REPORT OF THE
JOINT SUBCOMMITTEE STUDYING

The Necessity of Improvement In Erosion and Sediment Control Programs

TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA

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RICHMOND, VIRGINIA
JANUARY 1993

TO: The Honorable L. Douglas Wilder, Governor,
and
the General Assembly of Virginia

I. EXECUTIVE SUMMARY

In September 1992, the Division of Soil and Water Conservation presented to the Soil and Water Conservation Board the results of a three-year evaluation of the 171 erosion and sediment control programs operated by counties, cities or towns. Based on the report's conclusion that 40 of the 171 programs obtained on "adequate" score, the 1992 Session of the General Assembly passed House Joint Resolution 178. The resolution established a joint subcommittee to examine the necessity of improvement in erosion and sediment control programs statewide, including, but not limited to, finding ways that the Soil and Water Conservation Board can assist local governing bodies in developing, enforcing and improving existing erosion and sediment control programs.

The joint subcommittee found that although many of the local erosion and sediment control programs are effectively operated, a number of weaknesses exist, both in the implementation of some local programs and in the Commonwealth's Erosion and Sediment Control Law. Some of these weaknesses are amenable to legislative solutions. The findings and specific recommendations of the joint subcommittee, which are set forth in Section V of this report, include:

1. The Board of Soil and Water Conservation should be able to revoke its approval of a local erosion and sediment control program if the local program is not administered in accordance with minimum statewide effectiveness standards. If a locality's program approval is revoked, the soil and water conservation district becomes responsible for developing and implementing a program; if it does not, the Board would prepare and implement a program.

2. A greater emphasis should be placed on providing assistance to localities operating Erosion and Sediment control programs.

3. State projects should comply with the requirements of a local Erosion and Sediment control program if such requirements are more stringent than those of the state's program.

4. Greater emphasis should be placed on assuring that localities update their Erosion and Sediment control programs to reflect changes in state law and regulations.

5. Personnel administering Erosion and Sediment control programs and persons preparing Erosion and Sediment control plans should be required to have certifications of competence from the Board.

6. If a locality does not respond to complaints of program violations within ample time periods and after notice, the Department or the Board should be empowered to bring enforcement actions.

7. The procedure by which localities may issue stop work orders against program violators should be streamlined and strengthened.

8. Greater civil penalties should be allowed to deter owners from commencing land-disturbing activities without obtaining approved plans or permits.

9. The limitation preventing civil penalties from being assessed against program violators more often than once in a ten-day period should be removed.

10. The existing $1,000 cap on the fee localities may charge applicants for plan approval should be eliminated.

11. The exemption for the construction of certain single family residences should be removed, and the exemption for projects disturbing an area of less than 10,000 square feet should be reduced to 5,000 square feet.

12. Owners of property damaged by violations of an Erosion and Sediment program should be able to obtain injunctive relief and maintain civil suits for damages.

13. Builders of single family residences should be able to use agreements in lieu of a plan as an alternative to complying with the plan preparation and review procedure.

II. AUTHORITY FOR STUDY

The 1992 Session of the General Assembly enacted House Joint Resolution 178 (see Appendix A), which established a joint subcommittee to examine the necessity of improvement in erosion and sediment control programs in the Commonwealth, including but not limited to finding methods by which the Soil and Water Conservation Board can assist localities in developing, enforcing and improving existing erosion and sediment control programs.

Pursuant to authorization in HJR 178, the joint subcommittee convened an advisory council to assist in its work. The advisory council consisted of twelve members representing local government, the Virginia Association of Counties, the Virginia Municipal League, the building industry, the general contracting industry, soil and water conservation districts, the conservation community, and other groups. A list of the members of the advisory council is included as Appendix B.

The joint subcommittee was directed to complete its work and submit its findings and recommendations to the 1993 Session of the General Assembly.

