

**Virginia Soil and Water Conservation Board  
Wednesday, December 9, 2009  
Sheraton Richmond West, Richmond, Virginia**

**Virginia Soil and Water Conservation Board Members Present**

Linda S. Campbell, Chairman	Susan Taylor Hansen, Vice Chair
Joseph H. Maroon, DCR Director	C. Frank Brickhouse, Jr.
Darlene Dalbec	Gary Hornbaker
Jerry L. Ingle	Daphne W. Jamison
Jean R. Packard	

**Virginia Soil and Water Conservation Board Members Not Present**

Raymond L. Simms	John A. Bricker, NRCS, Ex Officio
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**DCR Staff Present**

Russell W. Baxter	Ryan J. Brown
David C. Dowling	Michael R. Fletcher
Jack E. Frye	Lee Hill
Christine S. Watlington	
Elizabeth Andrews, Office of the Attorney General	

**Others Present**

Phil Abraham, VACRE  
Dave Anderson, Roseland  
David Anderson, Fountainhead Alliance  
David W. Ball, Peter Francisco SWCD  
Chris Blake, Miller & Associates  
Barbara Brumbaugh, City of Chesapeake  
Tyler Craddock, Virginia Chamber of Commerce  
John Easter  
Tim Edwards, ADA  
Chuck Fleming, City of Hampton  
Spencer Francis, Bowman Consulting  
Brent Fults, CBNLT  
Mike Gerel, Chesapeake Bay Foundation  
Barrett Hardiman, Home Builders Association of Virginia  
Julia Hillegass, HRPDC  
Ann Jennings, Chesapeake Bay Foundation  
Steve Kindy, VDOT  
Monte Lewis  
Karl Mertig, Kimley-Horn & Associates  
Roy Mills, VDOT

Doug Moseley, GKY & Associates  
John Newton, Henrico County  
Rick Parish, SELC  
John Olenik, VDOT  
Ed Overton, VASWCD  
David Phemister, The Nature Conservancy  
Marirose Pratt, SELC  
David Reel, HBAR  
Scott Rees, CBMT  
Ryan Rotterskomp, Kimley-Horn & Associates  
Bob Shaffer, Main Street Homes  
Jenny Tribo, HRPDC  
Kendall Tyree, VASWCD  
Shannon Varner  
Keith White, Henrico County  
Amy Wolfe, New Kent County  
Mike Woods, VGDA

### **Call to Order**

Chairman Campbell called the meeting to order and declared a quorum present. She stated that the purpose of the meeting was for the Board to give consideration of final approval of the Stormwater Management Regulations Parts I, II, III and XIII as adopted and as suspended at the October 5, 2009 Board Meeting.

### **Consideration of adoption of Parts I, II and III and Part XIII of the Virginia Stormwater Management Program Final Regulations**

Chairman Campbell turned to Mr. Maroon to begin the staff overview.

Mr. Maroon made the following comments:

Madam Chair, members of the Board,  
I thought I would begin the staff report with a recap of where we are before turning it over to Dave Dowling to cover the specific staff recommendations for your consideration.

To say that these past four years have been quite a journey with regards to stormwater management, is to engage in understatement. One thing remains clear: Stormwater runoff from new and existing development is a major water quality problem that must be better addressed if Virginia is to make long-term progress on protecting the Bay, Virginia's rivers and streams and in minimizing impacts from flooding on downstream private property.

All of you are aware that this is a complicated arena but it is one that DCR has played a major role for 40 years. DCR has overseen the state erosion and sediment control program since the 1970's and it is the first phase of stormwater management that occurs during construction. Since 1989, the Chesapeake Bay Local Assistance staff which is now a part of DCR have been overseeing stormwater management in the 84 localities in Eastern Virginia that are subject to the Bay Preservation Act standards which uses .45 pounds of phosphorus per acre per year. Since 2005, DCR has been operating a delegated federal Clean Water Act stormwater program and issuing stormwater permits that uses today's .45 phosphorus standard statewide.

According to EPA, urban and suburban sources contribute 16% of N and 32% of P to the Bay from the entire watershed. Although it is not the biggest load, it is the only significant source that is increasing. The impacts of two other major sources, agriculture and wastewater treatment, are declining. While this does not mean that we are out of the woods yet, we are on the right path in those areas.

One reason urban sources are increasing is because ever year more land is being developed to a more intensive use. This is both desirable from an economic development standpoint and understandable. What is clear is that if the only stormwater problems came from existing development, then the load would not be increasing. New development is adding to the nutrient and sediment loads.

This does not mean that existing sites, those largely built before stormwater requirements of some measure were in place or those sites with inadequate measures, by today's standards, do not need to be addressed or retrofitted. They do.

But while efforts will be made to improve stormwater on existing development as well as all other sources, including agriculture, wastewater and air contributions, so too must new development do its part to keep from adding to the overall water pollution and localized flooding problems the Commonwealth faces.

You will recall that the numbers that staff have presented over the past several months are NOT aimed at keeping all runoff from occurring. That number would be much more stringent than what has been presented. Rather than .45 or .28, it would have been closer to a forested condition of around .11 phosphorus.

These last four years have not only been about water quality (that is, the nutrient and sediment levels carried off in the stormwater runoff) but they have also been about reducing the impacts on downstream channels and damages to private property from the high volume and velocity of stormwater coming off a given site, impacts that must continue to be controlled long after the construction stops.

This effort has also been about using the best science available and working with technical experts. We endeavored to bring the best science and expertise acquired over the past 20 years into development of these regulations. We used the Chesapeake Bay model, the most sophisticated water quality model in the county, to set our water quality

standards. This same model (version 4.3) has been used successfully by the Virginia Water Control Board and DEQ to establish allocations for municipal sewage treatment plants.

We worked with the highly acclaimed Center for Watershed Protection in developing key aspects of the regulations. And we openly invited consultants and engineers and local planners and developers to assist in a review of design charettes.

As I mentioned earlier, addressing stormwater is not a totally new idea in Virginia. Some localities, principally those in eastern Virginia covered by the Bay Preservation Act and the larger MS4 localities, have been dealing with this matter for 20 years. But, other parts of the state have NOT routinely addressed the long-term impacts of stormwater runoff on the local level, even though they all must address erosion and sediment control during construction. Since this Board took responsibility for stormwater in 2005, new development in every locality has received DCR issued stormwater permits covering projects located within their jurisdictions. These permits have had minimal upfront review and are enforced through after-the-fact site inspections that are more difficult to address if shortcomings are found after construction has begun. This new process will reverse that and put the review back upfront where it belongs.

Since the end of the first comment period in August, we have worked diligently to address many concerns brought to our attention by fashioning a set of workable regulations that do advance state water quality and Chesapeake Bay goals but that also accommodate smart growth, offsite options, and grandfathering and that recognize differences in the Bay watershed and the Southern Rivers. We also have also addressed concerns over local inspections and permit fees.

You will recall that we made sufficient adjustments such that some commercial developers and local officials spoke in support of the regulations at your October meeting.

I think this Board understands that EPA has taken a keen interest in these regulations. EPA officials have testified on their expectations at previous meetings.

More recently, EPA Administrator Lisa Jackson has also indicated in a letter written to the Governor on December 2, 2009 that if “the Bay jurisdictions’ Watershed Implementation Plans to meet nutrient and sediment limits in a Chesapeake Bay Total Maximum Daily Load do not support EPA’s expectations, then the agency is committed to taking specific actions, such as objecting to permits and withholding grant funds.” Furthermore, Administrator Jackson had stated that “Without significant reductions in pollutants delivered to the Chesapeake Bay system from stormwater runoff, the burden for reaching the load limits would shift more heavily to other sources including agriculture, point sources, air sources and others.”

Her letter also states that “if the regulations approved and suspended on October 5, 2009, are not modified to strengthen the underlying water quality requirements, the

Commonwealth may be required to develop and issue site-specific (individual) permits that would be subject to EPA review and approval. We are eager to work with you to avoid this approach.”

Only time will tell if we have met EPA’s expectations, although early indications are that EPA is willing to work with us on the package being presented to you today.

However, EPA has recently thrown us a curve that no one could have predicted. In late October, EPA released new draft Bay-wide target loads for nitrogen and phosphorus that would need to be achieved in order to restore the Bay and which will serve as the basis for development of the Chesapeake Bay Total Maximum Daily Load (TMDL). While this may prove to be good news overall for Virginia, as they say, timing is everything. Had the new EPA numbers been provided to us six months ago, I would venture to say that we would not be sitting here today, having instead taken today’s action earlier this fall. (Refer to the RTD article by Rex Springston in the board packet.)

