



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

FINAL DRAFT

(Approved July XX, 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>.

36 **Contact Information:**

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

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

46
47 **Disclaimer:**

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

58
59 **Nonpoint Nutrient Offset Program**

60
61 **I. Background:**

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

68
69 Specific conditions and exceptions for this program include:

- 70 ■ The permit issuing authority is granted discretion whether to allow the use of offsets to
71 meet the necessary water quality control requirements.
- 72 ■ Offsets shall not be utilized to address water quantity control requirements.
- 73 ■ Offsets cannot be used in contravention of local water quality-based limitations:
 - 74 ○ consistent with determinations made pursuant to subsection B of §62.1-44.19:7
75 (related to TMDLs developed to protect and restore water quality in impaired
76 waters);
 - 77 ○ contained in a municipal separate storm sewer system (MS4) program plan
78 approved by DCR; or
 - 79 ○ as otherwise may be established or approved by the Virginia Soil and Water
80 Conservation Board.
- 81 ■ Stormwater nonpoint nutrient offsets may not be acquired in a different tributary than the
82 tributary in which the development project is located and where an offset is available,
83 shall be within the same or adjacent eight digit hydrologic unit code. (See definition of
84 “tributary” and “eight digit hydrologic unit code”)

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

96
97 **II. Definitions:**
98

99 Only for the purposes of this guidance, the following terms are defined as follows:
100

101 "Best management practice (BMP)" or "BMP" means both structural or nonstructural practices
102 and other management practices used to prevent or reduce the pollution of surface waters and
103 groundwater systems from the impacts of construction activities. Such practices are designed in
104 accordance with standards and specifications provided on the Virginia Stormwater BMP
105 Clearinghouse (<http://www.vwrrc.vt.edu/swc/index.html>) or in the Virginia Stormwater
106 Management Handbook (http://www.dcr.virginia.gov/soil_and_water/stormwat.shtml#pubs).
107

108 "Board" means the Virginia Soil and Water Conservation Board.
109

110 "Broker" or "Offset Broker" means a person that facilitates the exchange of nutrient offsets
111 between an authorized buyer and an operational offset generating facility owner with certified
112 offsets available for acquisition.
113

114 "Buyer" means a person that is considering acquiring offsets and that is seeking authority from
115 the permit issuing authority for use of a nonpoint nutrient offset to satisfy the phosphorus load
116 reductions of VSMP construction permits.
117

118 "Chesapeake Bay Watershed Nutrient Credit Exchange Program" means the program
119 administered by DEQ pursuant to §62.1-44.19:12 et seq. under which the nutrient reductions of
120 an offset generating facility are certified as eligible stormwater nonpoint nutrient offsets.
121

122 "DCR" means the Virginia Department of Conservation and Recreation.
123

124 "DEQ" mean the Virginia Department of Environmental Quality.
125

126 "Directly discharge to" means the direct conveyance of stormwater from a land disturbing
127 activity into state waters. For purposes of both concentrated discharges through pipes, ditches,
128 MS4s, or other conveyances and sheet flow, the direct discharge is located where the stormwater
129 first enters a state water, either on or off-site.
130

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

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

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

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

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

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

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

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

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

182
183 “Offset generating facility” means a property that has generated nutrient offsets which DEQ has
184 certified under the Chesapeake Bay Watershed Nutrient Exchange Program.
185