III. BACKGROUND

The Virginia Erosion and Sediment Control Law (ESCL), consisting of §§ 10.1-560 through 10.1-569 of the Virginia Code, was enacted as Chapter 486 of the 1973 Session of the General Assembly. Prior to the enactment of the ESCL, the General Assembly had created the Soil and Water Conservation Board and had authorized the creation of soil and water conservation districts. The Soil Conservation Districts Law was enacted in 1936, and the State Soil Conservation Committee, predecessor of the current Board, was created in 1938. These legislative actions occurred in conjunction with the adoption of the federal Soil Conservation and Domestic Allotment Act (P.L. 46, 74th Congress) in 1935, and subsequent federal legislation. The soil and water conservation districts and the State Soil Conservation Committee were intended to work with the Soil Conservation Service of the United States Department of Agriculture in addressing the loss of arable soil.

The ESCL was based in part on the model state act for erosion and sediment control prepared in 1973 by the Committee on Suggested State Legislation of the Council on State Governments in conjunction with the National Association of Conservation Districts. The model law reflected a concern with the increase in and acceleration of sediment deposition resulting from rapid shifts in land use from rural and agricultural to urban and nonagricultural uses.

A. Description of State Erosion and Sediment Control Law

The focus of the ESCL is the regulation of land-disturbing activities. Such activities are defined as any land change which may result in soil erosion from water or wind and the movement of sediments into waters or onto lands. The definition of land-disturbing activities excludes fourteen categories of activities, including installation of certain utility lines, mining, agricultural, horticultural and silvicultural activities, site preparation for certain single-family residences, disturbed areas of less than 10,000 square feet, and certain "emergency work" and "minor land disturbing activities."

No person may engage in a land-disturbing activity until he has submitted an erosion and sediment control plan for the activity to the

plan-reviewing authority, which may be the local soil and water conservation district or a local government official. The plan is then reviewed for compliance with the requirements of the erosion and sediment control program. If the plan satisfies the program, the plan will be approved on the condition that the land-disturbing activity is conducted in compliance with the plan's terms.

The Virginia Soil and Water Conservation Board (Board) has the authority to promulgate regulations establishing minimum standards for local or district soil erosion and sediment control programs. Pursuant to this authority, the Board has issued the Virginia Erosion and Sediment Control Regulations, VR 625-02-00, effective September 13, 1990. The Board has also issued a handbook containing recommended techniques and methods for controlling erosion and sedimentation. Localities and districts are authorized to adopt programs with erosion and sediment control criteria that are more stringent than those set forth in the Board's regulations and handbook.

The ESCL is implemented through the adoption of soil erosion and sediment control programs consistent with the state program and the Board's regulations. Programs are required to be adopted by the soil and water conservation district, unless the county, city or town has adopted a program. If a district or locality fails to adopt a program, the Board is charged with creating a program for the jurisdiction to be carried out by the district, county or city. The Board has never exercised this power. Of the 171 erosion and sediment control programs within the Commonwealth, only the program covering Buchanan County was implemented by a district; all of the other 170 programs were created by ordinance of a county, city or town.

The ESCL provides that government agencies may not issue grading, building or other permits for a project involving land-disturbing activities unless the applicant submits an approved plan and a certification that the plan will be followed. As a condition to issuing a permit for a land-disturbing activity, the agency may require the applicant to submit a bond, letter of credit or other acceptable arrangement to ensure that the agency can pay for any necessary conservation actions at the applicant's expense if he fails, after proper notice, to initiate or maintain conservation actions required under the plan. Approximately 85% of the local programs require the issuance of a grading or other permit, in addition to the approval of a plan, for any regulated land-disturbing activity.

Periodic inspections of land-disturbing activities are required to be performed by the permit-issuing authority or, if a permit is not required, by the plan-approving authority. The inspector is required to give notice of the inspection to the owner or operator, and if the inspector finds a failure to follow the plan, the owner or operator is given notice and an opportunity to correct the failure. If the permittee fails to cure the failure within the period allowed, his permit may be revoked and he becomes subject to penalties for violating the ESCL. The chief administrative officer of the Board, the locality operating its own program, or a district which is responsible for monitoring

and inspection for compliance, may issue a stop-work order upon receipt of a complaint of a substantial violation from the designated enforcement officer. Unless the noncompliance poses a threat of imminent danger of causing harmful erosion or sediment deposition in waters, a stop-work order may be issued only after the permittee has failed to comply with a notice of violation. Stop-work orders are valid for seven days pending application to the circuit court.

