



GUIDANCE DOCUMENT ON THE IMPLEMENTATION OF THE VIRGINIA STORMWATER MANAGEMENT REGULATIONS GRANDFATHERING PROVISION

(Approved May 15, 2012)

Summary:

This guidance document specifies the procedures for implementation of the grandfathering provisions of the Virginia Soil and Water Conservation Board's Stormwater Management Program (VSMP) Permit Regulations set out in 4VAC50-60-48.

Grandfathering is relevant for those who intend to obtain VSMP permit after July 1, 2014. Compliance criteria established in the 2009-14 General Permit and reiterated in Part II.C of the storm water management regulations apply to:

- Construction activities which obtain VSMP permit coverage under the VSMP General Permit effective until July 1, 2014; and
- Construction activities which obtain VSMP permit coverage under the General Permit effective after July 1, 2014 but are identified as a grandfathered project in accordance with the grandfathering provisions.

However, the regulations do not preclude the permittee from constructing to a more stringent design standard at his discretion.

Under 4VAC50-60-47.1, permittees can continue to construct in accordance with the initial design criteria for two additional permit cycles (5 years each) after the expiration of the 2009-14 General Permit. Thus, those who obtain VSMP permit coverage under the 2009-14 General Permit have until 2024 to complete construction of the permitted construction activity utilizing the design criteria in place when coverage was initially authorized.

Electronic Copy:

An electronic copy of this guidance document is available in PDF format on the Regulatory Town Hall website at <http://townhall.virginia.gov/> under the "Guidance documents" tab (see Virginia Soil and Water Conservation Board).

Contact Information:

Please contact the Department of Conservation and Recreation's Division of Stormwater Management at Doug Fritz or by calling (804) 371-7330 with any questions regarding the application of this guidance.

Disclaimer:

This document is provided as guidance and, as such, sets forth the process for implementation of the grandfathering provisions found at 4VAC50-60-48. This guidance provides a general interpretation of the applicable Code and Regulations but is not meant to be exhaustive in nature.

The guidance does not carry the force of law and is not intended, and cannot be relied on, to create any rights, substantive or procedural, on the part of any person or entity. DCR reserves the right to modify the guidance at any time without public notice. In addition, DCR may deviate from the guidance as it deems necessary to carry out the intent of the laws and regulations that the Board and DCR are charged with implementing.

Implementation of the Virginia Stormwater Management Regulation Grandfathering Provision:

I. Background:

Section 4VAC50-60-48 of the Virginia Stormwater Management Program (VSMP) Permit Regulations sets out the conditions under which a land-disturbing activity may be grandfathered from the new technical criteria of Part II B established September 13, 2011 and be subject to the existing technical criteria of Part II C. This guidance document defines the policies and procedures for implementation of the Virginia Stormwater Management Regulation grandfathering provision found in this section.

II. Definitions:

"Land disturbance" or "land-disturbing activity" means a manmade change to the land surface that potentially changes its runoff characteristics including any clearing, grading, or excavation associated with a construction activity regulated pursuant to the CWA, the Act, and this chapter or with a Chesapeake Bay Preservation Act land-disturbing activity regulated pursuant to the Act and this chapter.

"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.

"Stormwater management plan" means a document(s) containing material for describing methods for complying with the requirements of the local program or this chapter.

III. Authority:

The Stormwater Management Law contains the following authorities applicable to development of the grandfathering regulation and this guidance:

10.1-603.2:1. Powers and duties of the Virginia Soil and Water Conservation Board. (as effective July 1, 2012)

In addition to other powers and duties conferred upon the Board, it shall permit, regulate, and control stormwater runoff in the Commonwealth. The Board may issue, deny, revoke, terminate, or amend state stormwater individual permits or coverage issued under state general permits; adopt regulations; approve and periodically review Virginia stormwater management programs and management programs developed in conjunction with a state municipal separate storm sewer permit; enforce the provisions of

this article; and otherwise act to ensure the general health, safety and welfare of the citizens of the Commonwealth as well as protect the quality and quantity of state waters from the potential harm of unmanaged stormwater. **The Board may:....**

2. Delegate to the Department any of the powers and duties vested in it by this article except the adoption and promulgation of regulations. Delegation shall not remove from the Board authority to enforce the provisions of this article.

§ 10.1-603.4. Development of regulations. (as effective July 1, 2012)

The Board is authorized to adopt regulations that specify minimum technical criteria and administrative procedures for Virginia Stormwater Management Programs. The regulations shall:.....