186 "Permit issuing authority"¹ pursuant to § 10.1-603.8:1 (A) means the Virginia Soil and Water
187 Conservation Board, DCR, or a locality that is delegated authority by the Board to issue, deny,
188 revoke, terminate, or amend stormwater permits under the provisions of the Virginia Stormwater
189 Management Act and includes any locality that has adopted a local stormwater management
190 program. For the purposes of allowing offsets, local stormwater management programs refers to
191 those localities located within Tidewater Virginia as defined by the Chesapeake Bay Preservation
192 Act (§ 10.1-2100 et seq.), or any locality that is partially or wholly designated as required to
193 obtain coverage under an MS4 permit under the provisions of the federal Clean Water Act. Such
194 localities serving as the permit issuing authority, when addressing offsets in accordance with this
195 guidance, shall utilize the water quality technical criteria of the Commonwealth’s Stormwater
196 Management Act and attendant regulations when conducting alternative site design and final
197 plan reviews or Board approved equivalent criteria, or the locality may choose to have DCR
198 remain the permit issuing authority for the purposes of offset approval until such time as the
199 locality becomes a qualifying local program in accordance with §10.1-603.3. Additional
200 localities may be authorized as permit issuing authorities for the purposes of allowing offsets
201 when they are approved as a qualifying local program by the Virginia Soil and Water
202 Conservation Board in accordance with §10.1-603.3.
203

204 "Person" means an individual, corporation, partnership, association, state, municipality,
205 commission, or political subdivision of a state, governmental body, any interstate body, or any
206 other legal entity.
207

208 “Post-development nonpoint nutrient runoff compliance” means that a construction activity,
209 utilizing BMP’s, has developed and implemented a design that will meet the appropriate
210 phosphorus reduction limits required by state law and regulations in order to protect water
211 quality.
212

213 “Practicable” means that a buyer and his engineer has demonstrated to the satisfaction of the
214 permit issuing authority using good engineering practices and professional judgment that full
215 compliance is not reasonably achievable on-site in light of factors including but not limited to
216 site constraints, cost associated with potential on-site best management practices, and local
217 conditions. Practicable necessarily involves the professional judgment of the buyer and his
218 engineer in determining what is appropriate for a given construction project’s requirements and
219 site constraints.
220

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

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.

224
225 "Total maximum daily load" or "TMDL" means the sum of the individual wasteload allocations
226 for point sources, load allocations (LAs) for nonpoint sources, natural background loading and a
227 margin of safety. TMDLs can be expressed in terms of either mass per time, toxicity, or other
228 appropriate measure.

229
230 "Tributary" or "Tributaries" means those identified pursuant to §62.1-44.19:13 (the
231 Potomac/Shenandoah, Rappahannock, York, and James River Basins, and the Eastern Coastal
232 Basin, which encompasses the creeks and rivers of the Eastern Shore of Virginia that drain into
233 the Chesapeake Bay).

234
235 "Virginia Stormwater Management Program (VSMP)" means the Virginia program for issuing,
236 modifying, revoking and reissuing, terminating, monitoring and enforcing permits, and imposing
237 and enforcing requirements pursuant to the federal Clean Water Act, the Virginia Stormwater
238 Management Act and attendant regulations, and associated Board guidance documents.

239
240 "Virginia Stormwater Management Program (VSMP) permit" means a document issued pursuant
241 to the Virginia Stormwater Management Act and attendant regulations authorizing, under
242 prescribed conditions, the potential or actual discharge of pollutants from a point source to
243 surface waters. Under the approved state program, a VSMP permit is equivalent to a NPDES
244 permit.

245 246 **III. Discussion: How to Gain Approval for Use of Nutrient Offsets under the VSMP** 247 **program**

248
249 The stormwater nonpoint nutrient offset program as described under this guidance contains roles
250 for the Department of Environmental Quality and the Department of Conservation and
251 Recreation. In general, DEQ is responsible for the certification of these offsets in consultation
252 with DCR where applicable, and DCR and authorized localities are authorized to approve the use
253 of these offsets to satisfy the phosphorus load reductions of VSMP construction permits. The
254 process is outlined in Sections A - E.

255 256 **Section A. Determining Availability of Offsets**

257
258 Nonpoint nutrient offsets must be certified under DEQ's Chesapeake Bay Watershed Nutrient
259 Exchange Program [§10.1-603.8:1(A)]. The Department of Environmental Quality's February
260 2008 guidance document entitled *Trading Nutrient Reductions from Nonpoint Source Best*
261 *Management Practices in the Chesapeake Bay Watershed: Guidance for Agricultural*
262 *Landowners and Your Potential Trading Partners* (the "DEQ Agricultural Lands Guidance"
263 (http://www.deq.virginia.gov/export/sites/default/vpdes/pdf/VANPSTradingManual_2-5-08.pdf)
264 is a key resource for those interested in developing stormwater nonpoint nutrient offsets in the
265 Chesapeake Bay Watershed. Additional information regarding brokers may be found on DEQ's
266 website at <http://www.deq.virginia.gov/vpdes/nutrienttrade.html>.

