 Act (§ 10.1-2100 et seq.), or any locality that is partially or wholly designated as required to
192 obtain coverage under an MS4 permit under the provisions of the federal Clean Water Act. Such
193 localities serving as the permit issuing authority, when addressing offsets in accordance with this
194 guidance, shall utilize the water quality technical criteria of the Commonwealth’s Stormwater
195 Management Act and attendant regulations when conducting alternative site design and final
196 plan reviews or Board approved equivalent criteria, or the locality may choose to have DCR
197 remain the permit issuing authority for the purposes of offset approval until such time as the
198 locality becomes a qualifying local program in accordance with §10.1-603.3. Additional
199 localities may be authorized as permit issuing authorities for the purposes of allowing offsets
200 when they are approved as a qualifying local program by the Virginia Soil and Water
201 Conservation Board in accordance with §10.1-603.3.
202

203 "Person" means an individual, corporation, partnership, association, state, municipality,
204 commission, or political subdivision of a state, governmental body, any interstate body, or any
205 other legal entity.
206

207 “Post-development nonpoint nutrient runoff compliance” means that a construction activity,
208 utilizing BMP’s, has developed and implemented a design that will meet the appropriate
209 phosphorus reduction limits required by state law and regulations in order to protect water
210 quality.
211

212 “Practicable” means that a buyer and his professional have demonstrated to the satisfaction of the
213 permit issuing authority using good engineering practices and professional judgment that full
214 compliance is not reasonably achievable on-site in light of factors including but not limited to
215 site constraints, cost associated with potential on-site best management practices, and local
216 conditions. Practicable necessarily involves the professional judgment of the buyer and his
217 professional in determining what is appropriate for a given construction project’s requirements
218 and site constraints.
219

220 “Professional” means a person who is licensed as a professional engineer, architect, certified
221 landscape architect, or land surveyor pursuant to Article 1 (§54.1-400 et seq.) of Chapter 4 of
222 Title 54.1.

¹ The term permit issuing authority when discussed in the context of the Virginia Stormwater Management Program normally means the entity that is authorized to issue coverage to a land disturbing activity under the Construction General Permit. Until a locality has been approved by the Board as a qualifying local program and is given authorization to locally administer coverage under the Board’s Construction General Permit, the Board and DCR will remain the recognized permit issuing authority. However, for the purposes of the offset program authorized by §10.1-603.8:1 A, the term includes those localities that are currently operating a DCR recognized local stormwater management program under a prior designation. Those entities are outlined in the definition provided above.

223
224 "State waters" pursuant to § 62.1-44.3 means all water, on the surface and under the ground,
225 wholly or partially within or bordering the Commonwealth or within its jurisdiction, including
226 wetlands.

227
228 "Total maximum daily load" or "TMDL" means the sum of the individual wasteload allocations
229 for point sources, load allocations (LAs) for nonpoint sources, natural background loading and a
230 margin of safety. TMDLs can be expressed in terms of either mass per time, toxicity, or other
231 appropriate measure.

232
233 "Tributary" or "Tributaries" means those identified pursuant to §62.1-44.19:13 (the
234 Potomac/Shenandoah, Rappahannock, York, and James River Basins, and the Eastern Coastal
235 Basin, which encompasses the creeks and rivers of the Eastern Shore of Virginia that drain into
236 the Chesapeake Bay).

237
238 "Virginia Stormwater Management Program (VSMP)" means the Virginia program for issuing,
239 modifying, revoking and reissuing, terminating, monitoring and enforcing permits, and imposing
240 and enforcing requirements pursuant to the federal Clean Water Act, the Virginia Stormwater
241 Management Act and attendant regulations, and associated Board guidance documents.

242
243 "Virginia Stormwater Management Program (VSMP) permit" means a document issued pursuant
244 to the Virginia Stormwater Management Act and attendant regulations authorizing, under
245 prescribed conditions, the potential or actual discharge of pollutants from a point source to
246 surface waters. Under the approved state program, a VSMP permit is equivalent to a NPDES
247 permit.

248 249 **III. Discussion: How to Gain Approval for Use of Nutrient Offsets under the VSMP** 250 **program**

251
252 The stormwater nonpoint nutrient offset program as described under this guidance contains roles
253 for the Department of Environmental Quality and the Department of Conservation and
254 Recreation. In general, DEQ is responsible for the certification of these offsets in consultation
255 with DCR where applicable, and DCR and authorized localities are authorized to approve the use
256 of these offsets to satisfy the phosphorus load reductions of VSMP construction permits. The
257 process is outlined in Sections A - E.

258 259 **Section A. Determining Availability of Offsets**

260
261 Nonpoint nutrient offsets must be certified under DEQ's Chesapeake Bay Watershed Nutrient
262 Exchange Program [§10.1-603.8:1(A)]. The Department of Environmental Quality's February
263 2008 guidance document entitled *Trading Nutrient Reductions from Nonpoint Source Best*
264 *Management Practices in the Chesapeake Bay Watershed: Guidance for Agricultural*
265 *Landowners and Your Potential Trading Partners* (the "DEQ Agricultural Lands Guidance"
266 (http://www.deq.virginia.gov/export/sites/default/vpdes/pdf/VANPSTradingManual_2-5-08.pdf)
267 is a key resource for those interested in developing stormwater nonpoint nutrient offsets in the
268 Chesapeake Bay Watershed. Additional information regarding brokers may be found on DEQ's
269 website at <http://www.deq.virginia.gov/vpdes/nutrienttrade.html>.

270

271 In addition to the options and procedures provided in DEQ’s guidance, §10.1-603.8:1(G)
272 specifies that stormwater nonpoint nutrient offsets must be secured in perpetuity. All offsets
273 must be placed under a conservation easement, open space easement, restrictive covenant, or
274 other instrument to ensure that the nutrient reducing offsets will remain in place in perpetuity and
275 that the offsets will be appropriately managed and monitored. An example of restrictive
276 covenants that may be modified for a specific situation is provided as Attachment 2. Perpetual
277 offset restrictions must be in place prior to the offset being sold as a stormwater nonpoint
278 nutrient offset. Drafts of such restrictive covenants or other legal instruments shall be a
279 component of the offset certification package provided to DEQ.

280
281 Although varying offset strategies may emerge in the future, today, one of the primary
282 stormwater nonpoint nutrient offsets that may be generated in perpetuity is an offset created as a
283 result of land conversion. Examples of potential land conversions currently allowed include
284 cropland to forest or hay to forest. DEQ may certify offsets through other means as well.

