

SUBDIVISION RECOMMENDATIONS:

I. Purpose and Need

These subdivision recommendations are based on and update previous procedures for the review of subdivision proposals and treatment of residual aquatic resources within those developments. The objectives of these guidelines are to ensure that:

- 1) Staff fully considers the potential impacts to aquatic resources posed by a development;
- 2) A consistent and logical framework is established for considering any residual aquatic resources (wetlands, streams, and open water areas for which impacts are not authorized) as well as upland areas and/or buffer areas within a subdivision;
- 3) The likelihood of additional and unpermitted impacts to any residual aquatic resource areas within a permitted subdivision is minimized;
- 4) Any residual aquatic resources within a permitted development retain their integrity and predevelopment functions and values after completion of the development;
- 5) Cumulative impacts associated with subdivisions are fully considered; and
- 6) Requirements for future regulatory compliance efforts associated with residual aquatic resources within a development are minimized;

II. Authority

The Norfolk District of the US Army Corps of Engineers (the Corps) issues permits under the authority of Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899 for regulated activities proposed in waters of the United States, including wetlands, throughout the state of Virginia. The Department of Environmental Quality (DEQ) and its Virginia Water Protection (VWP) Permit Program derives regulatory authority from both the Clean Water Act (§ 401) and the State Water Control Law (SWCL) for regulated activities proposed in surface waters, including wetlands. Virginia Water Protection Permit (VWPP) regulations incorporate, by reference, the mitigation sequencing guidelines from the Clean Water Act, also known as the Section 404(b)(1) guidelines (reference 9 VAC 25-210-115A).

III. Background

In accordance with the §404(b) (1) Guidelines of the Clean Water Act, applicants applying for authorization to impact waters and wetlands within the jurisdiction of DEQ and/or the Corps must demonstrate that impacts to aquatic resources have been avoided and minimized to the maximum extent practicable. As a result there are often residual aquatic resources that have been avoided in the permit process. These areas may be located in close proximity to impacted aquatic resources and are likely located adjacent to land that is permitted for construction.

Due to the nature of residential subdivisions, individual property owners are often not educated about the presence of a deed restriction on portions of their property, the location of aquatic resources remaining on their property, or activities in these areas that require permits or agency approval to conduct. Degradation of residual aquatic resources commonly occurs through landscaping, drainage improvements (complaints about standing water and mosquitoes), placement of fill material, disposal of lawn debris, and rubbish. In some cases, permit conditions requiring the protection of residual aquatic resource within lots conflict with some requirements of local governments. Regulatory agencies have had to expend substantial effort to ensure compliance with restrictive covenants recorded over residual aquatic resources in lots within subdivisions. Subsequently, the regulatory agencies realized the need to prevent future (and often unauthorized) cumulative impacts to these remaining aquatic resources within the proposed development.

In addition, large scale subdivisions are commonly developed in phases and the agencies are asked to provide authorization for portions of the overall project at a given time. The practice of permitting portions of a single and complete project under separate permits is commonly referred to as 'piece-mealing.'

Commercial developments, such as industrial or business parks, have similar permit review and residual aquatic resource issues as residential subdivisions. As the size of the parcels making up these developments can vary widely, these developments are best examined on a case by case basis, however, portions of this document would be applicable to the review of such proposals.

These revised guidelines were developed in an effort to learn from earlier successes and failures. The following sections provide guidance on determining impacts to aquatic resources, protection of residual aquatic resources and upland buffers (where applicable) and permitting and evaluation procedures for phased developments.

III. Definitions

The definitions in this section are a combination of federal and state regulations and guidance are meant to provide clarification for this document. To the extent these definitions conflict with definitions in the regulations, the definitions in the regulations control.

Independent utility A test to determine what constitutes a single and complete project. A project is considered to have independent utility if it would be constructed absent the construction of other projects in the project area. Portions of a phased development project that depend upon other phases of the development project do not have independent utility. Portions of a phased development project that would be constructed even if the other phases are not built can be considered as separate single complete projects with independent utility. The independent utility test includes physical features (infrastructure) and economic factors.

