


**COMMONWEALTH OF VIRGINIA  
DEPARTMENT OF ENVIRONMENTAL QUALITY  
WATER DIVISION**

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**Subject:** Guidance Memo No. 14-2014  
Implementation Guidance for Section 47 (time limits on applicability of approved design criteria) and Section 48 (grandfathering) of the Virginia Stormwater Management Program Regulation, 9VAC25-870

**To:** Regional Directors and Local VSMP Administrators

**From:** Melanie D. Davenport, Director 

**Date:** August 25, 2014

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**Summary:**

Section 47 (time limits on applicability of approved design criteria) and Section 48 (grandfathering) of the Virginia Stormwater Management Program (VSMP) Regulation, 9VAC25-870, set forth the applicable stormwater management technical criteria to be implemented for regulated land-disturbing activities. The purpose of this guidance document is to clarify implementation of Sections 47 and Section 48 of the VSMP Regulation and was developed consistent with the regulation for use by the Department and Local VSMP Authorities.

This guidance document replaces DCR-VSWCB-028, Guidance Document on the Implementation of the Virginia Stormwater Management Regulations Grandfathering Provisions (05/12), prepared by the Department of Conservation and Recreation.

**Electronic Copy:**

An electronic copy of this guidance document in PDF format is available for staff internally on DEQNET, and for the general public on DEQ's website at:  
<http://www.deq.virginia.gov/Programs/Water/Laws,Regulations,Guidance/Guidance/WaterPermitGuidance.aspx>.

**Contact Information:**

Please contact Drew Hammond, Office of Stormwater Management, at (804) 698-4037 or [Andrew.Hammond@deq.virginia.gov](mailto:Andrew.Hammond@deq.virginia.gov) with any questions regarding the application of this guidance.

**Disclaimer:**

**This document is provided as guidance and, as such, sets forth standard operating procedures for the agency. However, it does not mandate or prohibit any particular action not otherwise required or prohibited by law or regulation. If alternative proposals are made, such proposals will be reviewed and accepted or denied based on their technical adequacy and compliance with appropriate laws and regulations.**

## **Implementation Guidance for Section 47 (time limits on applicability of approved design criteria) and Section 48 (grandfathering) of the Virginia Stormwater Management Program Regulation, 9VAC25-870**

### **Definitions:**

"Chesapeake Bay Preservation Act (CBPA) land-disturbing activity" means a land-disturbing activity including clearing, grading, or excavation that results in a land disturbance equal to or greater than 2,500 square feet and less than one acre in all areas of jurisdictions designated as subject to the Chesapeake Bay Preservation Area Designation and Management Regulations (9VAC25-830) adopted pursuant to the Chesapeake Bay Preservation Act.

"Land disturbance" or "land-disturbing activity" means a manmade change to the land surface that potentially changes its runoff characteristics including clearing, grading, or excavation, except that the term shall not include those exemptions specified in § 62.1-44.15:34 of the Code of Virginia.

"Layout" means a conceptual drawing sufficient to provide for the specified stormwater management facilities required at the time of approval.

"Locality" means a county, city, or town.

"Part II B technical criteria" means the post-development stormwater management design criteria contained in Sections 62 through 92 of the VSMP Regulation, 9VAC25-870.

"Part II C technical criteria" means the post-development stormwater management design criteria contained in Sections 92 through 99 of the VSMP Regulation, 9VAC25-870.

"Stormwater management plan" means a document(s) containing material for describing methods for complying with the requirements of the VSMP Regulation, 9VAC25-870.

"Virginia Stormwater Management Program (VSMP) authority" means an authority approved by the Board after September 13, 2011 to operate a Virginia Stormwater Management Program or the Department.

### **Regulatory Text:**

9VAC25-870-47. Applicability of other laws and regulations; time limits on applicability of approved design criteria.

A. Nothing in this chapter shall be construed as limiting the applicability of other laws and regulations, including, but not limited to, the CWA, Virginia Stormwater Management Act, Virginia Erosion and Sediment Control Law, and the Chesapeake Bay Preservation Act, except as provided in § 62.1-44.15:27 K of the Code of Virginia, and all applicable regulations adopted in accordance with those laws, or the rights of other federal agencies, state agencies, or local governments to impose more stringent technical criteria or other requirements as allowed by law.

B. Land-disturbing activities that obtain an initial state permit or commence land disturbance prior to July 1, 2014, shall be conducted in accordance with the Part II C (9VAC25-870-93 et seq.) technical criteria of this chapter. Such projects shall remain subject to the Part II C technical criteria for two additional state permit cycles. After such time, portions of the project not under construction shall become subject to any new technical criteria adopted by the board.

C. Land-disturbing activities that obtain an initial state permit on or after July 1, 2014, shall be conducted in accordance with the Part II B (9VAC25-870-62 et seq.) technical criteria of this chapter, except as provided for in 9VAC25-870-48. Land-disturbing activities conducted in accordance with the Part II B technical criteria shall remain subject to the Part II B technical criteria for two additional state permit cycles. After such time, portions of the project not under construction shall become subject to any new technical criteria adopted by the board.