While these recently released numbers and model results are preliminary and will not be final until next year, the Department recognizes that the new data suggests that the 0.28 standard that the Board advanced in the October regulations for the Bay Watershed may now represent a greater pollutant reduction level than might be needed to be achieved by regulated construction projects.

Therefore, in light of these changed circumstances, and after conferring with EPA, the Secretary of Natural Resources office and the Governor’s office, it will be the Department’s recommendation that the new Bay data should be considered before the final Bay numbers are adopted. We want to continue to use the best science available.

As David Dowling will go over in a few minutes, it will be the Department’s recommendation that the 0.28 standard for Bay jurisdictions not advance and instead retain the 0.45 pounds per acre per year phosphorus design standard statewide along with the enhanced runoff reduction methodology until such time as the new Bay numbers are final. The runoff reduction methodology is a cutting edge tool that was developed in conjunction with the Center for Watershed Protection and has been subjected to public comment and scrutiny for several months now.

We also recommend that the additional improved water quantity criteria and methodologies of Part II be put into place, along with Parts I, III and XIII.

Further, we will recommend that the Board authorize a new regulatory process today to allow us to begin working with EPA and an advisory committee to consider the establishment of water quality design criteria within the Chesapeake Bay Watershed that are consistent with the pollutant loadings called for once EPA has approved the Virginia Bay TMDL Implementation Plan sometime next year.

Together, these actions will still allow major components of the program to move forward while we review the new Bay information over the next year.

Before I conclude my remarks, I do think it is important to reiterate our intent to continue to use the best science available. The Board should take great comfort in the following comments we received during the recent public comment period by one of the nation's premier stormwater experts. Let me read a few passages from the letter included in your packet dated November 16, 2009 from Mr. Thomas R. Schuler, Executive Director of the Chesapeake Stormwater Network.

Mr. Schuler wrote:

“When adopted, the Virginia stormwater regulations in Virginia will become the most advanced scientifically defensible and practical set of stormwater regulations of any state in the watershed, and for that matter, any state in the nation.

Most importantly, the local implementation of Virginia regulations will provide greater assurance that the streams, rivers and estuaries of the Commonwealth will be protected from the impacts of land development. Recent research continues to demonstrate that even low levels of land development can harm stream health. The strong emphasis on runoff reduction, nutrient removal and stream channel erosion protection in the new regulations will provide significant tools for localities to prevent stream degradation and protect Bay water quality.

DCR should be commended for the extensive and transparent three-year process to develop and test the new regulations and supporting tools, particularly by involving the scientific, engineering and public works communities. The process yielded a workable system that local designers and plan reviewers can understand and apply, as well as a flexible approach of offsets when full compliance is not possible.

The regulations also provide considerable “regulatory insurance” for localities in the Commonwealth, as EPA adopts more numerical and enforceable limits in the future, such as the Bay TMDL and proposed Bay-wide stormwater rules currently under development.”

Finally, Madam Chairman, I want to conclude my opening remarks by thanking the DCR staff who worked both tirelessly and at the same time, exhaustively, to develop a regulation in one of, if not the most, open and transparent public processes ever used in Virginia. We all owe them our thanks.

Mr. Maroon turned to Mr. Dowling for an overview of the amendments to the regulations.

Mr. Dowling gave the following presentation:

**Virginia Soil and Water Conservation Board**  
**Sheraton Richmond West, 6624 West Broad Street, Richmond**  
**(December 9, 2009)**  
**(by David Dowling, Policy, Planning and Budget Director)**

**Introductory remarks**

Madame Chairman, members of the Board, today, the Department is bringing to the Board for consideration two final regulations amending the Board's Virginia Stormwater Management Program Permit Regulations. These include regulatory actions related to:

- 1) Parts I, II, III – Definitions, Water Quality and Quantity Technical Criteria, and Local Program Criteria; and
- 2) Part XIII –Fees

Director Maroon has already provided you with a good background briefing regarding the new Chesapeake Bay model data and how that relates to the regulations before you today. The refinements to the final regulations that you will be considering are based both on this new information from EPA as well as comments received from, and our conversations with, a broad spectrum of stakeholders.

**Regulatory Process Update for Parts I, II, and III (Local program and Water Quality and Water Quantity Criteria and Part XIII (fees)**

This has been a significant journey that began in 2005 and has involved well over 100 public meetings and has resulted in a regulation based on the best science available.

- Upon completion of the technical advisory group meetings last year, proposed regulations were approved by the Board at the September 24, 2008 meeting.
- DCR submitted the proposed regulations for review to the Administration on March 26, 2009; review completed on May 28, 2009.
- A 60-day public comment period began on June 22, 2009 and closed on August 21, 2009.
  - Public hearings/informational meetings were held as follows:

June 30 <sup>th</sup>	Hungry Mother State Park	8 in attendance
and 3 spoke		
July 1 <sup>st</sup>	Augusta County Government Center	48 in attendance
and 22 spoke		
July 7 <sup>th</sup>	City of Manassas	59 in attendance
and 28 spoke		
July 9 <sup>th</sup>	City of Hampton	62 in attendance
and 22 spoke		

July 14<sup>th</sup> Virginia General Assembly Building ~165 in attendance  
and 60 spoke  
(overall 342 in attendance, 135 spoke)

- During the comment period a total 3,421 public comments were received. These included:
  - 2,032 from a door to door campaign
  - 135 from the public hearings
  - 443 from the Regulatory TownHall
  - 171 individualized stakeholder letters
  - 639 action alerts (3 groups – CBF, VCN, Realtors)
  - 1 EPA
- Additionally, the Director convened two special meetings (August 25 and September 3) of an informal “sounding board” composed of a diverse set of key stakeholders to discuss possible revisions to several key issues in the proposed regulations.
- On October 5, 2009, the Virginia Soil and Water Conservation Board adopted final revisions to the Virginia Stormwater Management Program (VSMP) Permit Regulations Parts I, II, and III and Part XIII (4VAC50-60), and then suspended the effective date of these regulatory actions under §2.2-4015 A 4 of the Virginia Administrative Process Act to allow time for a 30-day public review and comment period on changes made since the original proposed regulations were approved on September 24, 2008.
- The additional 30-day public review and comment period on the changes that were made between the proposed regulations and the final regulations adopted by the Board on October 5<sup>th</sup>, ran from October 26, 2009 to November 25, 2009. 207 comments were received during this comment period and a summary of the comments with Department responses was provided to the Board and made available on our website. Copies of the correspondence were also provided to the Board.

### **Summary of Recommendations**

The final regulations before you for consideration take into account the new information from the EPA regarding the Bay data as well as address a handful of technical issues raised in the comments we received. It will be our strong recommendation for the Board to adopt these final regulations.

We have worked hard and collectively accomplished a lot over the last year to develop these final regulations as well as to refine the BMP standards on the BMP Clearinghouse website, to develop a revised Stormwater Handbook, to update the Virginia Runoff Reduction Method Worksheets, and to conduct additional charettes. Our efforts have resulted in a solid set of regulations that is supported by the best science available nationally.



### **Attorney General's Office**

I should also note that a statement of the Board's authority for these final regulations has been received from the Office of the Attorney General substantiating the Board's authority to promulgate these final regulations based upon applicable law.

### **Final Regulation Discussion**

Next, I would like to provide the Board with an overview of the regulations beginning with Part II. The outline presented below follows the regulatory outline provided to the Board in September of 2008 and again in October of 2009 except that it has been updated to reflect the final regulations before you today. In doing such, items in grey or yellow represent areas where changes have been made between the proposed and final regulations. Specifically, areas in yellow represent items that have been amended since the October 5<sup>th</sup> version of the Board's final regulations. These areas in yellow will be the areas that I will be focusing on this morning.

