

# Virginia Soil and Water Conservation Board

## Summary of Public Comment and Response

### September 28, 2009

Pursuant to the Virginia Administrative Process Act [§ 2.2-4012 (E) of the Code of Virginia] and the Virginia Soil and Water Conservation Board's Public Participation Guidelines [4VAC50-11-50 (E)] you are being provided with this summary of the major issues raised by the public regarding the two stormwater regulatory actions concerning Parts I, II, III and Part XIII of the Virginia Stormwater Management Program (VSMP) Permit Regulations (4 VAC 50-60) and the Board's response to those issues. As required, this document is being sent to all those who commented on the proposed regulations during the public comment period. A more detailed document including all comments received and responses to them is available on DCR's website at <http://www.dcr.virginia.gov/lawregs.shtml> or by calling 804-786-6124 or by email to [pam.landrum@dcr.virginia.gov](mailto:pam.landrum@dcr.virginia.gov).

### Public Comment Status

During the 60-day public comment period that ran from June 22, 2009 to August 21, 2009, 3,421 comments were received on the two stormwater regulatory actions (Parts I, II, III and Part XIII). The comments included those received during the five public hearings held around the state, those submitted on Virginia's Regulatory Town Hall website, and those directly provided to the Department of Conservation and Recreation on behalf of the Board. A majority of the comments received were supportive of the proposed regulations; however, several key issues were raised that are reflected in the summary below. Please note that due to the large volume of comments received and the size of the comment document, we are providing you with a general summary of the comments and the revisions being recommended in the final regulations. As with the detailed comment document, the actual regulatory language for the recommended amendments will be made available at the website address noted above in advance of the October 5<sup>th</sup> Board meeting, where the final regulations will be considered.

### Key Issues Raised on the Part I, II, and III Regulatory Action

#### **Issue Raised: Proposed Regulations will lead to sprawling development patterns**

Comments received from the public indicated that the Board should consider adding additional flexibility to the technical standards for small infill sites, redevelopment sites, or sites within locality designated Urban Development Areas (UDAs). The concern raised was that the new stormwater standards for water quality and quantity were going to be more difficult to achieve in urban areas (both redevelopment areas and UDAs) and on small parcels and could result in development moving to more rural locations to build, where it was suggested that the standards might be easier to achieve. Some commenters also suggested that as development density was increased, that achieving the standards would be more difficult thus resulting in less dense development, stale zoning, and a more sprawling growth pattern.

#### **Summary of Draft Final Language:**

- Land disturbance between 2500 sq. ft. and 1 acre in the Chesapeake Bay Preservation Act area would be held to the 0.45 lbs/ acre/ year phosphorus standard. (unless they are part of a "common plan of development" in which case, the "common plan of development" standard applies).
- A 10% reduction in phosphorus below the predevelopment load for redevelopment sites disturbing less than 1 acre would be required. The proposed standard of 20% shall remain the threshold for redevelopment sites disturbing greater than or equal to 1 acre.
- Within a UDA in the Chesapeake Bay Watershed (greater than or equal to 1 acre), a qualifying local program may establish with Board approval a standard between 0.28 and 0.45 lbs/ acre/ year phosphorus in accordance with specified factors set out in the regulation.

#### **Issue Raised: Regulations should not apply the same stormwater quality standard in the non-Chesapeake Bay portions of the state as in the Bay Watershed**

This issue was raised by commenters as the 0.28 lbs/ acre/ year phosphorus water quality standard was derived using the Chesapeake Bay Watershed Model and it was suggested that the standard was not applicable to the southern rivers (those river basins that do not drain to the Chesapeake Bay). Others suggested that the

standard was acceptable to apply statewide as they noted that stormwater is a real and growing threat to the health and integrity of Virginia's waters and the value of those waters to the citizen's of the Commonwealth. It was noted that some of the most biologically significant rivers and streams in the entire country exist outside of the Bay Watershed.