285
286 All stormwater nonpoint nutrient offsets shall be used at a 1:1 ratio (pounds of phosphorus) of
287 nonpoint nutrient offsets to the construction activity’s remaining post development nonpoint
288 nutrient runoff compliance requirement (i.e. those authorized nutrient reductions that cannot be
289 met on site) pursuant to §10.1-603.8:1(G). Although a buyer will be authorized to use a specific
290 amount of phosphorus offsets to meet the stormwater nutrient reduction requirements, §10.1-
291 603.8:1(E) specifies that in addition to the phosphorus nonpoint nutrient offsets acquired, the
292 associated ratio of nitrogen nutrient offsets at the offset generating facility shall also be retired.
293 When working with the offset broker a buyer should determine whether the broker’s offset
294 generating facility has operational status and enough phosphorous offsets and associated nitrogen
295 offsets to meet a development project’s needs. This can be documented through an “Offset
296 Availability Letter.” (See Attachment 3 for an example)

297 **Section B. Obtaining Approval for the Acquisition of an Offset by a Buyer**

298
299
300 **Component 1: Allowance of the use of offsets.** Before buyers consider seeking an offset they
301 must determine whether the permit issuing authority allows their use. Section 10.1-603.8:1
302 allows a permit issuing authority to determine whether they will allow compliance with
303 stormwater nonpoint nutrient runoff water quality criteria established pursuant to §10.1-603.4
304 through the use of nonpoint nutrient offsets. If the permit issuing authority determines that it
305 will not allow the use of offsets within the locality or has established limitations on such use,
306 DCR and prospective buyers should be informed of these programmatic limitations. No further
307 analysis beyond this component is necessary by the buyer if consideration of offsets will not be
308 allowed.

309
310 Where an offset is not prohibited by a permit issuing authority, a potential offset buyer that
311 wishes to be authorized to acquire stormwater nonpoint nutrient offsets for a construction
312 activity shall submit a preliminary authorization package (see Section C) that will be evaluated
313 by the permit issuing authority to determine preliminary eligibility.

314
315 It should be noted that final authorization for the acquisition of an offset will be given only after
316 a buyer has demonstrated to the satisfaction of the permit issuing authority that components 2
317 through 6 in this section have been addressed. Failure to consider and satisfy these components
318 will likely result in a denial of the request for authorization to use stormwater nutrient offsets.

319

320 **Component 2: Determine availability of offsets.** Before seeking authorization to acquire a
321 nonpoint nutrient offset, the buyer should provide documentation that verifies that offsets are
322 available within allowable hydrologic unit codes, and if not, then within the same tributary as the
323 construction activity. Nonpoint nutrient offsets for construction activities shall be generated in
324 the same or adjacent eight digit hydrologic unit code as defined by the United States Geological
325 Survey as the permitted site [§10.1-603.8:1(F)]. A map of these eight digit hydrologic unit codes
326 may be found on DCR’s website at <http://www.dcr.virginia.gov/lr6.shtml>. Nonpoint nutrient
327 offsets outside the same or adjacent eight digit hydrologic unit code may only be used if it is
328 determined by the permit issuing authority that no nonpoint nutrient offsets are available within
329 the same or adjacent eight digit hydrologic unit code when the permit issuing authority accepts
330 the final site design. In such cases, nonpoint nutrient offsets generated within the same tributary
331 may be used. In no case shall nonpoint nutrient offsets from another tributary be used. Contact
332 DEQ for a listing of certified stormwater nonpoint nutrient offsets at
333 <http://www.deq.virginia.gov/vpdes/nutrienttrade.html>.

334
335 **Component 3: Meet state water quantity control requirements on site.** In order to minimize
336 local stream impacts and downstream flooding, the buyer shall ensure that BMPs are
337 implemented in accordance with approved stormwater plans and calculations that address water
338 quantity controls in accordance with the current state stormwater management regulations.

339
340 **Component 4: Determine if receiving waters to which there would be a direct discharge**
341 **have local water quality-based limitations that would be contravened by allowing the use of**
342 **offsets.** Pursuant to subsection C of §10.1-603.8:1 a permit issuing authority may not allow the
343 use of offsets when such use would be in contravention of local water quality-based limitations:
344 (i) consistent with determinations made pursuant to subsection B of §62.1-44.19:7
345 (related to TMDL development to protect and restore water quality in impaired
346 waters);
347 (ii) contained in a municipal separate storm sewer system (MS4) program plan
348 approved by DCR; or
349 (iii) as otherwise may be established or approved by the Virginia Soil and Water
350 Conservation Board.

351
352 Additionally, §10.1-603.2:2 specifies that “[i]t shall be unlawful to cause a stormwater discharge
353 from an MS4 or a land disturbing activity except in compliance with a permit issued by a permit
354 issuing authority (Board, DCR or qualifying local program). The requirements of §10.1-603.8:1
355 are in addition to those water quality permit requirements that a buyer must address in order to
356 receive coverage under the Virginia Soil and Water Conservation Board’s Construction General
357 Permit or to receive a Construction Individual Permit.

358
359 Each of the combined areas of local water quality limitations (TMDLs, MS4s, and Impaired
360 Waters) that must be addressed are discussed below. Where the construction activity directly
361 discharges to state waters that are impaired by phosphorus or have a TMDL wasteload allocation
362 associated with phosphorus, the permit issuing authority, should it not be DCR, shall consult
363 with DCR when developing its determination. Where impairments exist, buyers should be aware
364 that under DCR’s VSMP permit responsibilities, additional on-site BMPs may be required by the
365 Department should on-site inspections conclude that state waters are not being satisfactorily
366 protected.

367

368 **(i) TMDLs:** The provision of §10.1-603.8:1 (C)(i) is designed to address local water quality
369 issues when there has been a specific limitation developed for the receiving waters that the
370 construction activity directly discharges into. This determination would need to be made prior to
371 a permit issuing authority authorizing the use of offsets in a particular situation.
372

373 Subsection B of §62.1-44.19:7 provides for development of TMDLs and waste load allocations.
374

375 Section 4VAC50-60-1130 (A) (3) of the Construction General Permit related to “Authorization
376 to discharge” states that “[d]ischarges to waters for which a total maximum daily load (TMDL)
377 wasteload allocation has been established are not eligible for coverage under this general permit
378 unless they are otherwise authorized in accordance with 4VAC50-60-1170 Section II D 6 and
379 consistent with the requirements and assumptions of the wasteload allocations in the TMDL”.
380 Additional details regarding TMDL regulatory requirements may be found in Appendix I.
381

382 The permit issuing authority, prior to authorizing the use of offsets will need to determine
383 whether the amount of phosphorous allowed to leave the construction site due to the proposed
384 use of offsets would be inconsistent with any waste load allocation to construction activities for
385 the state water that receives the direct discharge from the construction activity. If state waters do
386 not have a TMDL wasteload allocation associated with phosphorus, there would be no
387 “contravention” of this provision. If such a requirement does exist, then the permit issuing
388 authority for the purposes of the stormwater offsets program in consultation with DCR shall
389 determine if an offset can be allowed, and if it is, then the offset generating facility must be
390 located in the upstream portion of the watershed of the TMDL segment. The permit issuing
391 authority may request the applicant to provide information to support a determination in this
392 regard.
393