267
268 In addition to the options and procedures provided in DEQ's guidance, §10.1-603.8:1(G)
269 specifies that stormwater nonpoint nutrient offsets must be secured in perpetuity. All offsets
270 must be placed under a conservation easement, open space easement, restrictive covenant, or
271 other instrument to ensure that the nutrient reducing offsets will remain in place in perpetuity and
272 that the offsets will be appropriately managed and monitored. An example of restrictive

273 covenants that may be modified for a specific situation is provided as Attachment 2. Perpetual
274 offset restrictions must be in place prior to the offset being sold as a stormwater nonpoint
275 nutrient offset. Drafts of such restrictive covenants or other legal instruments shall be a
276 component of the offset certification package provided to DEQ.

277
278 Although varying offset strategies may emerge in the future, today, one of the primary
279 stormwater nonpoint nutrient offsets that may be generated in perpetuity is an offset created as a
280 result of land conversion. Examples of potential land conversions currently allowed include
281 cropland to forest or hay to forest. DEQ may certify offsets through other means as well.

282
283 All stormwater nonpoint nutrient offsets shall be used at a 1:1 ratio (pounds of phosphorus) of
284 nonpoint nutrient offsets to the construction activity's remaining post development nonpoint
285 nutrient runoff compliance requirement (i.e. those authorized nutrient reductions that cannot be
286 met on site) pursuant to §10.1-603.8:1(G). Although a buyer will be authorized to use a specific
287 amount of phosphorus offsets to meet the stormwater nutrient reduction requirements, §10.1-
288 603.8:1(E) specifies that in addition to the phosphorus nonpoint nutrient offsets acquired, the
289 associated ratio of nitrogen nutrient offsets at the offset generating facility shall also be retired.
290 When working with the offset broker a buyer should determine whether the broker's offset
291 generating facility has operational status and enough phosphorus offsets and associated nitrogen
292 offsets to meet a development project's needs. This can be documented through an "Offset
293 Availability Letter." (See Attachment 3 for an example)

294

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

296

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

306

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

311

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

316

317 **Component 2: Determine availability of offsets.** Before seeking authorization to acquire a
318 nonpoint nutrient offset, the buyer should verify that offsets are available within allowable
319 hydrologic unit codes, and if not, then within the same tributary as the construction activity.
320 Nonpoint nutrient offsets for construction activities shall be generated in the same or adjacent
321 eight digit hydrologic unit code as defined by the United States Geological Survey as the

322 permitted site [§10.1-603.8:1(F)]. A map of these eight digit hydrologic unit codes may be
323 found on DCR’s website at <http://www.dcr.virginia.gov/lr6.shtml>. Nonpoint nutrient offsets
324 outside the same or adjacent eight digit hydrologic unit code may only be used if it is determined
325 by the permit issuing authority that no nonpoint nutrient offsets are available within the same or
326 adjacent eight digit hydrologic unit code when the permit issuing authority accepts the final site
327 design. In such cases, nonpoint nutrient offsets generated within the same tributary may be used.
328 In no case shall nonpoint nutrient offsets from another tributary be used. Contact DEQ for a
329 listing of certified stormwater nonpoint nutrient offsets at
330 <http://www.deq.virginia.gov/vpdes/nutrienttrade.html>.

331
332 **Component 3: Meet state water quantity control requirements on site.** In order to minimize
333 local stream impacts and downstream flooding, the buyer shall ensure that BMPs are
334 implemented in accordance with approved stormwater plans and calculations that address water
335 quantity controls in accordance with the current state stormwater management regulations.