A violation of the provisions of the ESCL which require plan approval or compliance with the terms of the plan after notice and opportunity to cure is a misdemeanor, punishable by a fine of up to $1,000 or thirty days imprisonment or both. In addition to criminal penalties, a person violating the ESCL may be liable to the Board or locality in a civil action for damages. The enforcing governmental agency may apply to circuit court to enjoin an existing or threatened violation of the ESCL. Any person failing to obey an injunction or court-ordered remedy is subject to a civil penalty not to exceed $2,000 per violation. Civil charges may be assessed in lieu of civil penalties with the consent of a person who has violated the ESCL, any Board regulation or order, or any permit condition.

The ESCL was amended by Chapter 298 of the 1992 Acts of Assembly. This change allows localities to adopt an ordinance establishing a schedule of civil penalties for violations of the ESCL, the local program, or a permit for a land-disturbing activity. Such an ordinance may be adopted by any county, city or town which has adopted a local program, administers a local control program, or is subject to a program adopted by a district or the Board. If a locality designates a particular violation for a civil penalty under such an ordinance, it is precluded from prosecuting the violation as a misdemeanor. A civil penalty for any violation may not exceed $100, and the civil penalties which may be assessed arising from the same set of operative facts may not exceed $3,000. In a civil action for a violation covered by a civil penalty ordinance, the locality has the burden of establishing a violation by the preponderance of the evidence.

When land-disturbing activities are undertaken by a state agency, the Department is charged with reviewing specifications or conservation plans. The state agency conducting the activity is responsible for ensuring compliance with the approved plan or specifications. The Department also may review plans for land-disturbing activities where a project involves lands under the jurisdiction of more than one program, provided the applicant initially submits the plan to the Board rather than to the localities.

The division of duties and responsibilities within Virginia's erosion and sediment control program involves not only the Division of Soil and Water Conservation (Division) of the Department of Conservation and Recreation (Department) and local governments, but also involves soil and water conservation districts. Moreover, the role of the districts in the implementation of local E&S control programs varies widely.

There are 45 soil and water conservation districts within Virginia. The boundaries of a district may be conterminous with those of a single locality, or may encompass as many as five localities. Districts, which are political subdivisions of the Commonwealth, are led by a board of directors comprised of a combination of locally-elected members and appointees designated by the Virginia Soil and Water Conservation Board. Districts receive funds from the Division, local governments, and the U.S. Department of Agriculture's Soil Conservation Service.

The ESCL allows wide discretion in allocating the duties and responsibilities of program administration among districts and units of local government. In some jurisdictions, the district is responsible for approving erosion control plans and performing inspections. In others, the district reviews plans and makes recommendations to local officials. In the one jurisdiction without a local-government erosion and sediment control program (Buchanan County), the district has total program administration authority. In several localities, the district plays no role in the local erosion and sediment control program.

B. Local Program Implementation

The ESCL enables localities to adopt erosion and sediment control programs complying with the parameters of the state program. Once a local program has been adopted, however, the Board and the Division lack the authority to ensure compliance with the state standards. The ESCL does not include a model local ordinance, either for mandatory or optional use. Consequently, the specific features of programs adopted by localities vary widely.

The ESCL gives discretion to some localities to reduce the exemptions for certain land-disturbing activities. The definition of land-disturbing activities was amended by the General Assembly in 1988, 1990 and 1991 to allow certain localities to regulate single family residence construction without regard to whether they are built in conjunction with multiple construction in subdivision development. Consequently, the ESCL allows a county with the urban county executive form of government, cities adjacent to such county, any county contiguous to such county and any city completely surrounded by such county (which would include Fairfax and Prince William Counties and the cities of Fairfax, Alexandria, Manassas and Manassas Park), and portions of Bedford, Franklin and Pittsylvania Counties to regulate land disturbing activities related to any free-standing home building, while in all other areas of the state such activities are subject to the ESCL only if done in conjunction with multiple construction in subdivision development. Similarly, the governing body of a county, city or town may reduce the exemption for disturbed land areas of less than 10,000 square feet to a smaller area of disturbed land or qualify the conditions under which the exemption applies.

Variations among localities in their regulation of erosion-causing activities may also result from differences in the extent to which localities enforce their programs. The ESCL does not empower the Board either to require a locality to enforce its program or to bring enforcement measures against owners or permittees in violation of the ESCL or the local program.