394 **(ii) MS4s:** The provision of §10.1-603.8:1 (C)(ii) applies if the construction activity will occur in
395 an area with an MS4 program plan approved by DCR and the plan includes nutrient local water
396 quality based limitations. The buyer must first determine if the runoff from the construction
397 activity would discharge to a municipal separate storm sewer system (MS4) and make note of
398 this in their application materials. A listing of MS4s is available on DCR’s website at
399 http://www.dcr.virginia.gov/soil_and_water/vsmp.shtml. If the construction activity is within an
400 MS4, then a determination will need to be made as to whether the phosphorous leaving the
401 construction site due to the proposed use of offsets would be inconsistent with that plan.
402

403 Where a stormwater management plan has been approved by the permit issuing authority, it will
404 be determined that the offset would not contravene the MS4’s Program Plan. In the absence of
405 the submission of a stormwater management plan to the permit issuing authority, the permit
406 issuing authority shall determine if the use of offsets within the MS4 would contravene the
407 MS4’s Program Plan.
408

409 **(iii) Impaired Waters:** Additional water quality requirements of the Virginia Soil and Water
410 Conservation Board’s Construction General Permit include provisions related to impaired waters
411 and must be taken into consideration in accordance with §10.1-603.8:1 (C)(iii). Section
412 4VAC50-60-1130 (A) (4) of the Construction General Permit related to “Authorization to
413 discharge” states that “[d]ischarges to waters that have been identified as impaired in the 2008 §
414 305(b)/303(d) Water Quality Assessment Integrated Report are not eligible for coverage under
415 this general permit unless they are otherwise authorized in accordance with 4VAC50-60-1170

416 Section I H.”. Additional details regarding the Board’s impaired waters regulatory requirements
417 may be found in Appendix I.

418
419 If it is determined that the construction activity will directly discharge to an impaired water, the
420 permit issuing authority will determine whether the nutrient runoff from the construction activity
421 may further contribute to the impairment. Should contribution to an impairment be determined
422 based on a review of the buyer’s information by the permit issuing authority in consultation with
423 DCR, an offset pursuant to §10.1-603.8:1 of the Code of Virginia may not be allowed unless
424 such offset is located within the upstream portion of the watershed of the impaired segment.

425
426 DEQ maintains on their website an assessment database to determine the location and type of
427 impairments. This tool and accompanying instructions may be found at
428 <http://www.deq.virginia.gov/wqa/adbims2008.html>.

429
430 **Component 5: Meeting Local Water Quality Requirements.** If the locality in which the
431 construction activity will occur has established local water quality requirements for the waters
432 that the construction activity will directly discharge to, the buyer should consult with the locality
433 regarding such local requirements.

434
435 **Component 6: Demonstration of On-site Practicability.** In accordance with §10.1-603.8:1(D),
436 if a buyer satisfactorily addresses each of the areas outlined below, they will be deemed as
437 having provided sufficient analyses for consideration. Such documented demonstration shall
438 include at a minimum:

- 439 a. Alternative site designs with necessary supporting calculations that may accommodate on-site
440 best management practices have been considered. A permit issuing authority has discretion to
441 determine what calculations are necessary at this stage to facilitate their review of the site
442 designs.
- 443 b. The placement of on-site BMPs that are designed in accordance with standards and
444 specifications provided on the Virginia Stormwater BMP Clearinghouse
445 (<http://www.vwrrc.vt.edu/swc/index.html>) or in the Virginia Stormwater Management Handbook
446 (http://www.dcr.virginia.gov/soil_and_water/stormwat.shtml#pubs) as approved by the locality.
447 The buyer is expected to demonstrate that on-site best management practices that may include
448 both conventional and low impact development practices have been considered in alternative site
449 designs to the maximum extent practicable.
- 450 c. A narrative discussing both the site plan options as well as the mix of BMPs considered and why
451 the selected option was chosen. This may include a discussion of costs, site constraints, local
452 conditions, and other factors clearly indicating why certain practices examined are impracticable
453 to achieve compliance on-site.

454
455 The permit issuing authority after becoming a Board approved qualifying local program may define an
456 alternative approach for demonstrating on-site practicability.

457
458 **Section C. Offset Nutrient Submittal Package**

459
460 Provided that a permit issuing authority will allow for compliance with stormwater nonpoint nutrient
461 runoff water quality criteria through the use of nonpoint nutrient offsets (see Section B, Component 1), a
462 two step, preliminary and final, offset evaluation process may be initiated.

463
464 **Preliminary Offset Authorization Review**

465 As part of a preliminary offset authorization review, the buyer must provide the following
466 documentation in order to receive review for offset use for a portion of the water quality requirement of
467 the project.

- 468
- 469 a. **Request and Certification:** Buyer signed request for consideration for the use of an offset
470 certifying that alternative site designs have been considered to the MEP and that full compliance
471 with postdevelopment nonpoint nutrient runoff compliance requirements cannot practicably be
472 met on-site.
 - 473
 - 474 b. **Alternative Site Designs:** Alternative site designs with necessary supporting calculations
475 showing that such designs have considered BMP's to the MEP (see Section B, Component 6
476 discussion above).
 - 477
 - 478 c. **Narrative:** Narrative discussing alternative site designs considered that may accommodate on-
479 site BMPs, the BMPs considered to the MEP, and the practicability of meeting full compliance
480 with nonpoint nutrient runoff compliance requirements on-site.
 - 481
 - 482 d. **Impaired and TMDL Waters Information:** Information regarding whether the project will
483 directly discharge to a MS4, an impaired water, or to a waterbody with a TMDL (see Section B,
484 Component 4) and if so, how these issues are being addressed.
 - 485
 - 486 e. **Offset Availability Letter:** A current offset availability letter from an operational certified offset
487 provider that documents the ability of the provider to supply the necessary number of offsets in
488 the appropriate service area pursuant to §10.1-603.8:1(F) (see Section B, Component 2). An
489 example of a completed form is provided as Attachment 3 of this document.
 - 490
 - 491 f. **Proposed Proof of Perpetuity of the Offset:** A copy of a proposed draft restrictive covenant or
492 other instrument that will be recorded for the offset property at the time of purchase of the offset
493 and always prior to the permitted construction activity commencing. An example of a set of
494 restrictive covenants is provided as Attachment 2 of this document.
 - 495

496 Packages associated with a preliminary authorization review shall be submitted to both the
497 locality in which the project is located and to DCR's Richmond Central Office at:

498

499 Virginia Department of Conservation and Recreation
500 c/o Stormwater Nutrient Offset Review
501 203 Governor Street
502 Room 206, 2nd Floor
503 Richmond, Virginia 23219
504

505 Upon receipt, the preliminary offset authorization package will be reviewed for completeness by
506 the permit issuing authority within 15 calendar days or it is deemed complete. If a package is
507 deemed incomplete, the buyer will be contacted via letter from the permit issuing authority
508 indicating what the deficiencies are.

