

**BOARD OF SUPERVISORS
COUNTY OF NEW KENT
VIRGINIA**

O-12-01

At the regular meeting of the Board of Supervisors of the County of New Kent in the Board Room of the County Office Building in New Kent, Virginia, on the 5th of November, 2001:

Present:	Vote:
Rebecca M. Ringley	Aye
James H. Burrell	Aye
Dean E. Raynes	Aye
W. R. "Ray" Davis Jr.	Aye
Julian T. Lipscomb	Aye

Motion was made by Mr. Davis, which carried 5:5 to adopt the following ordinance:

**AN ORDINANCE TO REPEAL SECTIONS
9-1 THROUGH 9-10 OF THE CODE OF NEW KENT COUNTY
AND REENACT PROVISIONS FOR
EROSION AND SEDIMENT CONTROL**

Sections 9-1 through 9-10 of the Code of New Kent County shall be repealed and the reenacted Erosion and Sediment Control provisions shall be codified in Code of the County of New Kent, Virginia as follows:

CHAPTER 82

ENVIRONMENT

ARTICLE II. EROSION AND SEDIMENT CONTROL*

Sec. 82-31. Definitions.

The following words, terms and phrases, when used in this article, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

Agreement in lieu of a plan means a contract between the plan-approving authority and the owner which specifies conservation measures which must be implemented in the construction of a single-family residence; this contract may be executed by the plan-approving authority in lieu of a formal site plan.

Administrator means the county director of planning.

Applicant means any person submitting an erosion and sediment control plan for approval or requesting the issuance of a permit, when required, authorizing land disturbing activities to commence.

Best Management practices or *BMPs* means a practice, or a combination of practices, that is determined by a state or designated areawide planning agency to be the most effective, practical means of preventing or reducing the amount of pollution generated by nonpoint sources to a level compatible with water quality goals.

Board means the state soil and water conservation board.

Certified inspector means an employee or agent of a program authority who:

- (1) Holds a certificate of competence from the board in the area of project inspection; or
- (2) Is enrolled in the board's training program for project inspection and successfully completes such program within one year after enrollment.

Certified plan reviewer means an employee or agent of a program authority who:

- (1) Holds a certificate of competence from the board in the area of plan review;

* **State law reference** - Authorized by Erosion and sediment control law, Code of Virginia, § 10.1-560 to § 10.1-571, 1950, as amended.

- (2) Is enrolled in the board's training program for plan review and successfully completes such program within one year of enrollment; or
- (3) Is licensed as a professional engineer, architect, certified landscape architect or land surveyor pursuant to Code of Virginia, §54.1-400 et. seq.

Certified program administrator means an employee or agent or a program authority who holds a certificate of competence from the board in the area of program administration or is enrolled in the board's training program for program administration and successfully completes such program within one year after enrollment.

Chesapeake Bay Preservation Area or CBPA means any land designated by the board of supervisor pursuant to Part III of the Chesapeake Bay Preservation Area designation and Management Regulations, VR 179-02-01, and Code of Virginia §10.1-2107. A Chesapeake Bay Preservation Area shall consist of a resource protection area and a resource management area.

Clearing means any activity which removes the vegetative ground cover including, but not limited to, root mat removal and/or topsoil removal.

Department means the state department of conservation and recreation.

Development means a tract of land developed or to be developed as a single unit under single ownership or unified control which is to be used for any business or industrial purpose or is to contain three or more residential dwelling units.

Director means the director of the department.

District or Soil and Water Conservation District means the Colonial Soil and Water Conservation District.

Erosion impact area means an area of land not associated with current land disturbing activity, but subject to persistent soil erosion resulting in the delivery of sediment onto neighboring properties or into state waters. This definition shall not apply to any lot or parcel of land of 10,000 square feet or less used for residential purposes or to shorelines where the erosion results from wave action or other coastal processes.

Erosion and sediment control plan, conservation plan or plan means a document containing material for the conservation of soil and water resources of a unit or a group of units of land. It may include appropriate maps, an appropriate soil and water plan inventory and management information with needed interpretations, and a record of decisions contributing to conservation treatment. The plan shall contain all major conservation decisions to insure that the entire unit or units of land will be so treated as to achieve the conservation objectives.

Excavating means any digging, scooping or other method of removing earth materials.

Filling means any depositing or stockpiling of earth materials.

Grading means any excavating or filling of earth materials, or any combination thereof, including the land in it excavated or filled condition.