Key provisions of this regulatory action include the following:

(NOTE: Line numbers reflect those in the December 4, 2009 Regulation Version)

**Part II A and Part II B [4VAC50-60-40 through 4VAC50-60-99] [Lines 868 – 1771]**

- 1) In the final regulations, a new section numbered **4VAC50-60-48** and entitled **Grandfathering [Line 902]** is added. In order to accommodate the grandfathering provision, the proposed Part II was split into a Part II A and a Part II B. Part II A [Lines 868 – 1606] contains the new water quality and quantity technical criteria and Part II B [Lines 1607 – 1771] contains today's current standards that grandfathered projects will be subject to in accordance with the following:
  - Subsection A specifies that if a project receives general permit coverage prior to adoption of a local stormwater management program within the jurisdiction within which the project is located, the project shall remain subject to the Part II B criteria until June 30, 2014. This reiterates the process already embodied in the Construction General Permit.
  - Subsection B specifies that if the operator of a project has by July 1, 2010 met the three listed local vesting criteria related to significant affirmative governmental acts and has received general permit coverage also by July 1, 2010, then the project is grandfathered until June 30, 2014. If permit coverage is maintained by the operator, then the project will remain grandfathered until June 30, 2019. Significant affirmative governmental acts was expanded to include state and federal projects that have received approval of state or federal funding or the approval of a stormwater management plan. This will allow for state agency projects to be treated like any other developers project
  - Additionally, in the event that the affirmative governmental act or the general permit coverage is modified during the grandfathering period and the amendments do not result in any increase in the amount of phosphorus leaving the site through stormwater runoff or any increase in the volume or rate of runoff, the project may remain grandfathered.
  - Past June 30, 2019 or if the project's general permit coverage is not maintained, portions of the project not yet completed shall become subject to the new technical criteria set out in Part II A.
  - Subsection C specifies that a project that is part of a common plan of development or sale and that has obtained general permit coverage by July 1, 2010 shall remain grandfathered and subject to the Part II B criteria.
  - Subsection D specifies that incases where governmental bonding or public debt financing has been issued for a project prior to July 1, 2010, the project shall remain grandfathered and subject to the Part II B criteria. [This refers to projects where public debt has been issued and that involves a repayment obligation over a specified time period.] [Amend line 945 of the regulations to include "debt" as specified above.]
- 2) Section **4VAC50-60-63** entitled **Water Quality Design Criteria Requirements [Line 1062]** specifies that in order to protect the quality of state waters and to

control stormwater pollutants, a local program shall apply the minimum technical criteria and statewide standards set out in this section for stormwater management associated with land disturbing activities unless such project is grandfathered as discussed above.

NOTE: In general, since 2005 when the Board took over the federal stormwater permit program, the current water quality technical criteria for construction activity statewide are as follows:

- Sites between 0 and 15% imperviousness for new development, all stormwater runoff goes virtually untreated.
  - New development above the 16% imperviousness threshold requires a post development pollutant load that is approximately 0.45 lbs/acre/year phosphorus.
  - A 10% reduction in the pre-development load is required on redevelopment sites.
- The water quality technical criteria for construction activity in the proposed regulations prior to the final changes outlined below were as follows:
    - For new development, a statewide 0.28 lbs/acre/year phosphorus standard was established.
    - On prior developed lands, total phosphorus loads were required to be reduced to an amount at least 20% below the pre-development phosphorus load.

In the final regulations, statewide water quality technical criteria for construction activities are as follows:

- For new development, a statewide 0.45 lbs/acre/year phosphorus interim standard is established.
- Language is added that specifies that should the Board establish by regulatory action a standard more stringent than 0.45 pounds per acre per year in the Chesapeake Bay Watershed, then authority is given to the qualifying local program to establish a standard between 0.28 and 0.45 lbs/acre/year phosphorus in a UDA in order to encourage compact development that achieves superior water quality benefits.
  - In this situation, the qualifying local program is required to provide to the Board for approval a justification for any standards established greater than 0.28. Factors are provided upon which the standard may be based.
- Language is added that upon the completion of the Virginia TMDL Implementation Plan for the Chesapeake Bay Nutrient and Sediment TMDL approved by EPA, the Board shall by regulatory action establish a water quality design criteria for new development activities that is consistent with the pollutant loadings called for in the approved Implementation Plan. [Before the Board today will be a motion to initiate this regulatory action and

to establish a regulatory advisory panel that will work with the Department and EPA on this issue.]

- On prior developed lands the following technical criteria apply:
  - Where land disturbance is greater than or equal to 1 acre, total phosphorus loads shall be reduced to an amount at least 20% below the pre-development phosphorus load.
  - Where land disturbance is less than 1 acre, total phosphorus loads shall be reduced to an amount at least 10% below the pre-development phosphorus load.
  - The total phosphorus load shall not be required to be reduced to below the applicable standard for new development unless a more stringent standard has been established by a qualifying local program.
- As was the case in the proposed regulations, the following continue to apply in the final regulations:
  - If a wasteload allocation for a pollutant has been established in a TMDL and is assigned to stormwater discharges from a construction activity, control measures must be implemented to meet the WLA.
  - A qualifying local program may establish more stringent standards.

3) **Water Quality Compliance** set out in **4VAC50-60-65 [Line 1132]** specifies the following:

- Compliance with the water quality criteria shall be determined utilizing the Virginia Runoff Reduction Method. (The Method and associated spreadsheets were refined between proposed and final regulations.)
- BMPs listed in the BMP Pollutant Removal Efficiency table (Table 1) of Part II shall be utilized to reduce the phosphorus load. (The table was updated between proposed and final.) The practice names and several of the efficiencies have been updated in the table in the final regulations. Design specifications for the BMPs listed in the table can be found on the Virginia Stormwater BMP Clearinghouse website. Other approved BMPs available on this website may also be utilized to achieve compliance.
- A locality may establish use limitations on specific BMPs (such as wet ponds or certain infiltration practices).
- Offsite alternatives where allowed (as specified in a new section numbered 4VAC50-60-69) may be utilized to meet the technical standards. (Offsite options set out in 4VAC50-60-65 in the proposed regulations were moved to the new section in the final regulations and refined.)

4) A new section numbered **4VAC50-60-69** entitled **Offsite Compliance Options [Line 1346]** is added to the final regulations. The section is outlined as follows:

- Subsection A specifies that a qualifying local program shall have authority to consider the use of 4 specified offsite compliance options.
  - **COMPREHENSIVE PLAN:** Specifies that if a local comprehensive watershed stormwater management plan has been adopted for the local watershed 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. In the final regulations additional details on this option are set out in Section 4VAC50-60-92 (section 4VAC50-60-96 in the proposed version.)
- LOCAL PRO-RATA: Specifies that a locality may use a pro rata fee in accordance with § 15.2-2243 or similar **local** 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.
  - NUTRIENT OFFSET: Incorporates the new offset option passed by the 2009 General Assembly (HB2168) for water quality and is to be applied in accordance with the stipulations set out in the Code of Virginia (§10.1-603.8:1).
  - DEVELOPER SITE: The option was modified to specify that water quality controls must be located within the same HUC or within the upstream HUCs in the local watershed that the land disturbing activity directly discharges to. The option may be utilized where no comprehensive watershed stormwater management plan or pro-rata fee exists, or where a qualifying local program elects to allow this option.
  - **Language is added that specifies that should the Board establish by regulatory action a standard more stringent than 0.45 pounds per acre per year in the Chesapeake Bay Watershed, that the** STATE BUY DOWN option in Subsection B may be utilized where 1) the 4 options outlined above are not available; 2) the fee established by a qualifying local program to offset a pound of phosphorus removal on site exceeds \$23,900; or, 3) a qualifying local program elects to allow its use. The section further specifies the following:
    - The payment shall be \$15,000 per pound of phosphorus not treated on site in a UDA and \$23,900 per pound in all other cases.
    - Payments will be deposited to the Virginia Stormwater Management Fund.
    - The Board shall establish priorities for the use of these payments by December 1 of each year (a list of priorities are provided for the Board to consider).
    - At least 50% of the payments shall be utilized for projects to address local urban stormwater quality issues.
    - The remaining payments shall be utilized to acquire certified nonpoint nutrient offsets where they exist and then any remaining funds may be utilized to establish contracts for long-term agricultural best management practices.
    - The Department shall track the monies received and expended and the reductions needed and achieved.
    - The Department may annually utilize up to 6% of the payments to administer the stormwater management program.
    - The Board shall periodically review the payment amount, at least every five years or in conjunction with the development of a new

construction general permit and shall evaluate the performance of the fund and the sufficiency of the payment rate in achieving the needed off-site pollution reductions. The Board shall adjust the payment amount based upon this analysis.