509

510 Upon receipt of a package that is deemed complete, the permit issuing authority shall complete
511 its review and issue its determination within 60 days.

512

513 If DCR is serving as the permit issuing authority, the buyer is requested to determine offset
514 usage in accordance with this guidance document prior to seeking Construction General Permit
515 coverage for their construction activity.

516
517 Upon preliminary approval of the use of an offset, a Letter of Preliminary Authorization, good
518 for one-year, will be sent to the buyer (i) acknowledging the permit issuing authority's
519 satisfaction of the buyer's demonstration pursuant to §10.1-603.8:1(D) (see Section B
520 Component 6), (ii) stipulating that the offsets being proposed must be secured in perpetuity, (iii)
521 noting any preliminary specific requirements concerning the acquisition (such as geographic
522 location constraints), and (iv) indicating the permit issuing authority's preliminary consent for
523 the use of an offset to meet the buyer's required nonpoint nutrient reductions pending submittal
524 of a final plan and calculations that is based on the approved site design and BMPs.

525
526 Similarly, should an approval be denied by the permit issuing authority based on the preliminary
527 review, a letter shall be sent to the buyer outlining the reasons for such denial. Copies of the
528 approval and denial letters shall be sent to and kept on file by both DCR and the locality in
529 which the project is located.

530
531 **Final Offset Authorization Review**
532 As part of a final offset authorization review, the buyer must provide within one-year of preliminary
533 offset authorization the following documentation.

- 534
535 a. **Request and Certification:** Buyer signed request for final approval for the use of an offset
536 certifying that the final plans are in accordance with the approved preliminary site design and
537 BMPs.
538
539 b. **Final Plans and Calculations:** The final site and stormwater plans and associated calculations
540 that are in accordance with the approved site design and BMPs during the preliminary review.
541
542 c. **Water Quantity Calculations:** Engineering calculations indicating that water quantity control
543 requirements are being met in accordance with §10.1-603.8:1 C (see Section B, Component 3).
544
545 d. **Updated Offset Availability Letter:** The applicant should provide a current offset availability
546 letter from an operational certified offset provider that documents the ability of the provider to
547 supply the necessary number of offsets in the appropriate service area pursuant to §10.1-
548 603.8:1(F) and that the offset will be protected in perpetuity.

549
550 Packages associated with a final authorization review shall be submitted to the permit issuing
551 authority. Final plan review and offset consideration shall be conducted in accordance with the
552 permit issuing authority's plan review procedures.

553
554 If DCR is serving as the permit issuing authority, the buyer is requested to determine offset
555 usage in accordance with this guidance document prior to seeking Construction General Permit
556 coverage for their construction activity. Upon receipt of a final offset authorization review
557 package, DCR shall review the final package for completeness within 15 calendar days or **it** is
558 deemed complete. If a package is deemed incomplete, the buyer will be contacted via letter from
559 DCR indicating what the deficiencies are. Upon receipt of a package that is deemed complete,
560 DCR shall complete its review and issue its determination within 60 days.

561

562 Upon final approval of the use of an offset, a Letter of Final Authorization will be sent to the
563 buyer (i) indicating the permit issuing authority's consent for the use of an offset to meet the
564 buyer's required nonpoint nutrient reductions, (ii) stipulating that the offsets being proposed
565 must be secured in perpetuity and outlining SWPPP requirements (see Section D), (iii)
566 specifying the number of pounds of phosphorus approved for use, and (iv) noting any specific
567 requirements concerning the acquisition (such as geographic location constraints).
568

569 Similarly, should an approval be denied by the permit issuing authority based on the final
570 review, a letter shall be sent to the buyer outlining the reasons for such denial. Copies of the
571 final approval and denial letters shall be sent to and kept on file by both DCR and the locality in
572 which the project is located.
573

574 **Section D. Offset Transfer Documentation to be Provided by the Buyer**

575
576 Before a construction activity that has acquired an offset may commence, the following
577 documents shall be incorporated into the buyer's stormwater pollution prevention plan.
578

- 579 a. **Letter of Final Authorization:** A letter from the permit issuing authority to the buyer outlining
580 conditions pursuant to the use of an offset.
581
- 582 b. **Notarized Affidavit of Offset Sale:** In addition to inclusion in the SWPPP, the notarized
583 affidavit will be provided to the permit issuing authority in addition to the buyer. An example of
584 the Affidavit of Nutrient Offset Sale is provided as Attachment 3 to this document.
585
- 586 c. **Proof of Perpetuity of the Offset:** A copy of the recorded covenants, restrictions, easement, or
587 other appropriate instrument verifying the stormwater nutrient offsets that have been acquired to
588 meet the construction activity's required nutrient reductions will be protected in perpetuity. See
589 Attachment 2 for an example of covenant restrictions.
590

591 In addition to these documents, the broker is also obligated to pay the permit issuing authority a water
592 quality enhancement fee equal to six percent of the amount paid by the permit applicant for the nonpoint
593 nutrient offsets prior to commencement of the construction activity. A bill of sale documenting the
594 amount paid by the buyer for the offsets shall be provided to the permit issuing authority with the
595 buyer's payment. The broker will coordinate with the permit issuing authority regarding payment
596 details.
597

598 **Section E. Annual monitoring and reporting requirements**

599
600 The recorded restrictive covenants or other appropriate instrument shall provide the broker and
601 DEQ and DCR and their authorized agents, with advance notice, the right to enter and go on the
602 offset generating facility to inspect and take actions necessary to verify compliance. The
603 instrument shall be enforceable by the broker, DEQ, and DCR.
604

605 Additionally, the offset broker shall provide an annual report to DEQ and DCR that includes the
606 current ledger and photographs fully documenting the status of the offset generating facility.
607

608 Should an acquisition occur from the offset generating facility, an updated ledger indicating at a
609 minimum the amount of offsets acquired as well as information identifying the buyer and the

610 location of the buyer's project shall be provided to DEQ and DCR within 7 business days of the
611 transaction.

612

613 **Adoption, Amendments, and Repeals:**

614

615 This document was adopted by the Board on July 23, 2009 and may be amended or repealed as
616 necessary by the Board.

617

618 **Appendix I**

619
620 **Authority:** The Virginia Soil and Water Conservation Board and DCR derive their authority to regulate
621 stormwater and to administer the Virginia Stormwater Management Program (VSMP) from the
622 Stormwater Management Act (Code of Virginia §10.1-603.1 et seq.). The Act contains the following
623 authorities applicable to this guidance and the implementation of a stormwater nonpoint nutrient offset
624 program:

625
626 **§10.1-603.8:1. Stormwater nonpoint nutrient offsets.** (Chapter 364 of the 2009 Virginia Acts
627 of Assembly [HB2168]) (See Attachment 1). This section authorizes a permit issuing authority
628 to allow compliance with stormwater nonpoint nutrient runoff water quality criteria established
629 pursuant to §10.1-603.4, in whole or in part, through the use of the permittee’s acquisition of
630 nonpoint nutrient offsets in the same tributary. Such nonpoint nutrient offsets are to be certified
631 under the Chesapeake Bay Watershed Nutrient Exchange Program (§62.1-44.19:12 et seq.).