Phased Subdivisions: A residential, commercial, industrial, or mixed-use/master-planned development in which the plan of development (POD) is broken into smaller units or phases of construction. Phased developments may be located on a single piece of land or an assemblage of contiguous properties and are proposed by the same entity or by related entities. Phases of a development may be considered “single and complete” despite the possibility that the phase under consideration may share or depend on common infrastructure, financing, ownership, etc. associated with the earlier phases. The phase will be considered to be “single and complete” if it can “stand alone” from subsequent phases due to its independent utility. However, impacts in a phased development will be considered cumulatively.

Proffers: During the local approval process for projects, a developer may dedicate land for public use or construct a certain amount of infrastructure in order to proceed with his project (zoning proffers). Due to the requirement of localities, project proponents often include proffers (e.g., school sites, stormwater management facilities, sewage pump station sites, roads, sewer lines, drainage improvements, etc.) as part of their proposals. The key to determining whether any impacts associated with these proffers are considered part of the development will depend on whether or not the proffers involve providing land or actual development. If a proffer is limited to providing land, the locality will be responsible for obtaining a permit for any impacts to aquatic resources not the developer. However, if a proffer involves providing land and constructing a facility, any impacts to aquatic resources will be considered as part of the developer’s project.

Real Estate Subdivision: The division of parcels into smaller parcels or the combination of 2 or more parcels into a larger parcel for the purpose of selling, conveying, transferring, leasing, or developing the resulting parcel(s). This includes the entire area of a residential, commercial, or industrial subdivision or a mixed-use or master-planned development divided or combined after October 5, 1984.

Residual Aquatic Resource A whole or portions of surface waters, including wetlands and streams, located within a project boundary that has not received authorization to be filled or otherwise impacted in accordance with State or Federal law.

Shared Infrastructure Those roads, utilities, and other infrastructure that are jointly owned, constructed, and/or used by more than one residential, commercial, municipal, or industrial development.

Single and Complete Project: The total project proposed or accomplished by one owner/developer or partnership or other association of owners/developers which also has independent utility. A project may be considered to be “single and complete” if it can be constructed independent of any reliance on subsequent or previous permit authorizations for additional regulated activities (e.g., activities preceding or following those under the current authorization).

Unencumbered Land: Land within a residential lot or commercial project that is free of legal or environmental constraints that would prevent the construction of structures or removal of vegetation. Land located within a residential lot that does not contain aquatic resources or their associated protected buffers; unless authorized for impact. This land does not contain areas that are protected as required by other entities such as Resource Protection Areas (RPAs) or buffers to aquatic resources required by localities.

IV. Permitting Subdivisions and Phased Developments

When evaluating land development projects, we defer to the localities on many land use and project design issues. A land development project usually receives preliminary approval(s) at the local level (zoning, conditional use, conditional, tentative or preliminary subdivision approval, etc.) prior to detailed design, final locality approval. It is important to consider what has been preliminarily approved by the locality when determining potential individual and cumulative impacts to aquatic resources. In order to obtain preliminary approval, a developer must demonstrate that the project complies with local ordinances and, at a minimum; the project can be accessed with adequate roads, sewer and water connections, either by public or private means.

During the local approval process for projects, a developer may be required to dedicate land for parks, schools, roads, or to construct a certain amount of infrastructure in order to proceed with their project (proffers). All aspects of the development project must be considered in order to evaluate individual and cumulative impacts to aquatic resources. When determining if a project is single and complete, we must identify whether the developer would ***build*** certain land improvements if they were not required for their project. For example, if a locality will not allow a developer to sell residential lots in a proposed subdivision until they ***build*** one mile of sanitary sewer trunkline that will serve the proposed subdivision and other developments, the subdivision is not feasible without the sanitary sewer trunkline. The subdivision cannot be constructed but for the sewer; therefore the subdivision is not a single and complete project. In other words, the subdivision is not separate from the sewer; the subdivision and the sewer are part of a single project. All impacts from both activities would need to be considered cumulatively but could be permitted separately.

If a zoning proffer is limited to providing land (i.e., for a school or a road), and the developer is not undertaking any construction on the dedicated land, any potential impacts resulting from the development of the dedicated land are considered separate from the developer’s project.