- Use of the STATE BUY DOWN option is in accordance with the following limitations:
  - A new development project disturbing greater than or equal to 1 acre in the Chesapeake Bay Watershed must reduce its phosphorus discharge to a level of 0.45 pounds per acre per year of phosphorus on site, or less, and then may achieve all or a portion of the remaining required phosphorus reductions through a payment.
  - A new development project disturbing less than 1 acre in the Chesapeake Bay Watershed may achieve all necessary phosphorus reductions through a payment.
  - Development on prior developed lands disturbing greater than or equal to 1 acre must achieve at least a 10% reduction from the predevelopment total phosphorus load on site and then may achieve the remaining required phosphorus reductions through a payment.
  - Development on prior developed lands disturbing less than 1 acre may achieve all necessary phosphorus reductions through a payment.
- Subsection C stipulates that where the Department is administering a local program, only the DEVELOPER SITE, NUTRIENT OFFSET, and when available STATE BUY-DOWN offsite options shall be available.

NOTE: Like the UDA provision, the state buy down option has been “parking lotted” until such time as the state develops a standard less than 0.45 should the data support that decision.

- 5) Section **4VAC50-60-66** entitled **Water Quantity [Line 1187]** specifies minimum standards to address channel protection and flood protection.
  - Channel protection shall be achieved through one of the following:
    - Stormwater released into a man-made conveyance system from the 2-year 24-hour storm shall be done without causing erosion of the system.
    - Stormwater released into a restored stormwater conveyance system, in combination with other existing stormwater runoff, shall not exceed the design of the restored system nor result in instability of the system.
    - Stormwater released to a stable natural stormwater conveyance shall not cause the system to become unstable from the one-year 24-hour storm discharge and it shall provide a peak flow rate from the one-year 24-hour storm that is less than or equal to the pre-development peak flow rate as ascertained by the energy balance equation. [Keep a stable stream stable.] [For this situation, it was further clarified that

- the peak flow rate for the developed project needs to be less than or equal to the peak flow rate of the pre-developed condition.]
- Stormwater released to an unstable natural stormwater conveyance shall provide a peak flow rate from the one-year 24-hour storm that is less than or equal to the good pasture peak flow rate as ascertained by the energy balance equation, unless the pre-developed condition is forested, in which case, both the peak flow rate and the volume of runoff from the developed site shall be held to the forested condition. (In the proposed regulation the specified standard was the forested condition instead of the good pasture condition that is now included in the final regulations.) [ For this situation, it was further clarified that the peak flow rate for the developed project needs to be less than or equal to the peak flow rate of the good pasture or forested condition as may be applicable.]
  - In the final regulations, exceptions to the unstable natural stormwater conveyance situation were added for land disturbing activity less than 5 acres on prior developed lands or a regulated land disturbing activity less than 1 acre for new development. In these situations, the sites are only expected to improve upon the pre-developed runoff condition.
- Flood protection shall be achieved through one of the following:
    - The post-development peak flow rate from the 10-year 24-hour storm is confined within a man-made conveyance system.
    - The post-development peak flow rate from the 10-year 24-hour storm is confined within a restored stormwater conveyance system.
    - The post-development peak flow rate from the 10-year 24-hour storm is confined within a natural stormwater conveyance that currently does not flood.
    - The post-development peak flow rate from the 10-year 24-hour storm shall not exceed the pre-development peak flow rate from the 10-year 24-hour storm based on good pasture conditions in a natural stormwater conveyance where localized flooding exists, unless the pre-developed condition is forested, in which case the peak flow rate from the developed site shall be held to the forested condition. (In the proposed regulation the standard was the forested condition instead of good pasture condition that is now included in the final regulations.)
    - In the final regulations, exceptions to the criteria for natural stormwater conveyance systems where localized flooding exists were also added for land disturbing activity less than 5 acres on prior developed lands or a regulated land disturbing activity less than 1 acre for new development. In these situations, the postdevelopment 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.
    - As was the case with water quality, a qualifying local program may establish more stringent water quantity standards.
  - If either of the following conditions are met, the channel protection and flood protection criteria do not apply:

- The site's contributing drainage area is less than or equal to one percent of the total watershed area draining to the point of discharge.
  - The development of the site results in an increase in the peak flow rate from the one-year 24-hour storm that is less than one percent of the existing peak flow rate from the one-year 24-hour storm generated by the total watershed area draining to the point of discharge.
- 6) Section **4VAC50-60-122** entitled **Qualifying Local Program Exceptions** in Part III A [**Line 2123**] specifies that a local program may also grant exceptions to the water quality and quantity provisions of Part II A and Part II B in accordance with the following:
- The exception is the minimum necessary to afford relief.
  - Reasonable and appropriate conditions are imposed to preserve the intent of the Act.
  - Granting will not confer on the permittee any special privileges denied to others under similar circumstances.
  - The exception requests are not based upon conditions or circumstances that are self-imposed or self created.
  - Economic hardship alone is not sufficient reason to grant an exception.
  - In the final regulations, additional language was added to tighten up the provision and specify 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, or through the available offsite options of subsection A of 4VAC50-60-69, be achieved through a payment made in accordance with subsection B of 4VAC50-60-69, **when such payment option is available**. In the case of the granting of an exception, the minimum on site thresholds of subsection B of 4VAC50-60-69 shall not apply.

**Part III A - D [4VAC50-60-102 through 4VAC50-60-159] [Lines 1778 – 2494]**

- 7) Section **4VAC50-60-106** entitled **Qualifying Local Program Administrative Requirements** [**Line 1805**] specifies the minimum criteria and ordinance requirements (where applicable) which include but are not limited to administration, plan review, issuance of coverage under the General Virginia Stormwater Management Program (VSMP) Permit for Discharges of Stormwater from Construction Activities, inspection, enforcement, reporting, and record keeping, for a Board-authorized qualifying local program (**Part III A**) or for a Board-authorized department-administered local stormwater management program (**Part III B**).

A local program shall provide for the following:



- a) Identification of the authority(ies) issuing permit coverage, reviewing plans, approving plans, conducting inspections, and carrying-out enforcement.
  - b) Any technical criteria differing from those set out in the regulations.
  - c) Plan submission and approval procedures.
  - d) Project inspection and monitoring processes.
  - e) Enforcement
  - f) Procedures for long-term inspection and maintenance of stormwater management facilities. (The order of e and f was switched in the final regulations.)
- An ordinance that incorporates the components (a - e) outlined above is required.
  - A local program shall report specified information to the Department.
  - A local program may require performance bonds or other financial surety.
- 8) Section **4VAC50-60-108** entitled **Qualifying Local Program Stormwater Management Plan Review [Line 1830]** specifies that a local program shall require stormwater management plans be that include the following elements:
- Location of points of discharge, receiving waters, pre and post-development conditions.
  - Contact information.
  - Project narrative.
  - Location and design of stormwater management facilities.
  - Hydrologic characteristics and structural properties of the soils utilized during facility installation.
  - Hydrologic and hydraulic computations of the pre and post-development runoff conditions for the required design storms.
  - Calculations verifying compliance with the water quality and quantity requirements.
  - A site map that includes the specified elements.
  - Plans shall be appropriately signed and sealed by a professional.
  - Plan approval is required prior to commencement of land disturbing activities.
  - The final regulations move the language in section 4VAC50-60-93 related to plan requirements in the proposed regulations into this section and strike the former section.

This section also establishes timelines for establishing plan and application completeness, for plan review and approval, and for plan modifications. It also establishes applicant notification requirements.

- 9) Section **4VAC50-60-112** entitled **Qualifying Local Program Authorization of Coverage Under the VSMP General Permit for Discharges of Stormwater from Construction Activities [Line 1965]** establishes that coverage under the construction general permit shall be authorized in accordance with the following:
- The applicant must have an approved stormwater management plan.