Land disturbing activity means any land change which may result in soil erosion from water or wind and the movement of sediments into state waters or onto lands in the commonwealth including, but not limited to, the clearing, grading, excavating, transporting and filling of land, except that the term shall not include:

- (1) Disturbed land areas of less than 2,500 square feet in size.
- (2) Such minor land disturbing activities as home gardens and individual home landscaping, repairs and maintenance.
- (3) Individual service connections.
- (4) Installation, maintenance or repair of any underground public utility lines when such activity occurs on an existing hard-surfaced road, street or sidewalk, provided that such land disturbing activity is confined to the area of the road, street, or sidewalk which is hard-surfaced.
- (5) Septic tank lines or drainage fields unless included in an overall plan for land disturbing activity relating to construction of the building to be served by the septic tank system.
- (6) Surface or deep mining.
- (7) Exploration or drilling for oil and gas, including the well site; roads, feeder lines and off-site disposal areas.
- (8) Tilling, planting or harvesting of agricultural, horticultural or forest crops, or livestock feedlot operations, including engineering operations as follows: construction of terraces, terrace outlets, check dams, desilting basins, dikes, ponds, ditches, strip cropping, lister furrowing, contour cultivating, contour furrowing, land drainage and land irrigation. However, this exception shall not apply to harvesting of forest crops unless the area on which harvesting occurs is reforested artificially or naturally in accordance with the provisions of Code of Virginia, § 10.1-1100 et seq., or is converted to bona fide agricultural or improved pasture use as described in Code of Virginia, § 10.1-1163(B).
- (9) Repair or rebuilding of the tracks, right-of-way, bridges, communication facilities and other related structures and facilities of a railroad company.
- (10) Installation of fenceposts and signposts or telephone and electric poles and other kinds of posts or poles.
- (11) Shore erosion control projects on tidal waters when the projects are approved by local wetlands boards, the state marine resources commission, or the United States Army Corps of Engineers.

- (12) Emergency work to protect life, limb or property, and emergency repairs; however, if the land disturbing activity would have required an approved erosion and sediment control plan, if the activity were not an emergency, then the land area disturbed shall be shaped and stabilized in accordance with the requirements of the director of planning.
- (13) Agricultural engineering operations including, but not limited to, the construction of terraces, terrace outlets, check dams, desilting basins, dikes, ponds not required to comply with the Dam Safety Act (Code of Virginia, § 10.1-604 et seq.), ditches, trip cropping, lister furrowing, contour cultivating, contour furrowing, land drainage and land irrigation. However, this exception shall not apply to harvesting of forest crops unless the areas on which harvesting occurs is reforested artificially or naturally or is converted to bona fide agricultural or improved pasture use.

Land disturbing permit means a permit issued by the administrator for the clearing, filling, excavating, grading, transporting of land or for any combination thereof for any purpose set forth in this article.

Local Erosion and sediment control program or program means an outline of the various methods employed by the county to regulate land disturbing activities and thereby minimize erosion and sedimentation in compliance with the state program and may include such items as local ordinances, policies and guidelines, technical materials, inspection, enforcement and evaluation.

Owner means the owner of a freehold of the premises or lesser estate therein, a mortgagee or vendee in possession, assignee of rents, receive, executor, trustee, lessee or other person, firm or corporation in control of a property.

Permittee means the person to whom the permit authorizing land-disturbing activities is issued or the person who certifies that the approved erosion and sediment control plan will be followed.

Person means any individual, partnership, firm, association, joint venture, public or private corporation, trust, estate, commission, board, public or private institution, utility, cooperative, county, city, town, or other political subdivision of this state, any interstate body, or any other legal entity.

Plan approving authority shall mean the Planning Department of New Kent County.

Program authority means the county which has adopted a soil erosion and sediment control program approved by the board.

Resource management area or RMA means that component of the Chesapeake Bay Preservation Area that is not classified as a resource protection area. RMAs include land types that, if improperly used or developed, have the potential for causing significant water quality degradation or for diminishing the functional value of the resource protection area.

Resource protection area or *RPA* means that component of the Chesapeake Bay Preservation Area comprised of lands at or near the shoreline that have intrinsic water quality value due to the ecological and biological processes they perform or are sensitive to impacts which may result in significant degradation to the quality of state waters.

Single-family residence means a noncommercial dwelling that is occupied exclusively by one family.