632
633 **§10.1-603.4. Development of regulations.**

- 634 ...The regulations shall:
- 635 2. Establish minimum design criteria for measures to control nonpoint source pollution and
636 localized flooding...;
 - 637 3. Require the provision of long-term responsibility for and maintenance of stormwater
638 management control devices and other techniques specified to manage the quality and quantity
639 of runoff;...;
 - 640 6. Establish statewide standards for stormwater management from land disturbing [construction]
641 activities of one acre or greater, except as specified otherwise within this article, and allow for
642 the consolidation in the permit of a comprehensive approach to addressing stormwater
643 management and erosion and sediment control, consistent with the provisions of the Erosion and
644 Sediment Control Law (§ 10.1-560 et seq.) and this article. However, such standards shall also
645 apply to land disturbing [construction] activity exceeding an area of 2500 square feet in all areas
646 of the jurisdictions designated as subject to the Chesapeake Bay Preservation Area Designation
647 and Management Regulations (9 VAC 10-20 et seq.) adopted pursuant to the Chesapeake Bay
648 Preservation Act (§ 10.1-2100 et seq.);
 - 649 7. Require that stormwater management programs maintain after-development runoff rate of
650 flow and characteristics that replicate, as nearly as practicable, the existing predevelopment
651 runoff characteristics and site hydrology, or improve upon the contributing share of the existing
652 predevelopment runoff characteristics and site hydrology if stream channel erosion or localized
653 flooding is an existing predevelopment condition....;
 - 654 8. Encourage low impact development designs, regional and watershed approaches, and
655 nonstructural means for controlling stormwater;
 - 656 9. Promote the reclamation and reuse of stormwater for uses other than potable water in order to
657 protect state waters and the public health and to minimize the direct discharge of pollutants into
658 state waters;...

659
660 Authority for the Virginia Department of Environmental Quality to establish the Chesapeake Bay
661 Watershed Nutrient Credit Exchange Program in Virginia’s portion of the Bay is found in §62.1-
662 44.19:12 et seq. Applicable authorities are as follows:

663
664 **§ 62.1-44.19:12. Legislative findings and purposes.**

665 The General Assembly finds and determines that adoption and utilization of a watershed
666 general permit and market-based point source nutrient credit trading program will assist in (a)
667 meeting these cap load allocations cost-effectively and as soon as possible in keeping with the

668 2010 timeline and objectives of the Chesapeake 2000 Agreement, (b) accommodating continued
669 growth and economic development in the Chesapeake Bay watershed, and (c) providing a
670 foundation for establishing market-based incentives to help achieve the Chesapeake Bay
671 Program's nonpoint source reduction goals.

672

673 **§ 62.1-44.19:15 . New or expanded facilities.**

674 B. Waste load allocations required by this section to offset new or increased delivered total
675 nitrogen and delivered total phosphorus loads shall be acquired in accordance with this
676 subsection.

677 1. Such allocations may be acquired from one or a combination of the following:

- 678 ...b. Acquisition of nonpoint source load allocations through the use of best management
679 practices acquired through a public or private entity acting on behalf of the land owner. Such
680 best management practices shall achieve reductions beyond those already required by or funded
681 under federal or state law, or the Virginia tributaries strategies plans, and shall be installed in the
682 same tributary in which the new or expanded facility is located and included as conditions of the
683 facility's individual Virginia Pollutant Discharge Elimination System permit; or
684 c. Acquisition of allocations in accordance with the terms of the general permit or through such
685 other means as may be approved by the Department on a case-by-case basis.

686

687 The Department of Environmental Quality's February 2005 guidance document entitled *Trading*
688 *Nutrient Reductions from Nonpoint Source Best Management Practices in the Chesapeake Bay*
689 *Watershed: Guidance for Agricultural Landowners and Your Potential Trading Partners*
690 (http://www.deq.virginia.gov/export/sites/default/vpdes/pdf/VANPSTradingManual_2-5-08.pdf) is a
691 detailed source of information regarding how nutrient trading works and how the offsets may be
692 developed and approved in the Chesapeake Bay Watershed. This guidance was developed in
693 accordance with § 62.1-44.19:15(B)(1)(b). This document shall serve as the foundation for certifying
694 nonpoint nutrient offsets that an authorized buyer may acquire.

695

696 Regulatory authorities embodied in the Construction General Permit relative to the Virginia Soil and
697 Water Conservation Board's responsibilities associated with impaired waters and waters for which a
698 TMDL WLA has been established include the following:

699

700 **Section 4VAC50-60-1130 related to "Authorization to discharge" states:**

701 A. Any operator governed by this general permit is authorized to discharge to state waters of the
702 Commonwealth of Virginia in accordance with 4VAC50-60-1150 A 4 provided that the operator has
703 filed a complete and accurate registration statement in accordance with 4VAC50-60-1150, submitted
704 any fees required by 4VAC50-60-700 et seq. (Part XIII) unless exempted pursuant to 4VAC60-60-1150
705 A 3 (a), complied with the requirements of 4VAC50-60-1150, complies with the requirements of
706 4VAC50-60-1180 through 4VAC50-60-1190, and

707 3. Discharges to waters for which a "total maximum daily load" (TMDL) wasteload allocation
708 has been established are not eligible for coverage under this general permit unless they are otherwise
709 authorized in accordance with 4VAC50-60-1170 Section II D 6 and consistent with the requirements
710 and assumptions of the wasteload allocations in the TMDL; and

711 4. Discharges to waters that have been identified as impaired in the 2008 § 305(b)/303(d) Water
712 Quality Assessment Integrated Report are not eligible for coverage under this general permit unless they
713 are otherwise authorized in accordance with 4VAC50-60-1170 Section I H.

714

715 **4VAC50-60-1170 Section I H. states:**

716 H. Water quality protection.

717 1. The operator must select, install, implement and maintain control measures at the construction
718 site that minimize pollutants in the discharge as necessary to ensure that the operator's discharge does
719 not cause or contribute to an excursion above any applicable water quality standards.

720 2. If it is determined by the permit-issuing authority in consultation with the State Water Control
721 Board at any time that the operator's stormwater discharges have reasonable potential to cause or
722 contribute to an excursion above any applicable water quality standard, the permit-issuing authority shall
723 require the operator to:

724 a. Modify control measures in accordance with Section II C to adequately address the identified
725 water quality concerns;

726 b. Submit valid and verifiable data and information that are representative of ambient conditions
727 and indicate that the receiving water is attaining water quality standards; or

728 c. Cease discharges of pollutants from construction activity and submit an individual permit
729 application according to 4VAC50-60-410 B 3.