336
337 **Component 4: Determine if receiving waters to which there would be a direct discharge**
338 **have local water quality-based limitations that would be contravened by allowing the use of**
339 **offsets.** Pursuant to subsection C of §10.1-603.8:1 a permit issuing authority may not allow the
340 use of offsets when such use would be in contravention of local water quality-based limitations:

- 341 (i) consistent with determinations made pursuant to subsection B of §62.1-44.19:7
342 (related to TMDL development to protect and restore water quality in impaired
343 waters);
- 344 (ii) contained in a municipal separate storm sewer system (MS4) program plan
345 approved by DCR; or
- 346 (iii) as otherwise may be established or approved by the Virginia Soil and Water
347 Conservation Board.

348
349 Additionally, §10.1-603.2:2 specifies that “[i]t shall be unlawful to cause a stormwater discharge
350 from an MS4 or a land disturbing activity except in compliance with a permit issued by a permit
351 issuing authority (Board, DCR or qualifying local program). The requirements of §10.1-603.8:1
352 are in addition to those water quality permit requirements that a buyer must address in order to
353 receive coverage under the Virginia Soil and Water Conservation Board’s Construction General
354 Permit or to receive a Construction Individual Permit.

355
356 Each of the combined areas of local water quality limitations (TMDLs, MS4s, and Impaired
357 Waters) that must be addressed are discussed below. Where the construction activity directly
358 discharges to state waters that are impaired by phosphorus or have a TMDL wasteload allocation
359 associated with phosphorus, the permit issuing authority, should it not be DCR, shall consult
360 with DCR when developing its determination. Where impairments exist, buyers should be aware
361 that under DCR’s VSMP permit responsibilities, additional on-site BMPs may be required by the
362 Department should on-site inspections conclude that state waters are not being satisfactorily
363 protected.

364
365 **(i) TMDLs:** The provision of §10.1-603.8:1 (C)(i) is designed to address local water quality
366 issues when there has been a specific limitation developed for the receiving waters that the
367 construction activity directly discharges into. This determination would need to be made prior to
368 a permit issuing authority authorizing the use of offsets in a particular situation.

369
370 Subsection B of §62.1-44.19:7 provides for development of TMDLs and waste load allocations.

371
372 Section 4VAC50-60-1130 (A) (3) of the Construction General Permit related to “Authorization
373 to discharge” states that “[d]ischarges to waters for which a total maximum daily load (TMDL)
374 wasteload allocation has been established are not eligible for coverage under this general permit
375 unless they are otherwise authorized in accordance with 4VAC50-60-1170 Section II D 6 and
376 consistent with the requirements and assumptions of the wasteload allocations in the TMDL”.
377 Additional details regarding TMDL regulatory requirements may be found in Appendix I.

378
379 The permit issuing authority, prior to authorizing the use of offsets will need to determine
380 whether the amount of phosphorous allowed to leave the construction site due to the proposed
381 use of offsets would be inconsistent with any waste load allocation to construction activities for
382 the state water that receives the direct discharge from the construction activity. If state waters do
383 not have a TMDL wasteload allocation associated with phosphorus, there would be no
384 “contravention” of this provision. If such a requirement does exist, then the permit issuing
385 authority for the purposes of the stormwater offsets program in consultation with DCR shall
386 determine if an offset can be allowed, and if it is, then the offset generating facility must be
387 located in the upstream portion of the watershed of the TMDL segment. The permit issuing
388 authority may request the applicant to provide information to support a determination in this
389 regard.

390
391 **(ii) MS4s:** The provision of §10.1-603.8:1 (C)(ii) applies if the construction activity will occur in
392 an area with an MS4 program plan approved by DCR and the plan includes nutrient local water
393 quality based limitations. The buyer must first determine if the runoff from the construction
394 activity would discharge to a municipal separate storm sewer system (MS4) and make note of
395 this in their application materials. A listing of MS4s is available on DCR’s website at
396 http://www.dcr.virginia.gov/soil_and_water/vsmp.shtml. If the construction activity is within an
397 MS4, then a determination will need to be made as to whether the phosphorous leaving the
398 construction site due to the proposed use of offsets would be inconsistent with that plan.