At a meeting in July 1990, the Board adopted a policy statement, a copy of which is attached as Appendix C, outlining the role of Department staff in implementing the ESCL and regulations, and the Board's procedures upon receiving referrals from the staff. The Board found that a "careful reading of the [ESCL] reveals that it is intended that the Board be able to enforce the Law although a clear set of options for doing so are not delineated." The Board concluded that where a program administrator fails to correct deficiencies in its program, the Board's only recourse is to send a letter requesting that the locality work with staff to achieve compliance.

C. Previous Legislative and Agency Studies

1. 1988 Study

The ESCL was amended in 1986 to allow program administrators to issue stop-work orders in certain instances. During testimony on the bill, legislators expressed concern about the effectiveness of the enforcement provisions of the ESCL. This concern resulted in the inclusion of Item 121 of the 1986 Appropriations Act, which required the Division to conduct a review of local compliance with the provisions of the ESCL in the Chesapeake Bay Region, and to submit a report to the 1988 Session of the General Assembly identifying "the financial, technical and statutory impediments to compliance with the Law."

The results of the study, which was broadened to include the entire Commonwealth, were reported in 1988 House Document No. 15, entitled "Implementation Effectiveness of the Virginia Erosion and Sediment Control Program." The study found that there was a wide range of effectiveness among the local programs, and verified that program enforcement was a major problem. The enforcement problems were found to result from insufficient staffing, inadequate or limited enforcement techniques, and lack of training among many program officials.

In response to the study, the 1988 Session of the General Assembly adopted six bills amending the ESCL. The 1988 enactments provided, among other things, for the elimination of certain project exemptions, the requirement of periodic review of local programs by the Division, a certification program for local officials, and the strengthening of provisions authorizing bonds and other performance guarantees.

2. Program evaluations

Pursuant to the 1988 change in the ESCL requiring the Board to "periodically conduct a comprehensive review and evaluation to ensure the acceptability of all erosion and sediment control programs operating under the jurisdiction of this article," the Board conducted reviews of the 171 programs between May 1989 and April 1991. The review process attempted to evaluate the degree to which the programs were meeting the statutory and regulatory requirements, and did not endeavor to measure the amount of erosion occurring under the various programs.

The results of the Division's review of the programs were presented to the Board in a report dated September 3, 1991. A copy of the report is attached as Appendix D. Each program was given a score on a 20-point scale, with a range of 0 to 5 points allocated in areas of ordinance compliance, site inspection procedures, enforcement efforts, and plan review and permitting criteria.

The procedure by which the Division conducted its reviews of the local programs included on-site meetings with the local program administrator and site reviews, and the time involved ranged from one-half to two days. When the review was completed, a written report was prepared and sent back to the locality with any recommendations for improvement.

The Division determined that an "adequate" program would score 15 of the possible 20 points. As of April 1, 1991, 40 of 171, or twenty-three percent, of the local programs met the 15 point standard. The rating scale allocated 0 to 5 points to programs in each of the four areas reviewed. The results showed that 53% of the programs did not obtain a adequate score for their ordinance; 46% did not conduct plan review and permitting in accordance with guidance offered by the Division; 72% did not complete the inspection process appropriately; and 58% did not follow through on enforcement to the conclusion of problems.

Trends based on regions of the state indicated that as of April 1991, there was a pattern of better programs in Northern Virginia, the Urban Crescent, the Roanoke County-Bedford area, and Southwest Virginia.

The findings also included the following:

- Only 47% of the local programs had been updated to comply with the 1988 changes in the ESCL and current Board regulations.

- The highest-scoring facet was plan review and permitting, which had an average score of 3.2 and a median score of 4.0.

- The lowest-scoring aspect of programs was enforcement, which had an average of 2.5, and a median score tied between 1.0 and 2.0.

- High-growth and slow-growth communities tended to score higher than middle-growth communities, which may be unprepared to control several medium-to-large projects that are being constructed concurrently.

- Increased disturbed acreage is positively correlated to better programs.

- Enforcement ratings tended to improve as more acreage is disturbed.