730

731 **4VAC50-60-1170 Section II D 6 and 7 states:**

732 D. Stormwater pollution prevention plan contents. The SWPPP shall include the registration
733 statement, this permit, and the following items:

734 6. Total maximum daily loads. A total maximum daily load (TMDL) approved by the State
735 Water Control Board may include a wasteload allocation to the regulated construction activity that
736 identifies the pollutant for which stormwater control measures are necessary for the surface waters to
737 meet water quality standards. The pollutant identified in a wasteload allocation as of the effective date
738 of this permit must be specified in the SWPPP. The SWPPP shall include strategies and control
739 measures to ensure consistency with the assumptions and requirements of the TMDL WLA that apply to
740 the operator's discharge. In a situation where a TMDL has specified a general wasteload allocation
741 applicable to construction stormwater discharges, but no specific requirements for construction sites
742 have been identified in the TMDL, the operator shall consult with the state or federal TMDL authority to
743 confirm that meeting permit requirements will be consistent with the approved TMDL. If the TMDL
744 specifically precludes such discharges, the operator is not eligible for coverage under the general permit.

745 7. Impaired waters. In accordance with Section I H, control measures shall be protective of water
746 quality standards for impaired waters identified as having impairments for pollutants that may be
747 discharged from the construction activity in the 2008 § 305(b)/303(d) Water Quality Assessment
748 Integrated Report.

749

750 **Attachment 1: 2009 Legislation authorizing stormwater nonpoint nutrient offsets.**

751
752 **VIRGINIA ACTS OF ASSEMBLY -- 2009 SESSION**
753 **CHAPTER 364**

754
755 An Act to amend the Code of Virginia by adding a section numbered 10.1-603.8:1, relating to
756 stormwater nonpoint nutrient runoff offsets.

757 [H 2168]

758 Approved March 27, 2009

759 **Be it enacted by the General Assembly of Virginia:**

760 **1. That the Code of Virginia is amended by adding a section numbered 10.1-603.8:1 as follows:**

761 § 10.1-603.8:1. Stormwater nonpoint nutrient offsets.

762 A. As used in this section:

763 "Nonpoint nutrient offset" means nutrient reductions certified as nonpoint nutrient offsets under the
764 Chesapeake Bay Watershed Nutrient Exchange Program (§ 62.1-44.19:12 et seq.).

765 "Permit issuing authority" has the same meaning as in § 10.1-603.2 and includes any locality that
766 has adopted a local stormwater management program.

767 "Tributary" has the same meaning as in § 62.1-44.19:13.

768 B. A permit issuing authority may allow compliance with stormwater nonpoint nutrient runoff water
769 quality criteria established pursuant to § 10.1-603.4, in whole or in part, through the use of the
770 permittee's acquisition of nonpoint nutrient offsets in the same tributary.

771 C. No permit issuing authority shall allow the use of nonpoint nutrient offsets to address water
772 quantity control requirements. No permit issuing authority shall allow the use of nonpoint nutrient
773 offsets in contravention of local water quality-based limitations: (i) consistent with determinations made
774 pursuant to subsection B of § 62.1-44.19:7, (ii) contained in a municipal separate storm sewer system
775 (MS4) program plan approved by the Department, or (iii) as otherwise may be established or approved
776 by the Board.

777 D. A permit issuing authority may only allow the use of nonpoint nutrient offsets when the permit
778 applicant demonstrates to the satisfaction of the permit issuing authority that (i) alternative site designs
779 have been considered that may accommodate on-site best management practices, (ii) on-site best
780 management practices have been considered in alternative site designs to the maximum extent
781 practicable, (iii) appropriate on-site best management practices will be implemented, and (iv) full
782 compliance with postdevelopment nonpoint nutrient runoff compliance requirements cannot practicably
783 be met on site.

784 E. Documentation of the permittee's acquisition of nonpoint nutrient offsets shall be provided to the
785 permit issuing authority in a certification from an offset broker documenting the number of phosphorus
786 nonpoint nutrient offsets acquired and the associated ratio of nitrogen nonpoint nutrient offsets at the
787 offset generating facility. The offset broker shall pay the permit issuing authority a water quality
788 enhancement fee equal to six percent of the amount paid by the permittee for the nonpoint nutrient
789 offsets. If a locality is not the permit issuing authority, such fee shall be deposited into the Virginia
790 Stormwater Management Fund established by § 10.1-603.4:1. If the permit issuing authority is a
791 locality,
792 such fees shall be used solely in the locality where the associated stormwater permit applies for
793 inspection and maintenance of stormwater best management practices, stormwater educational
794 programs, or programs designed to protect or improve local water quality.

795 F. Nonpoint nutrient offsets used pursuant to subsection B shall be generated in the same or
796 adjacent eight digit hydrologic unit code as defined by the United States Geological Survey as the
797 permitted site. Nonpoint nutrient offsets outside the same or adjacent eight digit hydrologic unit code
798 may only be used if it is determined by the permit issuing authority that no nonpoint nutrient offsets are
799 available within the same or adjacent eight digit hydrologic unit code when the permit issuing authority

800 accepts the final site design. In such cases, and subject to other limitations imposed in this section,
801 nonpoint nutrient offsets generated within the same tributary may be used. In no case shall nonpoint
802 nutrient offsets from another tributary be used.

803 G. For that portion of a site's compliance with stormwater nonpoint nutrient runoff water quality
804 criteria being obtained through nonpoint nutrient offsets, a permit issuing authority shall (i) use a 1:1
805 ratio of the nonpoint nutrient offsets to the site's remaining postdevelopment nonpoint nutrient runoff
806 compliance requirement and (ii) assure that the nonpoint nutrient offsets are secured in perpetuity.

807 H. No permit issuing authority may grant an exception to, or waiver of, postdevelopment nonpoint
808 nutrient runoff compliance requirements unless off-site options have been considered and found not
809 available.

810 I. In considering off-site options, the permit issuing authority shall give priority to the use of
811 nonpoint nutrient offsets unless a local fee-in-lieu-of, pro-rata share, or similar program has been
812 approved by the Board as being substantially equivalent in nutrient reduction benefits. However, prior
813 to approval by the Board, there shall be a rebuttable presumption that any local government fee-in-
814 lieuof,

815 pro-rata share, or similar program is substantially equivalent in nutrient reduction benefits. The
816 Board shall establish criteria for determining whether any such local program is substantially
817 equivalent, which shall be used during the local stormwater management program approval process in
818 § 10.1-603.3.

819 J. The Board may establish by regulation a stormwater nutrient program for portions of the
820 Commonwealth that do not drain into the Chesapeake Bay.