399
400 Where a stormwater management plan has been approved by the permit issuing authority, it will
401 be determined that the offset would not contravene the MS4’s Program Plan. In the absence of
402 the submission of a stormwater management plan to the permit issuing authority, the permit
403 issuing authority shall determine if the use of offsets within the MS4 would contravene the
404 MS4’s Program Plan.

405
406 **(iii) Impaired Waters:** Additional water quality requirements of the Virginia Soil and Water
407 Conservation Board’s Construction General Permit include provisions related to impaired waters
408 and must be taken into consideration in accordance with §10.1-603.8:1 (C)(iii). Section
409 4VAC50-60-1130 (A) (4) of the Construction General Permit related to “Authorization to
410 discharge” states that “[d]ischarges to waters that have been identified as impaired in the 2008 §
411 305(b)/303(d) Water Quality Assessment Integrated Report are not eligible for coverage under
412 this general permit unless they are otherwise authorized in accordance with 4VAC50-60-1170
413 Section I H.”. Additional details regarding the Board’s impaired waters regulatory requirements
414 may be found in Appendix I.

415
416 If it is determined that the construction activity will directly discharge to an impaired water, the
417 permit issuing authority will determine whether the nutrient runoff from the construction activity
418 may further contribute to the impairment. Should contribution to an impairment be determined
419 based on a review of the buyer’s information by the permit issuing authority in consultation with

420 DCR, an offset pursuant to §10.1-603.8:1 of the Code of Virginia may not be allowed unless
421 such offset is located within the upstream portion of the watershed of the impaired segment.

422
423 DEQ maintains on their website an assessment database to determine the location and type of
424 impairments. This tool and accompanying instructions may be found at
425 <http://www.deq.virginia.gov/wqa/adbims2008.html>.

426
427 **Component 5: Meeting Local Water Quality Requirements.** If the locality in which the
428 construction activity will occur has established local water quality requirements for the waters
429 that the construction activity will directly discharge to, the buyer should consult with the locality
430 regarding such local requirements.

431
432 **Component 6: Demonstration of On-site Practicability.** In accordance with §10.1-603.8:1(D),
433 if a buyer satisfactorily addresses each of the areas outlined below, they will be deemed as
434 having provided sufficient analyses for consideration. Such documented demonstration shall
435 include at a minimum:

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

451
452 The permit issuing authority after becoming a Board approved qualifying local program may define an
453 alternative approach for demonstrating on-site practicability.

454 **Section C. Offset Nutrient Submittal Package**

455
456 Provided that a permit issuing authority will allow for compliance with stormwater nonpoint nutrient
457 runoff water quality criteria through the use of nonpoint nutrient offsets (see Section B, Component 1), a
458 two step, preliminary and final, offset evaluation process may be initiated.

460 **Preliminary Offset Authorization Review**

461
462 As part of a preliminary offset authorization review, the buyer must provide the following
463 documentation in order to receive review for offset use for a portion of the water quality requirement of
464 the project.

- 465
466 a. **Request and Certification:** Buyer signed request for consideration for the use of an offset
467 certifying that alternative site designs have been considered to the MEP and that full compliance

468 with postdevelopment nonpoint nutrient runoff compliance requirements cannot practicably be
469 met on-site.