4. Require as a minimum the inclusion in VSMPs of certain administrative procedures which include, but are not limited to, specifying the time period within which a VSMP authority shall grant land-disturbing activity approval, **the conditions and processes under which approval shall be granted,** the procedures for communicating disapproval, the conditions under which an approval may be changed and requirements for inspection of approved projects;

6. Establish statewide standards for stormwater management from land-disturbing activities of one acre or greater, except as specified otherwise within this article, and allow for the consolidation in the permit of a comprehensive approach to addressing stormwater management and erosion and sediment control, consistent with the provisions of the Erosion and Sediment Control Law (§ 10.1-560 et seq.) and this article. However, such standards shall also apply to land-disturbing activity exceeding an area of 2500 square feet in all areas of the jurisdictions designated as subject to the Chesapeake Bay Preservation Area Designation and Management Regulations (9 VAC 10-20 et seq.) adopted pursuant to the Chesapeake Bay Preservation Act (§ 10.1-2100 et seq.);

The Virginia Stormwater Management Program (VSMP) Permit Regulations contain the following authorities applicable to this guidance and the following section is the subject of this guidance:

4VAC50-60-48. Grandfathering.

A. Until June 30, 2019, any land-disturbing activity for which a currently valid proffered or conditional zoning plan, preliminary or final subdivision plat, preliminary or final site plan or zoning with a plan of development, or any document determined by the locality as being equivalent thereto, was approved by a locality prior to July 1, 2012, and for which no coverage under the VSMP General Permit for Discharges of Stormwater from Construction Activities has been issued prior to July 1, 2014, shall be considered grandfathered by the stormwater program administrative authority and shall not be subject to the technical criteria of Part II B, but shall be subject to the technical criteria of Part II C for those areas that were included in the approval, provided that the stormwater program administrative authority finds that such proffered or conditional zoning plan, preliminary or final subdivision plat, preliminary or final site plan or zoning with a plan of development, or any document determined by the locality as being equivalent thereto, (i) provides for a layout and (ii) the resulting land-disturbing activity will be compliant with the requirements of Part II C. In the event that the locality-approved document is subsequently modified or amended in a manner such that there is no increase over the previously approved plat or plan in the amount of phosphorus leaving each point of

discharge of the land-disturbing activity through stormwater runoff, and such that there is no increase over the previously approved plat or plan in the volume or rate of runoff, the grandfathering shall continue as before.

B. Until June 30, 2019, for locality, state, and federal projects for which there has been an obligation of locality, state, or federal funding, in whole or in part, prior to July 1, 2012, or for which the department has approved a stormwater management plan prior to July 1, 2012, such projects shall be considered grandfathered by the stormwater program administrative authority and shall not be subject to the technical criteria of Part II B, but shall be subject to the technical criteria of Part II C for those areas that were included in the approval.

C. For land-disturbing activities grandfathered under subsections A and B of this section, construction must be completed by June 30, 2019, or portions of the project not under construction shall become subject to the technical criteria of Part II B.

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.

IV. Discussion and Interpretation:

On September 11, 2011, modifications to the Virginia Stormwater Management Program regulations (4VAC50-60-10 et seq.) became effective. These modifications included the establishment of new stormwater design criteria for the control of post construction stormwater runoff. The regulations included a grandfathering provision so as not to delay or negatively impact land-disturbing activities previously designed and in the process of review and approval. Parts of land-disturbing activities considered grandfathered are subject to the requirements of development design criteria found in 4 VAC 50-60, Part II C (4VAC50-60-93.1 et seq.). The grandfathering provision applies to both privately funded land-disturbing activities and publicly funded land-disturbing activities.

In order for land-disturbing activities to be considered as grandfathered until June 30, 2019, other than locality, state, and federal projects for which there has been an obligation of locality, state, or federal funding, in whole or in part, prior to July 1, 2012, or where governmental bonding or public debt financing has been issued for a project prior to July 1, 2012, the following conditions must be met:

1. The land-disturbing activity for which a currently valid proffered or conditional zoning plan, preliminary or final subdivision plat, preliminary or final site plan or zoning with a plan of development, or any document determined by the locality as being equivalent thereto, must be approved by a locality prior to July 1, 2012;
2. No coverage under the VSMP General Permit for Discharges of Stormwater from Construction Activities has been issued prior to July 1, 2014;
3. The document approved by the locality must include a layout; and

4. The document approved by the locality must include sufficient information for the locality to find that the resulting land-disturbing activity will be compliant with the requirements of the post development design criteria found in Part II C.