- The applicant must have submitted proposed right-of-entry agreements or easements granted from the owner to the local program for the purposes of inspection and maintenance of stormwater management facilities as well as maintenance agreements, including inspection schedules, where required for such facilities.
  - An approved general permit registration statement.
  - The required fee form and total fee.
- 10) Sections **4VAC50-60-114** entitled **Inspections [Line 1995]** and **4VAC50-60-124** entitled **Qualifying Local Program Stormwater Management Facility Maintenance [ Line 2149]** collectively specify that inspections shall be conducted as follows:
- The local program or its designee shall inspect the land disturbing activity during construction.
  - At the termination of the project and prior to any bond or surety release of the performance bond or surety (if required), construction record drawings for the permanent stormwater facilities shall be submitted to the local program.
  - The owner of the stormwater management facilities shall conduct inspections in accordance with the inspection schedule in the recorded maintenance agreement and shall submit the inspection report to the local program.
  - The local program shall develop a Board approved inspection schedule.
  - In the final regulations language was added that specified that stormwater management facilities designed to treat stormwater runoff **solely primarily** from an individual lot, at the qualifying programs discretion, are not subject to the locality inspection requirements (once every five years), homeowner inspections, maintenance agreement requirements, or construction record drawing requirements. **[Lot lines do not always follow drainage divides.]**
- 11) Section **4VAC50-60-116** entitled **Qualifying Local Program Enforcement [Line 2047]** outlines enforcement procedures and establishes a Schedule of Civil Penalties as guidance for a court as required by law.
- 12) Section **4VAC50-60-126** entitled **Qualifying Local Program Report and Recordkeeping [Line 2184]** specifies that information shall be reported by the local program to the Department on a fiscal year basis by October 1<sup>st</sup> annually as follows:
- Information regarding permanent stormwater facilities completed during the fiscal year.
  - Number of permitted projects inspected by acreage categories.
  - Number and type of enforcement actions taken.
  - Number of exceptions granted or denied.
- 13) Establishes in **Part III D [Lines 2436 – 2494]** the procedures the Board will utilize in authorizing a locality to administer a qualifying local program. The application package shall include the following:

- The local program ordinance(s);
- A funding and staffing plan based on the projected permitting fees;
- The policies and procedures, including but not limited to, agreements with Soil and Water Conservation Districts, adjacent localities, or other entities, for the administration, plan review, permit issuance, inspection and enforcement components of the program.
- The department shall operate a program in any locality in which a qualifying local program has not been adopted in accordance with a Board-approved schedule.

14) Establishes in **Part III C [Lines 2393 – 2435]** the criteria the Department will utilize in reviewing a locality's administration of a qualifying local program. The review shall consist of the following:

- An interview between department staff and the qualifying local program administrator or his designee;
- A review of the local ordinance(s) and other applicable documents;
- A review of a subset of the plans approved by the qualifying local program and consistency of application including exceptions granted;
- An accounting of the receipt and of the expenditure of fees received;
- An inspection of regulated activities; and
- A review of enforcement actions and an accounting of amounts recovered through enforcement actions.

**Part I [4VAC50-60-10 through 4VAC50-60-30] [Lines 5 – 867]**

15) Makes changes to definitions in **Part I** as follows [**Lines 5 – 846**]:

- Deletes unnecessary definitions;
- Establishes abbreviations for commonly used terms;
- Updates definitions such as “adequate channel”, “channel”, “development”, “drainage area”, “flood fringe”, “floodplain”, “floodway”, “impervious cover”, “local stormwater management program”, “permit-issuing authority”, “pre-development”, “site”, and “watershed”; and
- Adds needed definitions such as “comprehensive stormwater management plan”, “karst features”, “man-made stormwater conveyance system”, “natural channel design concepts”, “natural stormwater conveyance system”, “natural stream”, “point of discharge”, “pollutant discharge”, “prior developed lands”, “qualifying local program”, “restored stormwater conveyance system”, “runoff characteristics”, “runoff volume”, “site hydrology”, “stable”, “stormwater conveyance system”, “stormwater management standards”, “unstable”, “Virginia Stormwater Management Handbook”, and “Stormwater management standards”.
- In the final regulations, additional refinements were made to the definitions “adequate channel”, “comprehensive stormwater management plan”, “development”, “drainage area”, “flood fringe”, “linear development project”, “natural stream”, “point of discharge”, “pollutant discharge”, “predevelopment”,

and “runoff characteristics”. Clarified that the definitions of “flood fringe”, “floodplain”, and “floodway” are associated with the 100-year storm.

- In the final regulations, definitions were added for “Chesapeake Bay Watershed”, “karst area”, and “urban development area”.

#### **DOCUMENTS INCORPORATED BY REFERENCE [Lines 2495 -2518]**

- 16) In the final regulations, the Documents Incorporated by Reference section [Line 2495] has been updated to include new dates and to include the Virginia Runoff Reduction Method Worksheet associated with Redevelopment.

#### **Part XIII [4VAC50-60-700 through 4VAC50-60-840] [Lines 6 – 866]**

[No changes were made to this regulation since the October 5<sup>th</sup> meeting.]

- 17) Establishes in **Part XIII** a statewide fee schedule for stormwater management projects and notes that this part establishes the fee assessment and the collection and distribution systems for those fees.
- Permit fees were established at a level to allow a local program to cover stormwater program costs associated with plan review, permit review and issuance, inspections, enforcement, program administration and oversight, and travel. Fees also include costs associated with Department oversight functions and database management.
  - A qualifying local program with approval of the Board is authorized to establish a lower fee provided that they can demonstrate their ability to fully and successfully implement a program. This reduction cannot affect the Department’s portion of the fee. In the final regulations, additional authority is added to allow a qualifying local program to establish greater fees if they demonstrate to the Board that greater fees are necessary to properly administer a program. The Department’s share of the base fees does not increase.
  - 50% of the fees are due upon application and the remaining 50% at issuance of coverage. In the final regulations authority is given to the locality to determine the percentages, provided that no more than 50% of the base fee is required upon application.
  - The fees are split 72% to the local program and 28% to the Department. The 72% represents the full estimated costs (100%) associated with local program administration related to plan review, permit issuance, and project oversight and enforcement.
  - The fees shall be periodically assessed and revised as necessary through regulatory actions.
  - Permit fees are established for:
    - Municipal Separate Storm Sewer Systems new coverage (Individual and General Permit)
    - Municipal Separate Storm Sewer Systems major modifications (Individual)
    - Construction activity coverage (Individual and General Permit) (based on project acreage)

- Construction activity modifications or transfers (Individual and General Permit) [For those permits that require significant additional administrative expenses such as additional plan reviews, etc.]
- MS4 and Construction activity annual permit maintenance fees (Individual and General Permit) [For those projects that have not been completed and terminated within a year, allows for recovery in the out years of expenses associated with inspection, enforcement, etc.] In the final regulations, the permit maintenance fee for MS4's with general permit coverage has been reduced from \$4,000 to \$3,000 dollars.
- In the final regulations, the provision for an annual increase in fees based on the CPI-U is removed from the final regulations.
- In the final regulations, an updated Fee Form dated October 2009 is also incorporated by reference (and is included in your Board packet).

### **Closing Remarks**

With that overview of the limited changes made to the Parts I, II, and III and the Part XIII regulatory actions since the October 5<sup>th</sup> meeting, I would close by re-emphasizing again that the Department has worked hard to prepare these recommended final regulations, has been responsive to the public comments we have received, and has remained true to the science upon which they have been established. We again recommend that the Board adopt the regulations before you with my one additional recommended amendment on line 945.

I would also like to add my thanks to the team of professionals at DCR that have worked tirelessly on this regulatory action. It is greatly appreciated!

With that, I will turn it back to you Madame Chairman for questions from the members, for public comment, and for discussion and consideration of the adoption motions for Parts I, II, and III and a separate one for Part XIII and subsequently the corresponding motion associated with initiating a new regulatory action and establishing a regulatory advisory panel to consider establishment of water quality design criteria for new development activities within the Chesapeake Bay Watershed that are consistent with the pollutant loadings called for in the EPA approved Virginia TMDL Implementation Plan for the Chesapeake Bay Nutrient and Sediment TMDL. (A total of 3 motions for the Board's consideration.)

### **Board Questions and Discussion**

Chairman Campbell thanked Mr. Maroon and Mr. Dowling for their presentations and asked if Board members had questions or comments.

Ms. Hansen said that she appreciated the work of the staff, particularly since the last two meetings. She said that in almost every aspect, significant compromises had been made. She noted that grandfathering had been enhanced, the phosphorus standard had been amended, the buy down program was instituted, the channel discharge standard was changed, small redevelopment and infill projects have been made exempt from most of the requirements, localities have the flexibility to increase fees to cover their costs and the inspection requirement has been dropped. She said these were a few of the major concessions made as the Board had responded to comments.

Ms. Hansen said that she did not know of another time period where staff had to work so hard and produce so much work and be so responsive.

Mr. Dowling said that it had been a team effort.

There were no more comments from Board members.

### **Public Comment**

Chairman Campbell opened the meeting for Public Comment.

