



VA DEQ's 2022 Flood of Stormwater-Related Guidance - Part II: Proposed Technical Memorandum

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08.26.2022

Virginia's construction stormwater discharge permit program appears to be undergoing major transformation over the next six to nine months, and reception to these changes from stakeholders is likely to vary given the breadth and particularity of these changes. The Virginia Department of Environmental Quality (DEQ) is proceeding this year with several new stormwater-related regulatory actions and related procedural and technical guidance documents related to development projects and construction activity in Virginia.

Part I of this stormwater alert series (found [here](#)) addressed DEQ's proposed new Guidance Memo No. 22-2011, dated July 1, 2022 (Proposed Procedures Memo), that would establish important new procedural guidance for DEQ's review of erosion and sediment control plans (ESC Plans) and construction stormwater management plans (SWM Plans).

This alert, serving as Part II of this series, addresses DEQ's proposed Guidance Memo 22-2012, "Stormwater Management and Erosion & Sediment Control Design Guide," dated July 1, 2022 (Proposed Technical Memo), which is being proposed in tandem with the Proposed Procedures Memo. (Part III will discuss other pending and planned regulations and guidance addressing other stormwater-related program elements.)

In keeping with the overall theme espoused by DEQ for these new initiatives, the chief purpose of the Proposed Technical Memo is to consolidate into one centralized repository document descriptions of, and cross-references to, all the various regulatory and technical design standards and practices for erosion and sediment control and stormwater management. The Proposed Technical Memo is also intended to reflect updated and clearer guidance on how these criteria and standards will be implemented at construction sites and for post-development stormwater management to meet regulatory standards. More practically, when finalized, it is intended both to facilitate proper preparation of ECS Plans and SWM Plans (either, individually, a "Plan") and to serve as a primary desk reference

resource for DEQ staff for their technical sufficiency review of such Plans, presumably allowing for an overall more efficient Plan preparation and review experience.

DEQ is now taking comments on the Proposed Technical Memo. DEQ published the Proposed Technical Memo and gave notice of a 30-day public comment period in the August 1, 2022 *Virginia Register* and on the Virginia Regulatory Town Hall (see below). Comments are due by August 31, 2022, with a proposed effective date of September 1, 2022 (but that date assumes no material adverse comments).

Although a detailed review of all of the technical elements of the Proposed Technical Memo is beyond the scope of this alert, there are a few noteworthy points to consider. First, the Proposed Technical Memo offers a useful consolidation of current technical guidance and technical standard references, particularly as to assessing erosion and sediment control and stormwater management needs and controls. To this end, the Proposed Technical Memo aggregates into one primary guidance document key factors to be considered for determining water quantity and water quality impacts associated with regulated construction projects subject to ESC Plan and SWM Plan obligations and appropriate use of control measures, with cross-references to specific design standards. It also clarifies certain aspects of DEQ's technical review process for submitted Plans. Clearer, unified, and consistent centralized guidance on stormwater management and erosion and sediment control technical criteria and control measures is generally a positive step for all stakeholders.

Second, many provisions of the Proposed Technical Memo appear to alter and even make more stringent certain existing technical methods and practices used to demonstrate that water quantity and water quality criteria are satisfied. In these respects, the Proposed Technical Memo not only would consolidate existing technical standard references but would amend a number of them. Several such revisions involve applicable run-off coefficients and assumed groundcover conditions, analyses of channel protection and receiving stream adequacy, post-construction confirmation of soil composition use for run-off curve values, and greater accounting for flood-prone areas. Some amendments also seem to be influenced by an increasing urgency to ensure Virginia's compliance with the EPA Chesapeake Bay Total Maximum Daily Load Rule (**Bay TMDL Rule**), which addresses control of nutrients (nitrogen and phosphorous) and sedimentation loads in runoff and discharges into the Chesapeake Bay watershed. Virginia's Bay TMDL Phase III Watershed Implementation Plan (**Phase III WIP**) establishes the final goals and measures for reductions of nutrient and sediment loads in stormwater runoff and discharges in Virginia to meet the 2025 deadline for compliance with the Bay TMDL Rule requirements. In this light, DEQ appears to be ensuring through some of these amendments to current methodology that the Proposed Technical Memo will help to ensure timely achievement of the Phase III WIP objectives.