Summary of Draft Final Language:

- A 0.28 lbs/ acre/ year phosphorus standard applies in the Chesapeake Bay Watershed for new development; 0.45 applies for non-Bay areas.
- Localities which have lands that drain into both the Bay watershed and non-Bay watersheds may choose which standard to apply to non-Bay areas.
- Localities statewide may always elect to use a stricter standard. (ex: Swift Creek Reservoir in Chesterfield County which has a 0.22 phosphorus standard for residential development)
- Land disturbance between 2500 sq. ft. and 1 acre in the Chesapeake Bay Preservation Act area would be held to the statewide 0.45 lbs/ acre/ year phosphorus standard. (unless it is part of a "common plan of development" in which case, the "common plan of development" standard applies)

**Issue Raised: Need for expanded availability of "offsite options" should the necessary reductions not be fully achievable onsite.**

Developers wanted to ensure that an offsite strategy would exist should they not be able to meet their necessary reductions on site. Commenters recommended that the state institute a program with a reasonable and fixed cost to developers to create a "safe harbor". Some comments suggested that the funds should be expended on agricultural best management practices while others recommended that the funds be applied to urban retrofits or a blend of agricultural and urban options. There were suggestions offered that the state buy down option should only be allowed after all other local options are considered while others wanted this option to be available at all times.

Summary of Draft Final Language:

- Creates a new section numbered 4VAC50-60-69 that contains the following 5 offsite options:
  - **COMPREHENSIVE PLAN:** Maintains the proposed option where if a local comprehensive watershed stormwater management plan has been adopted by a locality for the area within which a project is located, then the development may be able to use offsite options to achieve all or part of the water quality and quantity technical criteria.
  - **LOCAL PRO-RATA:** Expands the use of this option currently contained in the proposed regulations. A locality may use a pro rata fee in accordance with § 15.2-2243 of the Code of Virginia or similar funding mechanism to achieve offsite the water quality and quantity reductions required. Participants will pay a locally established fee sufficient to fund improvements necessary to adequately achieve those requirements.
  - **DEVELOPER SITE:** Maintains the proposed option where if no comprehensive plan or pro rata program exists, or where a locality allows the use of this option, a development project may use offsite options to meet water quality technical criteria if they control or own property within the same HUC and modifies the language to specify that controls may also be located within the upstream HUCs in the local watershed that the land disturbing activity directly discharges to.
  - **NUTRIENT OFFSET:** Incorporates the new offset option passed by the 2009 General Assembly (HB2168). This option only applies to water quality requirements and is subject to stipulations in the legislation.
  - **BUY-DOWN:** Adds a new option to allow the developer at his discretion to meet the 0.28 lbs/ acre/ year phosphorus standard, where applicable, or pay the difference at a set fee per acre/per pound into a state fund. This option may be used where the other 4 options are not available, where the fee established by a locality to offset a pound of phosphorus removal on-site under their pro-rata program exceeds \$23,900, or where a locality otherwise elects to allow the use of the option. In a UDA, the payment shall be \$15,000 per pound of phosphorus not treated on site and in all other cases the payment shall be \$23,900. Payments will be deposited to the Virginia Stormwater Management Fund. The Virginia Soil and Water Conservation Board shall establish priorities for the use of these payments by December 1 of each year (a list of priorities for consideration is provided). Amongst several specified priorities, at least 50% of the payments shall be used for projects to address local urban stormwater quality issues. Of the remaining funds, a priority for the purchase of nutrient offsets is established. Limitations on the use of this option are also provided.

**Issue Raised: Need for “Grandfathering” for Approved Projects**

A number of commentors expressed the need for project grandfathering as landowners and developers have invested significant time and money into zoning analysis and modifications, site and subdivision plans, construction of infrastructure, etc. all based on certain financial assumptions and computations established at the conception of the project. Suggestions were made from some to use elements of the state vesting law as a grandfathering standard. The comments offered a wide spectrum on the requirements where grandfathering should be considered (ex. zoning versus site plan approval versus general permit coverage) and a variety of dates were suggested by which the requirements need to be met by and for how long a project may remain grandfathered.

**Summary of Draft Final Language:**

- Establishes a new section on Grandfathering numbered 4VAC50-60-48.
- Establishes a Part II B that contains today’s existing stormwater standards and labels the new water quality and quantity provisions as Part II A.
- Grandfathers projects under the Part II B water quality and quantity provisions that meet specified requirements from the vesting law as of the July 1, 2010 and that have obtained VSMP general permit coverage prior to July 1, 2010.
- Where these conditions are met, the project is grandfathered to June 30, 2014.
- If permit coverage continuously remains in effect, the project will remain subject to today’s existing criteria until June 30, 2019.
- Should permit coverage not continuously remain in effect or if project construction continues beyond June 30, 2019, portions of the project not completed shall be subject to the new Technical Criteria (Part II A).
- Grandfathers a project that is part of a common plan of development or sale that received VSMP general permit coverage prior to July 1, 2010. In those cases, the same standard that applied to the common plan of development will apply to the land disturbing activity within it.