D. Nothing in this section shall preclude an operator from constructing to a more stringent standard at his discretion.

#### 9VAC25-870-48. Grandfathering.

A. Any land-disturbing activity shall be considered grandfathered by the VSMP authority and shall be subject to the Part II C (9VAC25-870-93 et seq.) technical criteria of this chapter provided:

1. A proffered or conditional zoning plan, zoning with a plan of development, preliminary or final subdivision plat, preliminary or final site plan, or any document determined by the locality to be equivalent thereto (i) was approved by the locality prior to July 1, 2012, (ii) provided a layout as defined in 9VAC25-870-10, (iii) will comply with the Part II C technical criteria of this chapter, and (iv) has not been subsequently modified or amended in a manner resulting in an increase in the amount of phosphorus leaving each point of discharge, and such that there is no increase in the volume or rate of runoff;
2. A state permit has not been issued prior to July 1, 2014; and
3. Land disturbance did not commence prior to July 1, 2014.

B. Locality, state, and federal projects shall be considered grandfathered by the VSMP authority and shall be subject to the Part II C technical criteria of this chapter provided:

1. There has been an obligation of locality, state, or federal funding, in whole or in part, prior to July 1, 2012, or the department has approved a stormwater management plan prior to July 1, 2012;
2. A state permit has not been issued prior to July 1, 2014; and
3. Land disturbance did not commence prior to July 1, 2014.

C. Land disturbing activities grandfathered under subsections A and B of this section shall remain subject to the Part II C technical criteria of this chapter for one additional state permit cycle. After such time, portions of the project not under construction shall become subject to any new technical criteria adopted by the board.

D. In cases where governmental bonding or public debt financing has been issued for a project prior to July 1, 2012, such project shall be subject to the technical criteria of Part II C.

E. Nothing in this section shall preclude an operator from constructing to a more stringent standard at his discretion.

#### **Guidance:**

##### Existing Construction Activities

All regulated land-disturbing activities, including all Chesapeake Bay Preservation Act (CBPA) land-disturbing activities, that obtained coverage under the 2009 General Permit for Discharges of Stormwater from Construction Activities (general permit) or commenced land disturbance prior to July 1, 2014 are subject to the old Part II C stormwater management technical criteria for two (2) additional general permit cycles. Except for CBPA land-disturbing activities not requiring 2014 general permit coverage, all

previously permitted land-disturbing activities require continued coverage under the 2014 and 2019 general permit to remain under the old Part II C technical criteria.

Multi-phase land-disturbing activities (e.g., large-scale residential, commercial, and industrial developments), that obtained coverage under the 2009 general permit remain subject to the old Part II C technical criteria for two (2) additional general permit cycles provided that the Stormwater Pollution Prevention Plan (SWPPP) for the development included a description of, and necessary calculations supporting, all development-wide post-construction stormwater management measures that are to be installed prior to the completion of construction to ensure compliance with the old Part II C technical criteria. If the SWPPP did not include post-construction stormwater management measures for subsequent phases yet to be built, then those phases should be designed and constructed in accordance with the new Part II B technical criteria.

#### “Grandfathered” Construction Activities

“Grandfathered” land-disturbing activities are subject to the old Part II C stormwater management technical criteria. These activities remain subject to the old Part II C technical criteria for one (1) additional general permit cycle. In cases where governmental bonding or public debt financing has been issued for a project prior to July 1, 2012, the project will remain subject to the old Part II C technical criteria in perpetuity.

Private construction activities should be considered “grandfathered” by the VSMP Authority provided that all of the following conditions are met:

1. A proffered or conditional zoning plan, zoning with a plan of development, preliminary or final subdivision plat, preliminary or final site plan, or any document determined by the locality to be equivalent thereto was approved by the locality prior to July 1, 2012. The Department may require confirmation from the plan-approving locality to satisfy this regulatory requirement;
2. The aforementioned plan, plat, or equivalent document provided a “layout” as defined in the VSMP Regulation (i.e., a conceptual drawing sufficient to provide for the specified stormwater management facilities required at the time of approval) including basic pre- and post-construction water quality and water quantity calculations. The Department may require confirmation from the plan-approving locality to satisfy this regulatory requirement;
3. The aforementioned plan, plat, or equivalent document has not been subsequently modified or amended in a manner resulting in an increase in the amount of phosphorus leaving each point of discharge, or an increase in the volume or rate of runoff. The Department may require confirmation from the plan-approving locality to satisfy this regulatory requirement;
4. The construction activity will comply with the old Part II C technical criteria at the time of final design;
5. 2009 general permit coverage was not issued for the construction activity; and
6. Land disturbance did not commence prior to July 1, 2014.

Locality, state, and federal construction activities should be considered “grandfathered” by the VSMP Authority provided that all of the following conditions are met:

1. There has been an obligation of locality, state, or federal funding, in whole or in part, prior to July 1, 2012, or the Department has approved a stormwater management plan prior to July 1, 2012;
2. 2009 general permit coverage was not issued for the construction activity; and
3. Land disturbance did not commence prior to July 1, 2014.

#### New Construction Activities

Land-disturbing activities that obtain first-time coverage under the 2014 general permit, with the exception of “grandfathered” projects or projects served by an existing stormwater management facility, are subject to the new Part II B technical criteria for two (2) additional general permit cycles.

Any land-disturbing activities served by an existing on-site or off-site stormwater management facility, including a regional (watershed-wide) stormwater management facility, designed and implemented in accordance with the old Part II C technical criteria remain subject to the old Part II C technical criteria for two (2) additional general permit cycles. If the land-use assumptions upon which the stormwater management facility was designed and implemented change (e.g., an unanticipated increase in impervious cover), then the existing stormwater management facility should be modified to comply with the new Part II B technical criteria or the project should be designed in accordance with the new Part II B technical criteria.