Applicants should submit an application for all aspects of the single and complete project, including any impacts associated with proffers or related phases. It may be possible to phase the permitting of a phased development in accordance with agency regulation.

V. Residual Aquatic Resource Considerations

When permitting a project with residual aquatic resources, the agency personnel should consider the location and the best manner to protect those remaining resources. This section presents a tiered approach of agency preference in dealing with residual aquatic resources.

Previous guidance required that all residual aquatic resources remaining on lots of 15,000 square feet or less (with sewer/water service) be considered impacted even if the applicant was not proposing to physically fill these areas. For lots without sewer/water (septic service), the minimum lot size was raised to

30,000 square feet or less to account for the area required for septic tanks and drain fields. This guidance generally required deed restrictions for all residual aquatic resources in subdivisions to protect them. These guidelines did not prevent additional impacts to residual aquatic resources, typically due to property owner misunderstanding/noncompliance with the deed restrictions.

The primary solution is to avoid having any residual aquatic resources and their associated protected buffers within individual residential lots regardless of recordation of a deed restriction. Preferred alternatives for dealing with residual aquatic resources are listed below in order of preference. These alternatives should be considered during avoidance and minimization review.

1. All residual aquatic resources and their associated protected buffers should be located outside of individual lot lines, in the following order of preference:
 - a. All residual aquatic resources should be preserved in an easement to be held by a third party or public entity (TNC, VOF, state or locality)
 - b. All areas of concern preserved in an easement held by a viable Home Owners Association.
2. If residual aquatic resources/buffers must be located within lots, in the following order of preference:
 - a. All residual aquatic resources should be located within one or two large lots and preserved with an approved deed restriction. The lots must be of adequate size as indicated below.
 - b. If residual aquatic resources/buffers must be distributed among and within several individual residential lots, all residual aquatic resources/buffers must be preserved within lots of adequate size (see below) and located in the back of lots. Where there is an obvious demarcation of aquatic resources (i.e., swamps, marshes, severe topographic change leading to aquatic resource) which would inhibit impact from future homeowner activity, the project manager has the discretion to consider the resource as unimpacted, provided they are protected by a deed restriction. Landowners may not be able to readily identify aquatic resources where there is no such demarcation.
 - c. If residual aquatic resources/buffers must be distributed within several individual residential lots, the lots must be of adequate size to lower the risk of additional impacts from future homeowner activity. Adequate lot size is based on the type of sewer utility involved.
 - i. Where public sewer is available and where a lot contains less than ½ acre of unencumbered land, all waters should be considered impacted.
 - ii. Where public sewer is not available, and where waters are located within lots that do not contain ½ acre of unencumbered land in addition to the minimum needed for the septic system drain field, and the area effectively drained by any associated perimeter ditching, all waters will be considered impacted. The area effectively drained for septic purposes is typically 1 acre.

VII. Compliance

As with all projects, when permit compliance issues or enforcement cases are found or reported, agency staff must proceed with actions to bring the project into compliance. Commonly, noncompliance issues will typically include impacting more onsite wetlands or streams than permitted; poor or failing erosion control measures; no evidence of deed restriction recordation; or encroachment into buffers. Each agency

must follow their own process and procedure to resolve compliance and enforcement cases. However, DEQ and COE staff should coordinate compliance and enforcement activities when possible to reduce duplication of effort and increase consistency in resolution of compliance issues. When a project has received both state and federal permits, agency staff should coordinate all compliance efforts. When only one agency is responsible for issuing a permit, notification is encouraged to occur when circumstances merit the involvement and assistance of the other agency by aiding the resolution (for instance, additional impacts resulting in a change in the permit required). Enforcement cases where no permit has been issued should be pursued by each agency, particularly for larger cases, in accordance with agency processes and procedures.

In some cases, the landowner can resolve compliance or enforcement issues by permitting the project to allow the completion in a manner that avoids further damage to a wetland or watercourse and that is agreeable to the agencies. The practice of issuing an after-the-fact permit, particularly for relatively minor impact situations, should be limited as it has the consequence of removing the deterrent to acting without a permit.