Third, folded into the Proposed Technical Memo is the third iteration of DEQ's recent and evolving solar energy project stormwater policy set forth in its March 29 and April 14, 2022 solar project guidance memoranda. (See our alerts on these memoranda [here](#) and [here](#).) Imposing this new policy on the growing solar project development sector this year also seems connected (at least in part) to the increasing programmatic concerns about reaching the Phase III WIP goals by 2025. Solar project developers have already provided substantial feedback on the March and April memoranda expressing

the need for a more realistic transition to any such new policy treating solar panel arrays as impervious surfaces. In the Proposed Technical Memo, DEQ has clarified in some helpful respects the April 14 memorandum's implementation schedule so as to better, though not fully, reflect the planning, scheduling, property acquisition, and economic realities of solar project development and proposed project review and approval.

That said, solar project developers still have great concern about the underlying change in policy direction to start treating solar panels and the ground under them as impervious surfaces for purposes of stormwater runoff calculations and implications for solar project development planning and costs. Such change would result in increases in calculated stormwater volumes and nutrient loads to manage and a corresponding increase in post-development stormwater control measures and expenses. This change as applied to solar projects generally appears especially misplaced given that finished projects often, if not typically, are already being designed with vegetated cover underneath the panels. In the Proposed Technical Memo, DEQ has added some relief in this regard by recognizing that solar panels over vegetated or other pervious groundcover that rotate toward vertical positions during rain events would be eligible for determination of reduced impervious areas, in turn improving the runoff calculation results and lessening the degree of necessary required control measures. Nevertheless, the net result of the new policy direction as incorporated into the Proposed Technical Memo is a more stringent approach to solar development stormwater management generally than had been applied previously. DEQ should therefore expect solar developers to provide both policy and engineering/technical-based objections during the public comment period for the Proposed Technical Memo.

Finally, as noted in Part I of this series addressing the Proposed Procedures Memo, the Proposed Technical Memo, when finalized, would apply only to ESC Plans and SWM Plans submitted to DEQ when it is the Virginia Erosion and Sediment Control Program (VESCP) Authority under the VESCP Regulations (9VAC25-840) or the Virginia Stormwater Management Program (VSMP) Authority under the VSMP Regulations (9VAC25-870), respectively. Nearly all localities in Virginia administer their own VESCP, and most urban and suburban localities administer their own VSMP (all subject to DEQ program oversight). Therefore, ESC Plan and SWM Plan submissions to such local VESCP Authorities and VSMP Authorities, respectively, would not be subject to the Proposed Procedures Memo when finalized. Indeed, many of the urban and suburban localities in Virginia have their own, sometimes very complex, procedures for review of ESC Plans and SWM Plans. That said, some localities acting as either VESCP Authorities or VSMP Authorities, or both, could elect to adopt the final version of the Proposed Technical Memo (or some aspects of it) for their own use, so long as their own programs remain at least as stringent as the program requirements set by state VESCP and VSMP regulations.

It is important to recognize that the Proposed Technical Memo is part of a larger effort by DEQ, through a combination of policy and regulatory actions, to update, consolidate, and in some ways clarify and even revise Virginia's construction stormwater regulatory program requirements. In final form, the Proposed Technical Memo would seem poised to serve a key function in this evolution of the program. However, this function may be somewhat short-lived, as a new Virginia stormwater manual is currently being developed through DEQ staff and stakeholder efforts to consolidate the now outdated or disparate procedural and technical erosion and sediment control and stormwater management guidance memoranda, technical bulletins, and policies into one comprehensive procedural, guidance and

technical reference document. The forthcoming Part III of this alert series will address this effort, as well some key pending regulatory actions.

Finalization of the Proposed Technical Memo will not happen until the public comment period closes and DEQ wrestles with the expected numerous and substantive comments to formulate its responses and any corresponding revisions. Commenters can be expected to raise concerns about exceedance of statutory and regulatory authority, to speak to the appropriateness of certain technical criteria to particular circumstances, and to suggest opportunities for greater clarity in or usefulness for the Proposed Technical Memo. How DEQ responds, and how it may reshape or refine the Proposed Technical Memo into final form, remains to be seen.

Virginia Department of Environmental Quality, Guidance Memo No. 22-2012 (*Proposed*), ?Stormwater Management and Erosion and Sediment Control Guide? 38:25 VA.R. 2680 (August 1, 2022). *See also Virginia Regulatory Town Hall.*

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