*Shannon Varner*

Thank you, I'm Shannon Varner with Troutman Sanders. I'm here on behalf of the Chesapeake Bay Nutrient Land Trust. For those members who are new, the Chesapeake Bay Nutrient Land Trust is a private organization working on market-based approaches to water quality improvement, including the development and creation of what is known as nonpoint nutrient offsets. Those are nutrient reductions that are developed above and beyond any state or local requirements or tributary strategy requirements that are not funded by state or federal programs.

CBNLT was also an advocate for House Bill 2168 during this last legislative session to provide guidelines for the use of these types of offsets for stormwater offsite compliance.

I think this is the third time I have talked to the Board about these proposed regulations and expressed some concerns about these offsite compliance options that are provided in the proposed regulations. The parking lot for the state buy down program addresses some of those issues and will allow some additional time to review issues associated with that.

We still have concerns about whether the other offsite options other than my client's type of options provide the same type of nutrient benefits; whether they will have to meet the same type of criteria with those offsets and issues like that.

What I would note is that House Bill 2168 provides that this Board is to develop the criteria regarding the equivalency of the various types of offsite options to ensure that they are equivalent with the nonpoint nutrient offset program.

That is a means to address our concerns because currently it's not clear in this regulation that another offsite option could be used without having the offsite reductions actually place prior to the land disturbing activity. It's not clear how those reductions will be calculated and will they meet the same standards of the guidance that you all directed for offsite programs or nonpoint nutrient offsets. It's not clear that they would have to meet the same standards for the DEQ program that DCR also developed guidance with for the development of nutrient reductions from agricultural practice.

I would encourage you to move forward at least with the development of those criteria as soon as possible because those will provide the guidelines to local governments, to help assist with whatever changes might need to be made to the state buy down program. It would also provide a level playing field to increase competition and make sure that there are a variety of options available in any particular situation.

Thank you.

*David Anderson, Fountainhead Alliance*

Madame Chair and members of the Board, my name is David Anderson and I am here representing the Virginia Fountainhead Alliance. The Alliance is a group of land owners and mixed use and commercial developers whose mission is to harmonize the goals of environmental progress with economic growth and prosperity. We believe that the path to achieving these twin goals is through grounding public policy in hard data and sound science.

In my prior appearances before this Board, I have raised concerns about what my organization perceived as a lack of a solid foundation for the 0.28 phosphorus standard contained in the proposed regulations. In recent weeks, we have received new data from the Environmental Protection Agency as part of the Chesapeake Bay TMDL process showing that Virginia is far closer to meeting its goals with regard to phosphorus runoff than was previously thought. As a result of this new information, it is my impression that not only among the Alliance members and other business organizations, but also within the environmental community and among regulators, the view is shared that the 0.28 standard requires reexamination. This in itself is a remarkable development in what has already been a long and remarkable process.

As I understand it, the DCR staff proposal before you today would provide for such a reexamination. The 0.28 standard in the Chesapeake Bay watershed would be set aside in favor of what has come to be known as the “new” 0.45 standard. That standard would go into effect next July with the rest of the proposed regulations. In the meantime, a new Regulatory Advisory Panel (RAP) would be created to develop a new phosphorus standard using the latest and best data as it becomes available during the EPA TMDL process. Although not identical, the staff recommendation is strikingly similar to the recommendation that the Alliance made to the Board in its most recent written comments. We believe that creating a new RAP will provide a forum and process where stakeholders and individuals with technical expertise can come together to consider and assess the various issues, elements and concerns that go into developing and applying a new phosphorus standard. Of course, it is essential that a new RAP be given the latitude to go where the science and data lead and that the scope of its mandate be broad enough to encompass fully and fairly the various issues that underlie the creation and application of a new standard.

The staff’s proposal achieves another important goal as well. The new data we have received from the EPA provides refreshing encouragement that Virginia’s efforts with regard to the Bay have achieved positive results. This news should encourage us to move forward in our efforts and not provide an excuse to reduce them. This is especially true since we do not act alone, but, as a delegated program, we act in partnership with the EPA and the other Bay states. Under the staff’s proposal, while the RAP wrestles with important outstanding issues, important elements of the new regulatory framework will continue to go forward and we will keep faith with our federal partners, the other Bay states and our own citizens.

In conclusion, the Alliance urges you to adopt the staff recommendation and create a new RAP with the mandate that I have described.

Thank you very much.

*Ann Jennings, Chesapeake Bay Foundation*

Madame Chair, members of the Board, I am Ann Jennings, Virginia Executive Director of the Chesapeake Bay Foundation. I really appreciate this opportunity to comment. These are the views of the Chesapeake Bay Foundation and as well I will offer the views of the James River Association in Bill Street’s absence.

We again compliment the Board and the Department for your inclusive and, as a few have mentioned, exhaustive efforts during the past four years to develop a regulatory program that will greatly improve stormwater management in the Commonwealth.

We ask you to finalize the proposal before you today with no further revisions. Much has been done to accommodate the concerns raised by the development community as well as local governments.



We understand and we support the Departments recommendation to establish water quality criteria based upon Virginia's final TMDL implementation plan for the Chesapeake Bay.

We believe this is a reasonable approach that allows Virginia to move forward while ensuring that the regulations are based upon EPA's final TMDL analysis.

Any further erosion of the proposed stormwater management program, however, is unacceptable and frankly unreasonable. We applaud those in the development community that have been willing to work with the conservation community to find common ground on these outstanding concerns.

As we have stated previously, we all must do more to restore the health of our rivers as well as the Chesapeake Bay, including development, as well as agriculture, existing development, point sources and communities across the Commonwealth.

The status quo simply is no longer tolerable. We urge you to support these regulations and I thank you again for this opportunity to comment.

*Tyler Craddock, Virginia Chamber of Commerce*

Good morning Madame Chair, Members of the Board. I'm Tyler Craddock representing the Virginia Chamber of Commerce. Thank you for the opportunity to comment on the changes that have been proposed by staff.

We continue to appreciate their efforts to address the concerns that we and others have raised. The staff recommendation before you is an important step in the right direction.

Throughout this lengthy regulatory process concerns have been raised that the 0.28 phosphorus standard lacked a sound scientific foundation. I understand that in the staff proposal being put forward today to the Board, the 0.28 standard for the Chesapeake Bay Watershed area has been replaced by the proposed new statewide 0.45.

Further, that the 0.45 standard will be in place once those regulations go into effect. DCR will also create a new Regulatory Advisory Panel (RAP) to review the standard and base it on the data as it evolves from the TMDL process.

Sending this issue of the appropriate standard to a new panel is the proper thing to do and I encourage the Board to take that action.

It is important that the new panel be free to follow wherever the data may lead. As we and others have noted, the EPA has recently revised its water quality model for the Chesapeake Bay. It raised Virginia's total nonpoint allocations. The data suggests that

current practices are working and would perhaps be sufficient to bring Virginia under its allocation.

If it is in fact the case that the current procedures are sufficient, the new panel should be free to say so and to propose the appropriate changes to that regulation. This is especially true since the 0.45 standard that is proposed is not the 0.45 standard that is in practice today.

The managed turf requirements, the increased treatment volume provisions that are also in this proposal make the proposed 0.45 a significantly stricter standard. The Board should carefully consider whether all of the elements of the stricter standard need to go into effect now or whether they can be put off into the future.

We are not necessarily convinced that the strict 0.45 needs to go into effect now.

Accordingly though, we believe that the proper course of action is to create a new Regulatory Advisory Panel, giving the panel the latitude to examine the need for any changes. And if it is determined that changes to proposed standards be made based on actual performance data and in accordance with new science emerging from the EPA.

Thank you.

Mr. Maroon said that he in fairness to the Board to understand what Mr. Craddock was suggesting in terms of whether the Regulatory Advisory Panel would have the option of saying that what is in place is sufficient, certainly that would be one of the things considered along with everything else.

*Phil Abraham*

Madame Chairman, members of the Board, my name is Phil Abraham. I represent the Virginia Association of Commercial Real Estate. We appreciate the efforts of the staff to further revise the regulations.

We still have two concerns. First the grandfathering provisions. We still feel that the requirement that you obtain a stormwater permit to receive grandfathering status puts an excessive burden on the development community. Many preliminary plans that have been filed already have provisions for stormwater management which would have to be changed to obtain that permit.

The state passed legislation last year to extend the validity of site plans and permits for five years. We feel that requiring obtaining a permit to obtain grandfathering status is inconsistent with that action by the state.