- 470
- 471 b. **Alternative Site Designs:** Alternative site designs with necessary supporting calculations
472 showing that such designs have considered BMP's to the MEP (see Section B, Component 6
473 discussion above).
- 474
- 475 c. **Narrative:** Narrative discussing alternative site designs considered that may accommodate on-
476 site BMPs, the BMPs considered to the MEP, and the practicability of meeting full compliance
477 with nonpoint nutrient runoff compliance requirements on-site.
- 478
- 479 d. **Impaired and TMDL Waters Information:** Information regarding whether the project will
480 directly discharge to a MS4, an impaired water, or to a reach with a TMDL (see Section B,
481 Component 5) and if so, how these issues are being addressed.
- 482
- 483 e. **Offset Availability Letter:** A current offset availability letter from an operational certified offset
484 provider that documents the ability of the provider to supply the necessary number of offsets in
485 the appropriate service area pursuant to §10.1-603.8:1(F) (see Section B, Component 2). An
486 example of a completed form is provided as Attachment 3 of this document.
- 487
- 488 f. **Proposed Proof of Perpetuity of the Offset:** A copy of a proposed draft restrictive covenant or
489 other instrument that will be recorded for the offset property at the time of purchase of the offset
490 and always prior to the permitted construction activity commencing. An example of a set of
491 restrictive covenants is provided as Attachment 2 of this document.

492

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

495

496 Virginia Department of Conservation and Recreation
497 c/o Stormwater Nutrient Offset Review
498 203 Governor Street
499 Room 206, 2nd Floor
500 Richmond, Virginia 23219

501

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

506

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

509

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

513

514 Upon preliminary approval of the use of an offset, a Letter of Preliminary Authorization, good
515 for one-year, will be sent to the buyer (i) acknowledging the permit issuing authority's
516 satisfaction of the buyer's demonstration pursuant to §10.1-603.8:1(D) (see Section B

517 Component 6), (ii) stipulating that the offsets being proposed must be secured in perpetuity, (iii)
518 noting any preliminary specific requirements concerning the acquisition (such as geographic
519 location constraints), and (iv) indicating the permit issuing authority's preliminary consent for
520 the use of an offset to meet the buyer's required nonpoint nutrient reductions pending submittal
521 of a final plan and calculations that is based on the approved site design and BMPs.
522

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

528 Final Offset Authorization Review

529 As part of a final offset authorization review, the buyer must provide within one-year of preliminary
530 offset authorization the following documentation.
531

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

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

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

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

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

570

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

572

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

575

- 576 a. **Letter of Final Authorization:** A letter from the permit issuing authority to the buyer outlining
577 conditions pursuant to the use of an offset.
- 578
- 579 b. **Notarized Affidavit of Offset Sale:** In addition to inclusion in the SWPPP, the notarized
580 affidavit will be provided to the permit issuing authority in addition to the buyer. An example of
581 the Affidavit of Nutrient Offset Sale is provided as Attachment 3 to this document.
- 582
- 583 c. **Proof of Perpetuity of the Offset:** A copy of the recorded covenants, restrictions, easement, or
584 other appropriate instrument verifying the stormwater nutrient offsets that have been acquired to
585 meet the construction activity's required nutrient reductions will be protected in perpetuity. See
586 Attachment 2 for an example of covenant restrictions.

587

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

594

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

596

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

601

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

604

605 Should an acquisition occur from the offset generating facility, an updated ledger indicating at a
606 minimum the amount of offsets acquired as well as information identifying the buyer and the
607 location of the buyer's project shall be provided to DEQ and DCR within 7 business days of the
608 transaction.

609

610 **Adoption, Amendments, and Repeals:**

611

612 This document was adopted by the Board on July XX, 2009 and may be amended or repealed as
613 necessary by the Board.

614

615 **Appendix I**

616
617 **Authority:** The Virginia Soil and Water Conservation Board and DCR derive their authority to regulate
618 stormwater and to administer the Virginia Stormwater Management Program (VSMP) from the
619 Stormwater Management Act (Code of Virginia §10.1-603.1 et seq.). The Act contains the following
620 authorities applicable to this guidance and the implementation of a stormwater nonpoint nutrient offset
621 program:

622
623 **§10.1-603.8:1. Stormwater nonpoint nutrient offsets.** (Chapter 364 of the 2009 Virginia Acts
624 of Assembly [HB2168]) (See Attachment 1). This section authorizes a permit issuing authority
625 to allow compliance with stormwater nonpoint nutrient runoff water quality criteria established
626 pursuant to §10.1-603.4, in whole or in part, through the use of the permittee’s acquisition of
627 nonpoint nutrient offsets in the same tributary. Such nonpoint nutrient offsets are to be certified
628 under the Chesapeake Bay Watershed Nutrient Exchange Program (§62.1-44.19:12 et seq.).