821 **2. That no Virginia Soil and Water Conservation Board regulatory action, nor any local**
822 **government ordinance or regional (watershedwide) stormwater management plan amendment, is**
823 **necessary prior to implementation of this act; however, the Virginia Soil and Water Conservation**
824 **Board may conform its regulations to this act through an exempt action and may adopt**
825 **regulations through a nonexempt action.**

826
827
828
829
830
831
832
833
834
835
836
837
838
839
840
841
842
843
844
845
846
847
848
849
850
851
852
853
854
855
856
857
858
859
860
861
862
863
864
865
866
867
868
869
870
871
872

Attachment 2: Example of Declaration of Restrictions.

[NOTE: This example Declaration of Restrictions is provided for demonstrative purposes only. As noted elsewhere in this document, other instruments (including, but not necessarily limited to, conservation and open space easements) may also be utilized. In addition, the terms of any document utilized to protect nonpoint nutrient offsets in perpetuity will necessarily vary with the particular property and offset-generating activities in question.]

TAX MAP # _____

DECLARATION OF RESTRICTIONS

THIS DECLARATION OF RESTRICTIVE COVENANTS is made this ____day of _____, 20__, by [Owner], Grantor; [Broker], referred to as Grantor and Grantee for recordation purposes; and the Commonwealth of Virginia Department of Conservation and Recreation and the Commonwealth of Virginia Department of Environmental Quality, both of whom are referred to as Grantees for recordation purposes,

WHEREAS, _____, (the Grantor and “Owner”) is the owner in fee simple of certain property (the “Property”) consisting of _____acres, more or less, situated, lying, and being in _____, _____ County, Virginia, and more accurately described as _____

WHEREAS, Owner shall, be party to and comply with the respective conditions and terms of the _____ Nutrient Reduction Implementation Plan for the Property (the “Nutrient Reduction Implementation Plan”) dated _____ and approved by the Virginia Department of Environmental Quality (“DEQ”) and the Virginia Department of Conservation and Recreation (“DCR”) on _____, by imposing this Declaration of Restrictions upon those areas of the Property shown in the Nutrient Reduction Implementation Plan as “Land Conversion Areas” which are agricultural lands to be converted to _____ [e.g. forest] for the purpose of generating and transferring nutrient offsets. A plat of the permanent Land Conversion Areas, consisting of ____ acres, more or less, is attached hereto as Exhibit A, made a part hereof, and recorded herewith.

WHEREAS, Owner shall impose on said Land Conversion Areas this Declaration of Restrictions for conservation purposes and these Restrictions shall run with the land and burden the Property in perpetuity. The Owner shall comply with the respective conditions and terms of the Nutrient Reduction Implementation Plan by imposing this Declaration of Restrictions on the permanent Land Conversion Areas located on the Property. These Restrictions are imposed by the Owner freely and voluntarily in order to provide operational and nutrient offset transfer rights for the Land Conversion Areas under the terms of the Nutrient Reduction Implementation Plan to [Broker].

WHEREAS, Owner intends that the Restrictions contained within this Declaration of Restrictions be enforceable by the Commonwealth of Virginia Department of Conservation and Recreation, the

873 Commonwealth of Virginia Department of Environmental Quality, [Broker], and their successors and
874 assigns in perpetuity as required by Section 10.1-603.8:1 (G) of the Code of Virginia.

875

876 NOW THEREFORE THIS DECLARATION WITNESSETH: That for and in consideration of
877 One Dollar (\$1.00) cash in hand paid and other good and valuable consideration, the receipt and
878 sufficiency of which are hereby acknowledged, the Owner does hereby declare, covenant and agree, for
879 itself and its successors and assigns, that the permanent Land Conversion Areas as shown on Exhibit A
880 shall be hereafter held, leased, transferred, and sold subject to the following perpetual covenants and
881 restrictions:

882

883 **Covenants and Restrictions:**

884

885 A. The permanent Land Conversion Areas shall be preserved _____ [e.g., “as forest”] in
886 perpetuity by prohibiting the following activities:

887

888 1. Destruction or alteration of the Land Conversion Areas except:

889

890 (a) Alteration necessary to complete the land conversion and to implement the terms of the Nutrient
891 Reduction Implementation Plan and ensure the success of the planned nutrient reductions and
892 associated nutrient offsets and in conjunction with the construction, reconstruction, enhancement or
893 maintenance of the Land Conversion Areas;

894

895 (b) Alteration to construct structures such as walkways, boardwalks, foot trails, wildlife observation or
896 management structures, benches, observation decks, picnic tables, fence posts and ecological,
897 biological, hydrological or chemical monitoring, observation or management equipment including,
898 without limitation, monitoring wells, water control weirs or interpretive stations, or other
899 management or educational structures provided that such facilities do not impact the nutrient
900 reductions specified in the Nutrient Reduction Implementation Plan and are constructed and
901 maintained in accordance with all applicable federal and states laws;

902

903 (c) Addition of signs constructed in public right of ways by or on behalf of the Virginia Department of
904 Transportation or other governmental agencies;

905

906 (d) Removal of vegetation (where not precluded by federal or state law) when conducted for
907 (i) removal of noxious or invasive plants, or
908 (ii) limited aesthetic modifications not involving clearing or removal of trees or
909 limbs greater than three (3) inches in caliber unless dead, dying or diseased;

910

911 (e) Planting of native species of plants by hand for aesthetic landscaping or screening purposes;

912

913 (f) Alteration authorized by the Nutrient Reduction Implementation Plan and other activities pursuant to
914 all applicable laws, regulations and guidance governing the generation and trading of nutrient
915 offsets within the Commonwealth of Virginia as long as such activities do not negatively affect the
916 nutrient reductions specified in the Nutrient Reduction Implementation Plan;

917

918 (g) Alteration as reasonably necessary to comply with state or federal law or appropriate court order;

919
920
921
922
923
924
925
926
927
928
929
930
931
932
933
934
935
936
937
938
939
940
941
942
943
944
945
946
947
948
949
950
951
952
953
954
955
956
957

958
959
960
961
962
963

(h) Maintenance and use of existing trails and access roads crossing the Land Conversion Areas as long as activities do not negatively affect the nutrient reductions specified in the Nutrient Reduction Implementation Plan;

2. Construction, maintenance or placement of any new structures (including, but not limited to, residential, accessory, and farm and commercial structures) or fills other than those described in paragraph 1(b) above. Existing structures may be maintained, but the footprint of such structures may not be expanded without the consent of DEQ, DCR, and [Broker]. In no case shall any such expansion negatively affect the nutrient reductions specified in the Nutrient Reduction Implementation Plan;

3. Ditching, draining, diking, damming, filling, excavating, grading, plowing, flooding/ponding, mining, drilling, placing of trash and yard debris or removing/adding topsoil, sand, or other materials (except as may be necessary on a case-by-case basis with the approval of DEQ, DCR and [Broker]) other than as authorized under the Nutrient Reduction Implementation Plan;

4. Permitting livestock to graze, inhabit or otherwise enter the Land Conversion Areas;

5. Harvesting, cutting, logging, and pruning of trees and plants, or using fertilizers and spraying with biocides other than what is authorized by the Nutrient Reduction Implementation Plan (except as may be necessary on a case-by-case basis with the approval of DEQ, DCR, and [Broker]).