State erosion and sediment control program or *state program* means the program administered by the state soil and water conservation board pursuant to the Code of Virginia, § 10.1-560 et seq., including regulations designed to minimize erosion and sedimentation.

State waters means all waters on the surface and under the ground, wholly or partially within or bordering the commonwealth or within its jurisdictions.

Transporting means any moving of earth materials from one place to another, other than such movement incidental to grading when such movement results in destroying the vegetative ground cover, either by tracking or by the buildup of earth materials to the extent that erosion and sedimentation will result from the soil or earth materials over which such transporting occurs.

Wetlands means those areas that are inundated or saturated by surface water or groundwater at a frequency or duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.
(Code 1999, § 9-1(a) - (a), (a) - hh)

State law reference - Similar provisions, Code of Virginia, § 10.1-560.

Sec. 82-32. Utility and railroad companies.

Construction, installation or maintenance of electric and telephone utility lines and natural gas pipelines, and the tracks, rights-of-way, bridges, communication facilities and other related structures and facilities of railroad companies must be conducted pursuant to Code of Virginia, § 10.1-563(D).

Sec. 82-33. Standards.

Pursuant to Code of Virginia, § 10.1-4562, New Kent County hereby adopts the regulations, references, guidelines, standards and specifications promulgated by the Virginia Soil and Water Conservation Board for the effective control of soil erosion and sedimentation deposition to prevent the unreasonable degradation of properties, stream channels, waters, and other natural resources. Said regulations, references, guidelines, standards, and specifications for erosion and sedimentation control are included in, but not limited to, the "Virginia Erosion and Sediment Control Regulations," the Virginia Stormwater Management Handbook, and the Virginia Erosion and Sediment Control Handbook, as amended from time to time.

Sec. 82-34. Application.

All development and redevelopment exceeding 2,5000 square feet of land disturbances, including construction of all single-family houses, septic tanks and drainfields, shall be subject to a plan of development process, including the approval of a site plan in accordance with the provisions of Chapter 98 (§ 9-40 of Code 1999) or a subdivision plat in accordance with Chapter 90 (Article IV of Chapter 9 of Code 1999). This section shall not apply to state agency projects except as provided for in Code of Virginia § 10.1-564.
(Code 1999, § 9-3)

Sec. 82-35. Erosion and sediment control plan; requirements; fees.

(a) The plan required by section shall include an erosion and sediment control plan detailing those methods and techniques to be utilized in the control of erosion and sedimentation. The standards contained within the “Virginia Erosion and Sediment Control Regulations” and the Virginia Erosion and Sediment Control Handbook, and as adopted by the County pursuant to Sec. 82-34, are to be used by the applicant when making a submittal under the provisions of this article and in the preparation for an erosion and sediment control plan.

(b) Upon approval of an erosion and sediment control plan, a land-disturbing permit shall be issued. No such permit shall be issued until performance is secured as required by this article and all required fees have been paid.

(c) A plan review and inspection fee shall be charged according to the Fee Ordinance of New Kent County.

(d) No agency authorized under law to issue grading, building or other permits for activities involving land disturbing activities may issue any such permits until the applicant therefor submits with his application evidence of a plan approved under the provisions of this article.

(e) Where the land disturbing activities involve lands under the jurisdictions of more than one local control program, an erosion and sediment control plan may, at the option of the applicant, be submitted to the Virginia State Water Control Board for review and approval rather than to each jurisdiction concerned.

(f) The preparation, submission and approval of an erosion and sediment control plan shall ultimately be the responsibility of the landowner.

Sec. 82-36. Plan submission; requirements and approval; bonding.

(a) Five copies of the erosion and sediment control plan shall be submitted to the administrator, and be accompanied by the following information:

- (1) Name, address and phone number of applicant.

