



Proposed Amendments to VSMP Regulations Would Move Goal Posts

11.19.2013

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The State Water Control Board recently issued a Public Notice concerning proposed amendments to the Virginia Stormwater Management Regulations, 9 VAC 25-870, et seq. (the “Regulations”), and indicated it will consider those amendments at its meeting on December 17, 2013. Among others, the proposed amendments concern a change to 9 VAC 25-870-48.A. (the “Grandfather Provision”). The Public Notice indicates the change is a “clarification” of the Grandfather Provision, but that isn’t accurate. Instead, what’s proposed is a revision that revokes grandfather status for many who now have it.

Background

Before the Regulations were promulgated in 2011, a concern was expressed that many who had projects already planned would be subjected to the new stormwater requirements, causing them to revise their projects. This could make some of these projects financially unworkable as well as result in significant delays. Accordingly, a Grandfathering Subcommittee was formed from the Regulatory Advisory Panel formed by the Virginia Department of Conservation and Recreation to assist with development of the Regulations. The subcommittee recommended a balanced approach that provided fairness and certainty to parties with projects already planned. The subcommittee also believed localities should be empowered to make decisions within defined parameters about which documents they approved were sufficient to ensure the resulting land-disturbing activity would be compliant with the post-development design criteria in Part II C.

The Proposed Amendment

The subcommittee’s recommendations were subsequently incorporated into the Grandfather Provision to the Regulations which became effective on September 13, 2011, more than two years ago. That provision now states, in part:

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 General Permit for Discharges of Stormwater from Construction Activities has been issued prior to July 1, 2014, shall be considered grandfathered by the VSMP 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 VSMP 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.

(emphasis added).

Many developers and owners then moved forward with their projects based on the understanding that they would be grandfathered from having to comply with the technical criteria of Part II B. of the Regulations, provided they met the requirements of the Grandfather Provision. In addition, many local planning departments proceeded under the same assumption and worked with developers and owners in determining what documents were deemed “equivalent” for purposes of grandfathering.

The proposed amendment to the Grandfather Provision would revise it to read as follows:

Any land-disturbing activity shall be considered grandfathered and shall be subject to the Part II C technical criteria of this chapter provided:

1. *A preliminary or final subdivision plat or a preliminary or final site plan* was (i) approved by a locality prior to July 1, 2012 and (ii) has not been modified in a manner resulting in an increase in the amount of phosphorus leaving each point of discharge or I [sic] the volume or rate of runoff;
2. No coverage under the General VPDES Permit for Discharges of Stormwater from Construction Activities has been issued prior to July 1, 2014; and
3. The VSMP authority finds that such preliminary or final subdivision plat or preliminary or final site plan (i) provides a layout as defined in 9VAC25-870-10 and (ii) the resulting land-disturbing activity complies with the technical criteria of Part II C.

(emphasis added).

Effect of the Amendment

The proposed amendments would retroactively delete “a currently valid proffered or conditional zoning plan,” “zoning with a plan of development,” and “any document determined by the locality as being equivalent to any of the above” from the list of documents able to confer grandfather status. That means entities that had such documents approved and whose land-disturbing activity qualified for grandfather status under the Grandfather Provision would have that status revoked if the amendment is adopted. Moreover, there will be no way for these entities to re-qualify for grandfather status because the Grandfather Provision requires all approvals to be obtained “prior to July 1, 2012.” Thus, entities

that relied on and complied with the Grandfather Provision will be subject to the technical criteria of Part II B if the proposed amendment is adopted.

The fundamental unfairness of retroactive rule-making is self-evident. The universe of land-disturbing activity that ever could come within the safe harbor of the Grandfather Provision was fixed as of July 1, 2012. By changing the rules for parties who incurred costs and did what was required to obtain grandfathered rights as of that date, those parties' reasonable expectations of fairness and consistency will be undermined. Entities that relied on the Grandfather Provision spent significant sums designing and engineering their projects based on the belief that they would not have to comply with the technical criteria of Part II B. If those projects must be re-designed and re-engineered to meet Part II B, dollars spent for the original design and engineering work will be wasted as owners must pay a second time for the new design and engineering work necessary to comply. There are also likely to be significant delays in project schedules, not only because the projects will have to be revised, but also because localities will have to review and approve the new design, drawings and calculations.

The Virginia Association of Commercial Real Estate, the Virginia Homebuilders Association and others have taken notice of the proposal and are taking action to oppose it. The State Water Control Board will consider the amendments at its meeting on December 17. Comments on the proposal are being accepted until November 20 and should be sent to Drew Hammond at DEQ at Andrew.hammond@deq.virginia.gov.

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