Secondly, while we certainly appreciate the adoption of the 0.45 phosphorus standard, and recognize that's a significant improvement over what was in the regulation that was

adopted at the last meeting, our preference would still be for the Board to suspend action on Part II of the regulations and allow the entirety of that regulation to be considered by the new advisory panel that you are recommending today.

*Barrett Hardiman*

Madame Chair, I'm Barrett Hardiman with the Home Builders Association of Virginia. This has been a long and arduous process and I do want to compliment the DCR staff on their professionalism and collegiality throughout this process. It has been contentious at times, but they have never failed to be polite and professional with any of us who have dealt with them so they do deserve our compliments.

I do feel that in regard to these changes, this regulatory process, and I'm not sure that anybody in the room would disagree with me, has been a procedural nightmare. It began in 2005 when the first NOIRA went out and didn't include the changes to the technical requirements that were necessary to inform the public that those changes were going to be made. That process was abandoned in 2007 at the Attorney General's recommendation.

In 2008, when the Technical Advisory Committee was reformed, we were told that we weren't allowed to discuss the technical requirements because they were determined by the last Technical Advisory Committee and that we would have to wait until the public comment period to comment on them.

Throughout the process the Home Builders Association has really asked for one thing. We've pointed out a number of problems with the regulations throughout the process. But the one thing we asked for was a change in the process.

On September 25, 2008, during a public hearing when you proposed the regulations, and again July 14, 2009 at the public hearing, and then our comment letters of August 12, 2009 and also of November 23, 2009, the one thing we asked for was a suspension of the technical regulations to have another Technical Advisory Committee put together so that we could evaluate the science behind these regulations.

As we've seen come out from the EPA data just recently, there have been some changes to Virginia's allocations and we don't know what those final numbers are going to be.

What is being proposed today is half a step in the right direction. Another Regulatory Advisory Panel to review the science and to really get in the science of what the EPA is telling us the actual load where Virginia needs to be. It's not going to be just one load. There are going to be multiple TMDLs for multiple watersheds in Virginia. We don't know what those are yet.

We believe that it is irresponsible to move forward with a new regulatory regime that will only be in effect for six to eight months before we have to rewrite this regulation again to comply with the new EPA guidelines.

In that regard, we do reassert our request to the Board to not move forward with Part II of the technical regulations, but to form this new Regulatory Advisory Panel to look at the new data that is coming out from EPA to make sure we are keeping up with the most up to date science that is available.

Thank you.

*David Phemister, The Nature Conservancy*

Good morning, Madame Chair and members of the Board. My name is David Phemister, and I serve as Director of Government Relations with The Nature Conservancy in Virginia. I appreciate the opportunity to be with you today, and once again, I thank the Board and the Department for their laudatory work on this issue, which has assuredly been a longer and more arduous process than many would have predicted when it got started roughly four years ago.

I am here today to once again ask that you approve the regulations that are before you. While much of the discussion today undoubtedly centers on the small change that staff proposed on the water quality requirements, let me reflect on a few things that have not changed.

- First, the science remains overwhelming that stormwater poses a real and growing threat to the health and integrity of Virginia's streams, rivers and the Chesapeake Bay. That basic reality is clear to our leading scientists; it is also clear to any 10 year-old who explores her urban creek to find it choked with sediment, smelling unpleasant, an largely devoid of life.
- Second, Virginia's existing regulations are demonstrably inadequate to protect our streams and rivers today, let alone be able to accommodate future growth in a manner that does not irreversibly damage our waters.
- Third, independent analyses have demonstrated that complying with these regulations has been both technically feasible and financially manageable from the start, and that the numerous changes DCR has made to earlier versions of the regulations make them even more so. In short, these regulations represent a fair and equitable step forward to deliver a result all Virginians seek: cleaner and healthier rivers, streams and Chesapeake Bay.

On the change DCR has proposed on the water quality requirements – The Nature Conservancy supports this change as a prudent response to some new uncertainties associated with allocation limits and the development of a new Bay-wide TMDL. The Nature Conservancy – and I am sure I speak for others in the environmental community and our state agency partners – has always wanted a product that represented the best and

most effective policy response based on a considered analysis of the best discussion following completion of Virginia TMDL Implementation Plan for an EPA approved Chesapeake Bay Nutrient and Sediment TMDL.

Lastly, I want to end by thanking the members and representatives of the regulated community that have stepped forward at this meeting and the last to acknowledge the changes DCR and the Board have made in response to their concerns and to support these regulations. It is natural for me to argue that the status quo on stormwater means further degradation of our waters and that such a situation is not acceptable. For you to recognize the same and to commit to helping shape and be part of a real solution speaks even louder, and again, I do appreciate it.

Thank you for your time.

*Dave Anderson*

Good morning members of the Board. My name is Dave Anderson. I'm a professional engineer and developer and a resident of Virginia.

I've been very involved in the stormwater regulations process and I appreciate the openness that has been a part of this process.

Today you are looking at regulations that are enormously different than the ones that you passed and suspended in October. The change from 0.28 to 0.45 is very significant to the language of these regulations.

I do have concerns and it is not about why the number has gone to 0.45. My concern is that you might pass these regulations today even though we've only recently been made aware of changes to the Bay model data. The very data that was the cornerstone of the need for regulatory change in the first place.

In a Saturday email to stakeholders that have participated in the regulatory process, DCR Policy Director David Dowling wrote "Changes are being recommended that are a result of the new EPA information. While these recently released numbers and model results are preliminary and final information will not be made available until some time next year, the Department recognized that the new data suggests that the 0.28 standard may at present represent greater pollutant reduction levels than might be needed to be achieved by regulated construction activities."

So let me repeat one part of that email that is very important. "Model results are preliminary and final information will not be made available until some time next year."

Ladies and gentleman if this is the case, why on earth are we acting on regulations of this magnitude prior to having final information.

My final concern is one of legal process. The change to the 0.45 statewide rule is a major change. No one can dispute that. State law requires that regulatory change of this nature go through an advertised public process so that those aware of the change may make appropriate comment.

Quoting state code now “If an agency wishes to change a proposed regulation before adopting it as final regulation it may choose to publish a revised proposed regulation provided that the latter is subject to a public comment period of at least 30 additional days and the agency complies in all other respects with this section.”

Ladies and gentlemen that public comment period has not happened since this language change was made. I do not see how you can vote on anything today based on Virginia law.

I hope that you will recommend deferral of any action by this Board until proper notice is made and then appropriate public comment may be received on the changes that have come forth.

Thank you very much.

*John Easter, Williams Mullen*

My name is John Easter, I'm with the law firm of Williams Mullen. I'm here representing my own opinion. I want to reiterate the comment that Dave Anderson just made.

I have concerns about both the substance and the process of where we are at this point.

You all have consistently heard from representatives of the development community concerns articulated about the proposed 0.28 standard. Initially the response a few months ago was to pull out the Southern Rivers that don't drain into the Bay. And then, more recently, after EPA threw what was termed as a recent curve ball, of course, you now have a proposal to make statewide a 0.45 standard.

I think to take such a major provision...the phosphorus load is not some sort of a peripheral provision. To take a provision at literally the eleventh hour and 59<sup>th</sup> minute that supposedly undergirds the entire rationale for these regulations and based on new data from EPA to say we're just going to change that major provision in my mind really puts in question the entire rationale for these regulations at this point.

To use Mr. Maroon's analogy of you being thrown a curve, what I would suggest is that the curve ball was thrown. It's just left the pitcher's hand. We have preliminary data from the EPA. We don't know whether the curve ball is going to be a strike. Whether it is going to be way outside the plate and you are being asked to take your swing right now. To me that doesn't make any sense.

What does make sense is the idea of putting together a process to do what one of the previous speakers said, to make sure we get the best results from the best science we can. We just don't have that yet. The EPA data is still preliminary. We need to know what that data is.

When I spoke to you at that very crowded meeting at MCV, I asked you to wait until the TMDL process had gone through and we had the scientific information available. This was before the new preliminary data came out. I still would encourage you to do that.

I think that would make sense. Not to adopt a set of regulations that may only be in place for a limited number of months but wait until you have the real best data and then have an integrated approach that makes sense.

Don't simply change one number, a key number, at the last minute.

I want to say this is not a comment at all on the staff. They worked very hard and very professionally. This new data coming in at this point is not any part of their fault. It's just unfortunately the cards you have been dealt.