- (2) Name, address and phone number of landowner of record.
 - (3) Name, address and phone number of person that holds a certificate of competence, as provided for by §10.1-561, who will be in charge of and responsible for carrying out the land-disturbing activity.
 - (4) Name, address and phone number of the person preparing the plan.
 - (5) Location of the site including, but not limited to, road number, tax map reference and lot number.
 - (6) Other information as determined by the administrator.
- (b) Upon submission of an erosion and sediment control plan to the plan approving authority:
- (1) The plan approving authority shall, within 45 days, approve any such plan if it determines the plan meets the conservation standards required by this article and if the person responsible for carrying out the plan certifies that he will properly perform the erosion and sediment control measures included in the plan and will conform to the provisions of this article. In addition, as a prerequisite to approval of the plan, the person responsible for carrying out the plan shall provide the name of an individual holding a certificate of competence, as provided by regulations of the board, who will be in charge of and responsible for carrying out the land-disturbing activity. For purposes of this article, individuals holding a valid Virginia Professional Engineer, Land Surveyor, Landscape Architect, or Architect license, and such other individuals as determined by regulations of the board, shall be considered competent to be in charge of and responsible for carrying out the land-disturbing activity without further training, certification or fees. In determining whether any plan meets the required conservation standards, the plan approving authority may seek the advice of the district.
 - (2) The plan approving authority shall act on all plans submitted within 45 days from their receipt by either approving such plan in writing or by disapproving such plan in writing and giving the specific reasons for its disapproval. When a plan submitted for approval under this article is found, upon review, to be inadequate, the plan approving authority shall specify such modifications, terms and condition as will permit approval of the plan and communicate those requirements to the applicant within 45 days.
 - (3) If no action is taken by the plan approving authority within the time specified, the plan shall be deemed approved and the person authorized to proceed with the proposed activity.
- (c) Surety.

All control measures required by this article shall be undertaken at the expense of the owner or his agent; and pending actual compliance with the terms of this article, the owner or his agent shall execute and file with the administrator prior to the issuance of the land disturbing permit a reasonable performance bond with surety, cash escrow, letter of credit, any combination thereof, or such other legal arrangement acceptable to the county attorney, to pay the approximate total

cost of providing the erosion and sediment control improvements and in a form approved by the county attorney, guaranteeing that the required control measures will be properly and satisfactorily undertaken and maintained. Should it be necessary for the county to take such conservation action, the county may collect from the applicant any cost in excess of the amount of the surety held. The minimum performance bond with surety, cash escrow, letter of credit, or any combination thereof required under this section shall be \$500.00. Within 60 days of the adequate stabilization of the land disturbing activity such performance bond with surety, cash escrow, or letter of credit, or the unexpended or unobligated portion thereof, shall be released or refunded to the owner or his agent or terminated as the case may be. Adequate stabilization will consist of at least 85% vegetative cover. The administrator shall have the sole authority to determine whether adequate vegetation exists.

(Code 1999, § 9-5)

Sec. 82-37. Amendment of plan.

An approved plan may be changed by the authority that approved the plan in the following cases:

- (1) Where inspection has revealed that the plan is inadequate to satisfy applicable regulations; or
- (2) Where the person responsible for carrying out the approved plan finds that because of changed circumstances or for other reasons the approved plan cannot be effectively carried out, and proposed amendments to the plan, consistent with the requirements of this article, are agreed to by the plan approving authority and the person responsible for carrying out the plan.

(Code 1999, § 9-6)

State law reference - Similar provisions, Code of Virginia, § 10.1-563.

Sec. 82-38. Designation of Erosion Impact Area.

In order to prevent further erosion, the Program authority may require approval of a conservation plan for any land identified as an Erosion impact area.

State law reference - Code of Virginia, § 10.1-563(E).

Sec. 82-39. Inspection and Enforcement.

(a) Inspection and enforcement of this article shall rest with the administrator and with the code official as the agent of the administrator.

(b) The administrator shall provide for periodic on-site inspections as set forth in VESCR 4 VAC 50-30-60B and require that an individual holding a certificate competence, as provided by regulations of the board, or other competent individual pursuant to § 82-35(b)(1), be in charge of and responsible for carrying out the land-disturbing activity. Pursuant to Code of Virginia, § 10.1-566(A), the owner, permittee or person responsible for carrying out the plan shall be provided an opportunity to accompany the official. Notice of the right of inspection shall be included in all land disturbing permits issued. The administrator shall be responsible for

developing and implementing a filing system for land disturbing projects. The individual holding a certificate of competence, as required under the State program, who will be in charge of and responsible for carrying out the land-disturbing activity shall be required by the Administrator to periodically inspect the land-disturbing activity.

(c) Upon determination that a violation exists or that the permittee has failed to comply with the plan, the administrator shall prepare a notice to comply which shall contain a detailed description of the conservation measures necessary for compliance. Such notice shall be served upon the permittee or person responsible for carrying out the plan by registered or certified mail to the address specified by the permittee in the permit application. If no action is taken within 48 hours of delivery of the notice to comply, the administrator may issue a stop work order to prepare a letter of intent to utilize the performance cash escrow or other legal arrangement to perform the conservation measures to correct the deficiency.