(a) A current written forest management plan or Virginia Forest Stewardship Plan shall be developed prior to the commencement of any timber harvesting, cutting, or logging activities. All such activities shall be conducted in a manner consistent with Virginia’s Forestry Best Management Practices for Water Quality.

B. Owner hereby grants operational and nutrient offset transfer rights for the Land Conversion Areas under the terms of the Nutrient Reduction Implementation Plan to [Broker]. [Broker] agrees that all management activities undertaken by [Broker] shall be in accordance with the terms of this Declaration of Restrictions and the Nutrient Reduction Implementation Plan.

Amendment:

The covenants contained herein shall not hereafter be altered in any respect without the express written approval and consent of the Owner or its successor in interest, DEQ, DCR, and [Broker]. After recording, this declaration may only be amended or vacated if such amendment or vacation does not negatively affect areas within the Land Conversion Areas which continue to support transferred nutrient offsets and if set forth in a recorded document signed by [Broker], DEQ, DCR, and the Owner or its successor in interest.

Compliance Inspections and Enforcement:

DEQ, DCR, Broker and their authorized agents shall have the right to enter and go on the Land Conversion Areas to inspect and take actions necessary to verify compliance with this declaration of restrictions. For safety reasons, DEQ and DCR shall notify the Owner and [Broker] in advance of on-site inspections. Each request for access by non-DEQ and DCR private parties will be

964 evaluated on a case by case basis by [Broker] and Owner. Violation of the terms of this
965 Declaration by Owner or a third party shall be enforceable by any proceeding at law or in equity or
966 administrative proceeding by DEQ, DCR, and [Broker], and also by Owner in the case of a third
967 party. Violation of the terms of this Declaration by [Broker] shall be enforceable by any
968 proceeding at law or in equity or administrative proceeding by DEQ, DCR, and Owner. Failure by
969 DEQ, DCR, [Broker] or Owner to enforce any covenant or restriction contained herein shall in no
970 event be deemed a waiver of the right to do so thereafter.

971

Severability Provision:

972

973 The provisions hereof shall be deemed individual and severable and the invalidity or partial
974 invalidity or unenforceability of any one provision or any portion thereof shall not affect the
975 validity or enforceability of any other provision thereof.
976

977

Consent of Lender and Trustee: (If Applicable)

978

979

Reference Document:

980

981

982 The Nutrient Reduction Implementation Plan dated _____ between:
983 _____, the Virginia Department of Environmental Quality and the Virginia
984 Department of Conservation and Recreation is available upon written request from DCR

985

986

_____.

987

988

_____, Virginia _____

989 WITNESS the following signature(s) and seal(s):

990
991
992
993
994
995
996
997
998
999

[OWNER]

BY: _____

1000
1001

STATE OF _____,

1003

COUNTY OF _____, to-wit:

1005

1006 The foregoing instrument was acknowledged before me this the ____ day of
1007 _____, 20__, by _____.

1008

My commission expires: _____

1009

1010

1011

1012

Notary Public

1013

1014

1015

[BROKER]

1016

1017

BY: _____

1018

1019

1020

1021

1022

1023

STATE OF _____,

1024

1025

COUNTY OF _____, to-wit:

1026

1027

1028

1029

1030

1031

1032

1033

1034

The foregoing instrument was acknowledged before me this the ____ day of
_____, 20__, by _____.

My commission expires: _____

1031

1032

1033

1034

Notary Public

1035 **Attachment 3: Example of Offset Availability Letter.**

1036
1037
1038 Permit Applicant _____
1039 _____
1040 _____
1041 _____

1042
1043
1044
1045 **RE: _____ – Nutrient Offset Availability**
1046 _____ [broker]
1047
1048 _____ [Date]

1049
1050 Project Reference: “ _____ ”

1051
1052
1053 Attention: Mr(s) _____:

1054
1055 This letter is to confirm the availability of authorized nonpoint nutrient offsets at our
1056 _____ project located in _____ County. The _____ project has received
1057 operational status through the Chesapeake Bay Watershed Nutrient Exchange Program (Virginia
1058 Code § 62.1-44.19:12 et seq.) of the Virginia Department of Environmental Quality.
1059 _____ [broker] currently has _____ pounds of phosphorus offsets and
1060 _____ pounds of nitrogen offsets available for transfer in the approved service area in the
1061 _____ watershed.

1062
1063 These offsets were certified pursuant to the Chesapeake Bay Watershed Nutrient Exchange
1064 Program by the Virginia Department of Environmental Quality and the Virginia Department of
1065 Conservation and Recreation to be used as compensation for state or local permit water quality
1066 requirements. These offsets have been generated and are transferable according to § 10.1-
1067 603.8:1 of the Code of Virginia.

1068
1069 If we can provide further assistance please feel free to contact our office.

1070
1071
1072 Sincerely,
1073
1074
1075 _____
1076

1077 **Attachment 7: Example of Affidavit of Nutrient Offset Sale.**

1078
1079

1080 AFFIDAVIT OF NUTRIENT OFFSET SALE

1081
1082 _____, [broker] (the "Company"), hereby certifies the following:
1083

1084 1. Pursuant to that certain Acquisition and Sale Agreement dated _____, 20__ (the
1085 "Agreement"), between the Company (as Seller) and _____ ("Acquirer"), the Company,
1086 for the benefit of the Acquirer, agreed to sell _____ pounds of phosphorus offsets and retire _____
1087 pounds of nitrogen (representing the ratio of nitrogen offsets to the phosphorous offsets at the offset
1088 generating facility) offsets to Acquirer;
1089

1090 2. The Company and the Acquirer, as of the date hereof, have closed the transaction
1091 contemplated by the Agreement and the Company has sold to Acquirer phosphorus offsets and retired
1092 _____pounds of nitrogen (representing the ratio of nitrogen offsets to the phosphorous offsets at the offset
1093 generating facility) offsets.
1094

1095 WITNESS the following signature:

1096 _____
1097

1098
1099
1100 By: _____
1101 Manager

1102
1103 Date: _____
1104

1105
1106 Sworn to and subscribed before me this _____ day of _____, 20__, by
1107 _____, Manager, on behalf of _____.
1108

1109 My commission expires:

1110
1111 _____
1112 Notary Public

1113
1114
1115 Acquirer: _____
1116

1117 Name of Project: _____
1118

1119 Phosphorus Offsets: _____ pounds
1120

1121 Nitrogen Offsets: _____ pounds
1122