629
630 **§10.1-603.4. Development of regulations.**

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

656
657 Authority for the Virginia Department of Environmental Quality to establish the Chesapeake Bay
658 Watershed Nutrient Credit Exchange Program in Virginia’s portion of the Bay is found in §62.1-
659 44.19:12 et seq. Applicable authorities are as follows:

660
661 **§ 62.1-44.19:12. Legislative findings and purposes.**

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

665 2010 timeline and objectives of the Chesapeake 2000 Agreement, (b) accommodating continued
666 growth and economic development in the Chesapeake Bay watershed, and (c) providing a
667 foundation for establishing market-based incentives to help achieve the Chesapeake Bay
668 Program's nonpoint source reduction goals.

669
670 **§ 62.1-44.19:15 . New or expanded facilities.**

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

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

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

683
684 The Department of Environmental Quality's February 2005 guidance document entitled *Trading*
685 *Nutrient Reductions from Nonpoint Source Best Management Practices in the Chesapeake Bay*
686 *Watershed: Guidance for Agricultural Landowners and Your Potential Trading Partners*
687 (http://www.deq.virginia.gov/export/sites/default/vpdes/pdf/VANPSTradingManual_2-5-08.pdf) is a
688 detailed source of information regarding how nutrient trading works and how the offsets may be
689 developed and approved in the Chesapeake Bay Watershed. This guidance was developed in
690 accordance with § 62.1-44.19:15(B)(1)(b). This document shall serve as the foundation for certifying
691 nonpoint nutrient offsets that an authorized buyer may acquire.

692
693 Regulatory authorities embodied in the Construction General Permit relative to the Virginia Soil and
694 Water Conservation Board's responsibilities associated with impaired waters and waters for which a
695 TMDL WLA has been established include the following:

696
697 **Section 4VAC50-60-1130 related to "Authorization to discharge" states:**

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

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

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

711
712 **4VAC50-60-1170 Section I H. states:**

713 H. Water quality protection.

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

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

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

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

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

727

728 **4VAC50-60-1170 Section II D 6 and 7 states:**

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

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

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

746

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

748
749 **VIRGINIA ACTS OF ASSEMBLY -- 2009 SESSION**
750 **CHAPTER 364**

751
752 An Act to amend the Code of Virginia by adding a section numbered 10.1-603.8:1, relating to
753 stormwater nonpoint nutrient runoff offsets.

754 [H 2168]

755 Approved March 27, 2009

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

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

758 § 10.1-603.8:1. Stormwater nonpoint nutrient offsets.

759 A. As used in this section:

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

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

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

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

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

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

781 E. Documentation of the permittee's acquisition of nonpoint nutrient offsets shall be provided to the
782 permit issuing authority in a certification from an offset broker documenting the number of phosphorus
783 nonpoint nutrient offsets acquired and the associated ratio of nitrogen nonpoint nutrient offsets at the
784 offset generating facility. The offset broker shall pay the permit issuing authority a water quality
785 enhancement fee equal to six percent of the amount paid by the permittee for the nonpoint nutrient
786 offsets. If a locality is not the permit issuing authority, such fee shall be deposited into the Virginia
787 Stormwater Management Fund established by § 10.1-603.4:1. If the permit issuing authority is a
788 locality,

789 such fees shall be used solely in the locality where the associated stormwater permit applies for
790 inspection and maintenance of stormwater best management practices, stormwater educational
791 programs, or programs designed to protect or improve local water quality.