The Division compared the scores of all jurisdictions with the scores of those jurisdictions which are subject to the Chesapeake Bay Preservation Act's requirements. The results indicated that a smaller percentage of the ordinances for Bay area programs received an adequate rating than did those for all programs (35% vs. 47%), but higher percentages of Bay area programs received adequate ratings for plan review/permitting (63% vs. 54%), adequacy of inspections (35% vs. 28%), enforcement (51% vs. 42%), and overall adequacy (28% vs. 23%). While the Bay locality programs scored an average higher than did all jurisdictions, the degree of difference was not believed to be substantial in light of the tremendous pressures on them to improve their programs over the past few years.

Following the Division's presentation of the results of the survey to the Board and other groups, the Board suggested that the Division conduct public meetings to obtain input from local governments and other interested groups regarding these issues. Six public meetings were held in October 1991. The Board had prepared a series of "options" for consideration at the public meetings to stimulate comment on the subject. (Appendix E). The options included making no changes to the current law, modifying the law to give the Board clear authority to institute legal action against localities to ensure compliance with their ordinances, modifying the law to empower other state agencies (such as the Water Control Board) to enforce state law upon the request of the Board, modifying the law to allow the Board to issue "stop work" orders or levy administrative fires where the local programs cannot or will not take effective action, and allowing localities to return programs to the state for administration at the locality's discretion.

In response to reactions to the ratings of local programs, the Division agreed to reevaluate the programs which received a score of 15 or less. Fifty localities requested that their programs be re-evaluated. From the completed reevaluations, the statewide average score increased from 11.2 points to 12.5 points (on a scale of 0-20). The percentage of all programs scoring an "acceptable" total of 15 points or more increased from 23% to 28%. (Appendix F).

D. Other Laws Regulating Erosion and Sedimentation in Virginia

In addition to the ESCL, several other laws address soil erosion and sedimentation. These include programs directed at environmental protection, such as the federal Clean Water Act, the Chesapeake Bay Preservation Act and programs covering activities which are excluded from the definition of land-disturbing activities, such as agriculture and mining.

1. Federal Clean Water Act

At the time of the ESCL's enactment, the focus of water quality programs was on controlling discharges from point sources. The federal Clean Water Act, as enacted in 1972, established effluent limitations on point sources. The effect of sediment on statewide water quality standards is addressed under Section 319 of the Clean Water Act (33 U.S.C. § 1329). Section 319, which was added to the Clean Water Act in 1987, requires states to develop an assessment of nonpoint source (NPS) pollution, and to prepare an NPS management plan.

The Division, in conjunction with an advisory board of affected state agencies, including the State Water Control Board, produced a NPS management plan in 1988. The plan outlines a four-year program for identification and implementation of best management practices (BMPs). The BMPs identified in the NPS management program are implemented through a combination of education, technical assistance and financial incentives. Sources of NPS pollution addressed in the management program include agriculture and forestry, mining, and construction activities.

2. Chesapeake Bay Preservation Act

The Chesapeake Bay Preservation Act is analogous to the ESCL in its requirement that local governments adopt and implement state-approved conservation programs. The Bay Act, adopted in 1988, requires certain localities to incorporate general water quality protection measures into their comprehensive plans, zoning ordinances and subdivision ordinances. The Bay Act regulations include several provisions that limit exclusions from activities covered by the ESCL. First, while the ESCL excludes land disturbances in areas of less than 10,000 square feet, the Bay Act reduces the area of excluded disturbances to 2,500 square feet. Under the ESCL, localities have had the option to reduce the size of excluded areas, and may reduce it to less than the 2,500 square feet in jurisdiction covered by the Bay Act.

The Bay Act also provides that every single-family residence in a preservation area is required to have a soil and water conservation plan. The ESCL generally excludes single-family home residences from its provisions unless they are part of a subdivision development. Finally, the Bay Act limits the exclusion for work on septic tank lines or drainage fields performed other than in conjunction with building construction.

The effect of these Bay Act provisions is to bring certain land-disturbing activities within the scope of the ESCL when they occur within preservation areas. This facet of the Bay Act may create overlapping responsibilities. For example, a locality's erosion and sediment control program may address activities such as septic field replacement in order to satisfy the Bay Act, though such activities are not covered by the ESCL.