I would ask you to do what makes sense. Don't adopt regulations now when you don't have the best information. We will have that soon. The TMDL process is supposed to be complete within a year. We should know that and I would suggest that you take action at that time.

Thank you very much.

Chairman Campbell said that to respond to Mr. Easter's comments it was the opinion of the Chair that by adopting the recommendations of the staff, the Board was actually retaining the current standard and that the methodologies that were proposed have not changed with regard to the calculation process. Additionally by setting up the recommended advisory group the Board and staff would continue to address this issue.

Ms. Hansen concurred. She said that the Board would have an opportunity to make necessary adjustments.

Mr. Maroon noted that the regulations would not be on the ground or implemented for an additional fifteen to twenty-one months from the effective date. He said that the standards would be reviewed prior to locality implementation in 2012.

Mr. Hornbaker asked Ms. Andrews if the requirement for a 30 day public comment period affected the potential actions of the Board at this meeting.

Ms. Andrews said that the Virginia Administrative Process Act provides that any an agency making substantial changes may seek additional public comment. She said that the decision with regard to whether the changes were substantial was the Board's.

Ms. Campbell said that it was the opinion of the Board that these were not significant changes.

Ms. Packard asked a question with regard to the facilities for nutrient removal where a delay process is written in for the buy down where money is set aside. She said that in Fairfax County money is set aside for transportation but that it sometimes takes years before adequate funds are collected. She asked if there was a way to assure that the nutrient removal facilities were available before or at the time of land disturbance.

Mr. Maroon noted that Mr. Varner raised the issue of the Board addressing the equivalency criteria relative to the other options. He said that was a valid point that perhaps that may need to be incorporated with the new RAP and do it as one process.

Mr. Dowling said that staff recommendation would be that those criteria be kept separate from the work of the RAP. However he noted that the section on the state buy down as a compliance provision was part of the motion that the RAP would be looking at. He said that it was a two step process.

Mr. Maroon said that there should be assurance that staff would address that issue.

Mr. Dowling said that those would be addressed under the motions as recommended.

Mr. Brown noted that House Bill 2168 did call on the Board to make a determination with regard to equivalency. He said that staff thought was that this should be a separate working group.

Ms. Hansen said that perhaps at the next meeting the Board could consider a motion to create that process.

Mr. Dowling said that staff would develop a recommendation to bring to the Board at the January meeting.

Chairman Campbell said that the floor was open for a motion.

MOTION: Ms. Hansen moved the following:

**Motion to rescind suspension, then adopt, authorize and direct the filing of final regulations related to the Board's Virginia Stormwater Management Program (VSMP) Permit Regulations (Parts I, II, and III)**

The Board rescinds the suspension of these regulations, adopts these final regulations, and authorizes the Director of the Department of Conservation and Recreation and the Departmental Regulatory Coordinator to submit the Board's final amendments to Parts I, II, and III of the Board's Virginia Stormwater Management Program (VSMP) Permit Regulations and any other incorporated or



associated forms or documents to the Virginia TownHall and upon approval by the Administration to the Registrar of Virginia.

This authorization is related to those changes that are subject to the Administrative Process Act and to the Virginia Register Act. The Department shall follow and conduct actions in accordance with the Administrative Process Act, the Virginia Register Act, the Board's Regulatory Public Participation Procedures, the Governor's Executive Order 36 (2006) on the "Development and Review of Regulations Proposed by State Agencies".

This authorization extends to, but is not limited to, the drafting of the documents and documentation as well as the coordination necessary to gain approvals from the Department of Planning and Budget, the Secretary of Natural Resources, the Governor, the Attorney General, and the Virginia Registrar of Regulations for the final regulatory action publication.

The Board requests that the Director or the Regulatory Coordinator report to the Board on these actions at subsequent Board meetings.

SECOND: Ms. Packard

DISCUSSION: None

VOTE: Motion carried unanimously

MOTION: Ms. Packard moved the following:

**Motion to rescind suspension, then adopt, authorize and direct the filing of final regulations related to the Board's Stormwater Management Program (VSMP) Permit Regulations (Part XIII)**

The Board rescinds the suspension of these regulations, adopts these final regulations, and authorizes the Director of the Department of Conservation and Recreation and the Departmental Regulatory Coordinator to submit the Board's final amendments to Part XIII of the Board's Virginia Stormwater Management Program (VSMP) Permit Regulations and any other incorporated or associated forms or documents to the Virginia TownHall and upon approval by the Administration to the Registrar of Virginia.

This authorization is related to those changes that are subject to the Administrative Process Act and to the Virginia Register Act. The Department shall follow and conduct actions in accordance with the Administrative Process Act, the Virginia Register Act, the Board's Regulatory Public Participation Procedures, the Governor's Executive Order 36 (2006) on the "Development and Review of Regulations Proposed by State Agencies".

This authorization extends to, but is not limited to, the drafting of the documents and documentation as well as the coordination necessary to gain approvals from the Department of Planning and Budget, the Secretary of Natural Resources, the Governor, the Attorney General, and the Virginia Registrar of Regulations for the final regulatory action publication.

The Board requests that the Director or the Regulatory Coordinator report to the Board on these actions at subsequent Board meetings.

SECOND: Ms. Hansen

DISCUSSION: None

VOTE: Motion carried unanimously

MOTION: Ms. Packard moved the following:

Motion to authorize and direct the filing of Notice of Intended Regulatory Actions (NOIRA) related to the establishment within the Virginia Stormwater Management Program (VSMP) Permit Regulations of water quality design criteria for new development activities within the Chesapeake Bay Watershed:

The Board authorizes the Director of the Department of Conservation and Recreation and the Departmental Regulatory Coordinator to prepare and submit a NOIRA to consider changes and solicit recommendations related to the Board's Virginia Stormwater Management Program (VSMP) Permit Regulations. The changes shall be limited to the establishment of water quality design criteria for new development activities within the Chesapeake Bay Watershed that are consistent with the pollutant loadings called for in the EPA approved Virginia TMDL Implementation Plan for the Chesapeake Bay Nutrient and Sediment TMDL and compliance methodologies and mechanisms associated with any new design criteria. As part of this process, a Regulatory advisory panel shall be established to make recommendations to the Director and the Board on potential regulatory changes, and the Department shall prepare a draft proposed regulation(s) for the Board's review and consideration. In its discretion the Department is authorized to determine if a public meeting should be held after publication of the NOIRA in the Virginia Register of Regulations.

The panel shall meet at least three times during CY2010 to discuss progress being made on the development of the TMDL and the Implementation Plan and its relationship to the Stormwater Management Regulations. Upon the completion of the Implementation Plan, the panel shall assist the Department in the development of a proposed regulation establishing the appropriate water quality design criteria

to achieve the required reductions. The panel will be comprised of representatives of key stakeholders such as the environmental community, residential and commercial/mixed-use development communities, as well as local governments, consulting and engineering firms, applicable state agencies, and turf grass industries. The Board also requests that representatives of the U.S Environmental Protection Agency serve on the panel and provide technical expertise and assistance to the Department.

This authorization is related to those changes that are subject to the Administrative Process Act and to the Virginia Register Act. The Department shall follow and conduct actions in accordance with the Administrative Process Act, the Virginia Register Act, the Board's Regulatory Public Participation Procedures, the Governor's Executive Order 21 (2002) on the "Development and Review of Regulations Proposed by State Agencies", and other technical rulemaking protocols.

This authorization extends to, but is not limited to, the drafting and filing of the NOIRA(s), the holding of a public meeting, the development of the draft proposed regulation and other necessary documents and documentation as well as the coordination necessary to gain approvals from the Department of Planning and Budget, the Secretary of Natural Resources, the Governor, the Attorney General, and the Virginia Registrar of Regulations.

The Board requests that the Director or the Regulatory Coordinator report to the Board on these actions at subsequent Board meetings as deemed appropriate.

SECOND: Ms. Hansen  
DISCUSSION: None  
VOTE: Motion carried unanimously

Chairman Campbell noted that concluded the recommended actions. She thanked the Board and members of the public who attended the meeting.

Ms. Packard thanked the staff for the amount of work and long hours in reaching this point.

### **Upcoming Meetings**

The next meeting of the Virginia Soil and Water Conservation Board was scheduled for January 14, 2010.

### **Other Business**

There was no other business.

**Adjourn**

There was no further business and the meeting was adjourned.

Respectfully submitted,

Linda S. Campbell  
Chairman

Joseph H. Maroon  
Director