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

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

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

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

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

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

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

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

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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

870 Commonwealth of Virginia Department of Environmental Quality, [Broker], and their successors and
871 assigns in perpetuity as required by Section 10.1-603.8:1 (G) of the Code of Virginia.
872

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

879

880 **Covenants and Restrictions:**

881

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

884

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

886

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

891

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

899

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

902

903 (d) Removal of vegetation (where not precluded by federal or state law) when conducted for

904 (i) removal of noxious or invasive plants, or

905 (ii) limited aesthetic modifications not involving clearing or removal of trees or
906 limbs greater than three (3) inches in caliber unless dead, dying or diseased;

907

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

909

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

914

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

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(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

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

968

969 **Severability Provision:**

970

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

974

975 **Consent of Lender and Trustee: (If Applicable)**

976

977 **Reference Document:**

978

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

982

983 _____.

984 _____

985 _____, Virginia _____

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

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[OWNER]

BY: _____

STATE OF _____,

COUNTY OF _____, to-wit:

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

My commission expires: _____

Notary Public

[BROKER]

BY: _____

STATE OF _____,

COUNTY OF _____, to-wit:

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

My commission expires: _____

Notary Public

1032 **Attachment 3: Example of Offset Availability Letter.**

1033
1034
1035 Permit Applicant _____
1036 _____
1037 _____
1038 _____

1039
1040
1041
1042 **RE: _____ – Nutrient Offset Availability**
1043 _____ [broker]

1044
1045 _____ [Date]

1046
1047 Project Reference: “ _____ ”

1048
1049
1050 Attention: Mr(s) _____:

1051
1052 This letter is to confirm the availability of authorized nonpoint nutrient offsets at our
1053 _____ project located in _____ County. The _____ project has received
1054 operational status through the Chesapeake Bay Watershed Nutrient Exchange Program (Virginia
1055 Code § 62.1-44.19:12 et seq.) of the Virginia Department of Environmental Quality.
1056 _____ [broker] currently has _____ pounds of phosphorus offsets and
1057 _____ pounds of nitrogen offsets available for transfer in the approved service area in the
1058 _____ watershed.

1059
1060 These offsets were certified pursuant to the Chesapeake Bay Watershed Nutrient Exchange
1061 Program by the Virginia Department of Environmental Quality and the Virginia Department of
1062 Conservation and Recreation to be used as compensation for state or local permit water quality
1063 requirements. These offsets have been generated and are transferable according to § 10.1-
1064 603.8:1 of the Code of Virginia.

1065
1066 If we can provide further assistance please feel free to contact our office.

1067
1068
1069 Sincerely,
1070
1071 _____
1072 _____
1073

1074 **Attachment 7: Example of Affidavit of Nutrient Offset Sale.**

1075
1076

1077 AFFIDAVIT OF NUTRIENT OFFSET SALE

1078
1079 _____, [**broker**](the “Company”), hereby certifies the following:
1080

1081 1. Pursuant to that certain Acquisition and Sale Agreement dated _____, 20__ (the
1082 “Agreement”), between the Company (as Seller) and _____ (“Acquirer”), the Company,
1083 for the benefit of the Acquirer, agreed to sell _____ pounds of phosphorus offsets and retire
1084 _____pounds of nitrogen (representing the ratio of nitrogen offsets to the phosphorous offsets at the offset
1085 generating facility) offsets to Acquirer;
1086

1087 2. The Company and the Acquirer, as of the date hereof, have closed the transaction
1088 contemplated by the Agreement and the Company has sold to Acquirer phosphorus offsets and retired
1089 _____pounds of nitrogen (representing the ratio of nitrogen offsets to the phosphorous offsets at the offset
1090 generating facility) offsets.
1091

1092 WITNESS the following signature:

1093 _____
1094

1095
1096
1097 By: _____
1098 Manager

1099
1100 Date: _____
1101

1102
1103 Sworn to and subscribed before me this _____ day of _____, 20__, by
1104 _____, Manager, on behalf of _____.
1105

1106 My commission expires:

1107
1108 _____
1109 Notary Public

1110
1111
1112 Acquirer: _____
1113

1114 Name of Project: _____
1115

1116 Phosphorus Offsets: _____ pounds
1117

1118 Nitrogen Offsets: _____ pounds
1119