- (1) Except as provided in this subsection (c), the stop work order may be issued only after the alleged violator has failed to comply with a notice to comply. The order shall be served in the same manner as a notice to comply, and shall remain in effect for seven days from the date of service pending application by the enforcing authority or alleged violator for appropriate relief to the county circuit court. Where the alleged noncompliance is causing or is in imminent danger of causing harmful erosion of lands or sediment deposition in waters within the watersheds of the commonwealth, or where the land disturbing activities have commenced without an approved plan or any required permits, such an order may be issued whether or not the alleged violator has been issued a notice to comply.
- (2) If the letter of intent to utilize the performance guarantee is sued, it shall be sent by registered or certified mail to the permittee. If no action is taken to correct the deficiencies within five days of the sending of the letter of intent to utilize the security, then the administrator shall proceed to authorize the corrective measures to be made and to recover the cost from the security. The failure of a permittee to comply with the notice provided for in this subsection shall be deemed to be a violation of this article.
- (3) If the alleged violator has not obtained an approved plan or any required permits within seven days from the date of service of the order, the administrator may issue an order to the owner requiring that all construction and other work on the site, other than corrective measures, be stopped until an approved plan and any required permits have been obtained.

(Code 1999, § 9-7)

Sec. 82-40. Administrative appeal; judicial review.

(a) Final decisions of the administrator or the plan approving authority under this article shall be subject to review by the board of supervisors, provided that an appeal is filed within 30 days of the date of any written decision by the administrator or the plan approving authority.

(b) Final decisions of the board of supervisor shall be subject to review by the county circuit court, provided that an appeal is filed within 30 days of any written decision adversely affecting

the rights, duties or privileges of the person engaging in or proposing to engage in land disturbing activities.

(Code 1999, § 9-8)

Sec. 82-41. Liability for land disturbing activities.

Compliance with the provisions of this article shall be prima facie evidence in any legal or equitable proceeding for damages caused by erosion or sedimentation that all requirements of law have been met and the complaining party must show negligence in order to recover any damages.

(Code 1999, § 9-9)

Sec. 82-42. Civil Penalties for violation of article.

(a) Any violations of any regulation or order of the administrator, any provision of the program, any condition of a permit or any provision of this ordinance shall upon a finding of an appropriate general district court be subject to a civil penalty. The civil penalty for any one violation shall be \$100, except that the civil penalty for commencement of land disturbing activities without an approved plan shall be \$1,000. Each day during which the violation is found to exist shall constitute a separate offence. In no event shall a series of specified violations arising from the same operative set of facts result in civil penalties which exceed a total of \$3,000, except that a series of violations arising from the commencement of land disturbing activities without an approved plan for any site shall not result in civil penalties which exceed a total of \$10,000.

(b) Nothing in this section shall be deemed to limit the authority of the county to apply to the county circuit court for injunctive relief to enjoin a violation or threatened violation of this article, or to seek damages in a civil action.

(c) Without limiting the remedies which may be obtained in this section, any person violating or failing, neglecting or refusing to obey any injunction, mandamus or other remedy obtained pursuant to this section shall be subject, in the discretion of the court, to a civil penalty not to exceed \$2,000 for each violation. A civil action for such violation or failure may be brought by the locality wherein the land lies. Any civil penalties assessed by a court shall be paid into the treasury of the locality wherein the land lies, except that where the violator is the locality itself, or its agent, the court shall direct the penalty to be paid into the state treasury.

(d) With the consent of any person who has violated or failed, neglected or refused to obey any regulation or order of the Administrator, or any condition of a permit or any provision of this ordinance, the Board, the Director, or plan-approving or permit-issuing authority may provide, in an order issued by the Board or plan-approving or permit-issuing authority against such person, for the payment of civil charges for violations in specific sums, not to exceed the limit specified in subsection (c) of this section. Such civil charges shall be instead of any appropriate civil penalty which could be imposed under subsection (a) or (c).

(Code 1999, § 9-10)

State law reference - Penalties, injunctions and other legal actions, Code of Virginia, § 10.1-562(J) and § 10.1-569.

Secs. 82-43 - 82.70. Reserved.

R. J. Emerson, Jr. AICP
County Administrator

Julian T. Lipscomb
Chairman