In considering whether a land-disturbing activity can be considered grandfathered, a locality should require that the approved document includes a conceptual drawing that identifies the location of the proposed stormwater facilities and includes the pre and post development calculations that detail the required pollutant reduction necessary to comply with the water quality design criteria, as well as, the calculations necessary to determine compliance with the water quantity design criteria. Land-disturbing activities that do not include these necessary items should not be considered grandfathered. The Department of Conservation and Recreation cannot make the determination whether privately funded land-disturbing activities are grandfathered activities and such determination remains the responsibility of the locality.

In the event that the locality-approved document is subsequently modified or amended in a manner such that there is no increase over the previously approved plat or plan in the amount of phosphorus leaving each point of discharge of the land-disturbing activity through stormwater runoff, and such that there is no increase over the previously approved plat or plan in the volume or rate of runoff, the grandfathering shall continue as before (in accordance with Part II C).

In order for publicly funded (local, state, or federal) land-disturbing activities to be considered a grandfathered until June 30, 2019, they must meet the following conditions:

1. There has been an obligation of locality, state, or federal funding prior to July 1, 2012. Funding can be whole or in part but must be appropriated towards the project. Authorization or approval to begin design of a land disturbing project without appropriation of funds should not meet the necessary requirements in order to be considered grandfathered; or
2. The Department of Conservation and Recreation has approved a stormwater management plan prior to July 1, 2012. The stormwater management plan approved by the Department must have ensured compliance with Part II. C. of the regulations.

Land-disturbing activities that qualify under the grandfathering provision must be completed by June 30, 2019. Portions of the grandfathered project that are not under construction at that time become subject to the technical criteria found in Part II.B. The only exception to the June 30, 2019 date is for publicly funded projects financed by governmental bonding or public debt financing issued for a project prior to July 1, 2012. In these cases, there is no completion date requirement and projects shall be subject to the technical criteria of Part II C. Nothing in the grandfathering provisions of 4VAC50-60-48 shall preclude an operator from constructing to a more stringent standard at his discretion.

The grandfathering provision applies specifically to land-disturbing activities and does not apply to regional or watershed stormwater management plans or stormwater master plans. Regional and watershed stormwater management plans and stormwater master plans will need to be reviewed and modified in order to ensure compliance with the new stormwater design criteria. It should also be noted that the vesting requirements set out in the Code of Virginia in § 15.2-2307

have no relationship to the grandfathering provisions of 4VAC50-60-48 and the technical criteria that are applicable to a given project.

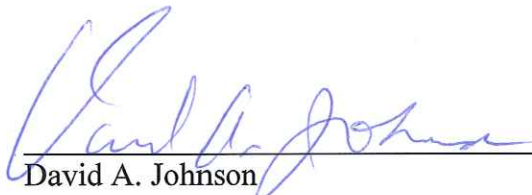
This guidance does not apply to land-disturbing activities that obtain VSMP permit coverage prior to July 1, 2014. Land-disturbing activities that obtain VSMP permit coverage prior to July 1, 2014 shall comply with the stormwater management requirements found in the VSMP General Permit for Stormwater Discharges from Construction Activities, Part II.C and shall be subject to the time limits on applicability of approved design criteria set out in 4VAC50-60-47.1. The Grandfathering provisions should not be confused with the Time limits on applicability of approved design criteria found at 4VAC50-60-47.1.

4VAC50-60-47.1. Time limits on applicability of approved design criteria.

Beginning with the VSMP General Permit for Discharges of Stormwater from Construction Activities issued July 1, 2009, all land-disturbing activities that receive general permit coverage shall be conducted in accordance with the Part II B or Part II C technical criteria in place at the time of initial permit coverage and shall remain subject to those criteria for an additional two permit cycles, except as provided for in subsection D of 4VAC50-60-48. After the two additional permit cycles have passed, or should permit coverage not be maintained, portions of the project not under construction shall become subject to any new technical criteria adopted since original permit coverage was issued. For land-disturbing projects issued coverage under the July 1, 2009 permit and for which coverage was maintained, such projects shall remain subject to the technical criteria of Part II C for an additional two permits.

V. Adoption, Amendments, and Repeal:

This guidance document shall remain in effect until rescinded, amended or superseded.



David A. Johnson
Director, Virginia Department of Conservation and Recreation

5/15/12
Date