**Issue Raised: Local Government concern regarding resources needed to meet inspection requirements**

As the new regulations are expected to result in an increase in the use of small LID practices on individual lots (such as rain barrels, rain gardens, etc.), localities expressed concern that they would not be able to inspect all of these practices on the 5-year schedule outlined in the regulations. The commentors requested that amendments be made to limit the scope of required recurring inspections of residential properties and enforcement against residential property owners with small, decentralized stormwater management facilities.

**Summary of Draft Final Language:**

- Amends 4VAC50-60-124 (Stormwater Management Facility Maintenance) so that a maintenance agreement shall not be required for a stormwater management facility located on an individual residential lot, provided it is demonstrated to the satisfaction of the qualifying local program that future maintenance of such a facility will be addressed through a deed restriction or other mechanisms. Amends 4VAC50-60-114 (Inspections) to limit owner and locality inspections to only those for which a maintenance agreement is required. Authorizes a qualifying local program to develop a strategy for addressing maintenance of stormwater management facilities designed to treat stormwater runoff solely from an individual residential lot on which they are located, which may include periodic inspections, homeowner outreach and education, or other method targeted at promoting the long-term maintenance of such facilities.

**Issue Raised: Concerns about the stringent nature of the Water Quantity and Flood Protection provisions:**

Some commentors stated that the water quality standard will have perhaps even greater impact on development costs than water quality requirements and may increase the size of BMPs resulting in increased costs and loss of developable land and that changes to the standard be considered. Others noted that changes should be limited to those related to development on prior developed lands within a UDA that discharge to an unstable channel in order to encourage redevelopment within UDAs. In this situation it was recommended to improve upon the pre-developed condition rather than the forested condition.

#### Summary of Draft Final Language:

- Section 4VAC50-60-66 was modified to specify that stormwater discharged from a site to an unstable channel must be released at or below a “good pasture” peak flow rate condition, unless the pre-developed condition for the site is forest, in which case, the runoff from the site shall be held to the forested condition.
- Exceptions to the “good pasture” standard are provided for a land disturbing activity that is:
  - less than 5 acres on prior developed lands; or
  - less than 1 acre for new development.Under the exceptions, the sites are expected to improve upon the pre-developed runoff condition.
- Where localized flooding exists during the 10-year 24-hour storm, the post-development peak flow rate must not exceed the predevelopment peak flow rate based on “good pasture” conditions unless the pre-developed condition for the site is forest, in which case, the peak flow rate shall be held to the forested condition.
- Same as above, exceptions to this standard are provided to a land disturbing activity:
  - less than 5 acres on prior developed lands; or
  - less than 1 acre for new development.
- Under the exception, post-development peak flow rate for the 10-year 24-hour storm must be less than the predevelopment peak flow rate from the 10-year 24-hour storm.

#### **Issue Raised: Exceptions to the Regulations:**

Some suggested that there is need for greater specificity on when an exception is appropriate. It was noted that given that the permittee can find relief through the use of offsite controls, the granting of exceptions should be rare and that these regulations must establish a more detailed standard so that the local program can be evaluated in the appropriate use of exceptions. Some suggested that the local government should be allowed to require that the developer provide a contribution that represents the full opportunity cost of not providing stormwater management onsite.

#### Summary of Draft Final Language:

- Language was added to 4VAC50-60-122 specifying that any exception to the water quality technical criteria of 4VAC50-60-63 subdivisions 1 and 2 shall require that all available offsite options be utilized before an exception is granted and that any necessary phosphorus reductions unable to be achieved on site be achieved through a payment made in accordance with subsection B of 4VAC50-60-69.

### **Key Issues Raised on the Part XIII Regulatory Action**

#### **Issue Raised: Local share of fees may be insufficient to administer program:**

A number of localities noted that the construction permit fees established were insufficient to cover their costs associated with plan review, permit issuance, and program administration and requested authority to establish fees above the baseline fees established in Part XIII. Some localities also noted that they would incur upfront costs associated with establishing a stormwater management program before fees became available.

#### Summary of Draft Final Language:

- Authority was provided in 4VAC50-60-700 for a qualifying local program to establish greater fees than those specified by in Part XIII should they demonstrate to the Virginia Soil and Water Conservation Board that such greater fees are necessary to properly administer the qualifying local program. It also specifies that any fee increases generated beyond those established in Part XIII shall not be subject to the fee distribution formula set out in 4VAC50-60-780.
- The Department is considering providing one-time grants to assist those localities that need to establish new stormwater management programs.