The Bay Act also requires agricultural operations in preservation areas to prepare conservation plans by January 1995. This is in addition to the requirements for one hundred foot buffers and identification of wetlands, which apply to all persons in resource protection areas. The conservation plans, which must address soil erosion as well as pesticides and nutrient discharge, are reviewed by the local soil and water conservation districts. The Bay Act does not, however, require farmers to implement their conservation plans.

The Bay Act authorizes the Local Assistance Board to "[t]ake administrative and legal actions to ensure compliance by counties, cities and towns with the provisions of this chapter." (§10.1-2103.10). Section 10.1-2104 provides that the Local Assistance Board has the exclusive authority to institute legal actions to ensure compliance with the Act an its criteria and regulations. The Bay Act does not authorize the Commonwealth to bring enforcement actions against individuals who are in violation of the state standards, a local ordinance, or a conservation plan. To date, the state has not brought an action against a locality for violating the Bay Act.

3. Agricultural Programs

Agricultural activities are excluded from the definition of "land disturbing activities" under the ESCL. The implementation of measures to control erosion from agricultural activities is guided both by the NPS management program under the Clean Water Act and the conservation compliance measures of the federal 1990 Farm Act. Under both laws, a farmer's implementation of erosion control measures is voluntary.

The NPS management program, as it applies to agriculture, encompasses components of erosion control, nutrients and integrated pest management. Under the agricultural program, soil and water conservation districts are charged with obtaining the cooperation of farmers and implementing agricultural BMPs. The districts assist in the implementation of BMPs by developing conservation plans, conducting demonstrations, and providing participating farmers with technical assistance, equipment and materials for BMP installation. The Virginia Cooperative Extension Service and the Department of Agriculture's Agricultural Stabilization and Conservation Service and Soil Conservation Service also have responsibilities in implementing the agriculture portions of the NPS management program.

The Food, Agriculture, Conservation and Trade Act of 1990, which builds on the Food Security Act of 1985, contains strong incentives for soil conservation. In order to maintain eligibility for USDA benefits such as farm loans and commodity price supports, farmers of highly erodible land must implement conservation plans, approved by the district, by 1995. Approximately 25% of Virginia's croplands is affected by this requirement. Erosion-related features of the 1990 Farm Act include the Wetland Reserve Program (with a goal of enrolling one million acres), a voluntary Agriculture Water Quality Protection Plan, and an expansion of the LISA (low-input sustainable agriculture) program.

4. Forestry Program

Soil erosion arising from forestry activities is addressed in a voluntary program emphasizing the dissemination of information to landowners, local governments and the forestry industry. The Clean Water Act's NPS provisions require states to address and report on erosion from silviculturally-related NPS pollution. In response, Virginia has adopted a Forestry Water Quality Management Plan, under which the Virginia Department of Forestry prepares Cooperative Forest Management Plans for landowners in priority areas. Funds may be available to landowners to allow implementation of forestry BMPs under the Agricultural Conservation Program, the Forest Incentives Program, and the State Reforestation of Timberlands Program. The U. S. Forest Service provides monitoring and surveillance of forestry BMPs on Natural Forest land, and encourages the use of BMPs in all forestry activities. The ESCL excludes forestry from the scope of covered land-disturbing activities. The Department of Forestry has administered a nonregulatory program for silvicultural activities since 1988.

The program's objective calls for every logger to implement silvicultural best management practices (BMPs), which include installing water bars, stabilizing disturbed areas and maintaining streamside buffers. Every timber harvesting operation over five acres is inspected for compliance with BMPs. Though the department cannot penalize foresters for failure to use BMPs, it has successfully persuaded most foresters to adopt BMPs voluntarily. By focusing on changing attitudes through education, the program has had success in changing foresters' behaviors. The Department of Forestry has entered into nonbinding Memoranda of Agreement whereby 92 consulting firms and 51 major forest products companies have pledged to use BMPs.

The forestry program has exceeded its goals of reducing siltation by 10% between July 1988 and July 1991; the amount of reduction achieved was 14%. Other goals include a further reduction of siltation by 30% from the 1988 baseline levels by 1995, obtaining preharvest plans on 90% of logging projects by 1995, implementing educational programs, and monitoring and evaluating the effect of BMP implementation on water quality.

5. Mining Program

The ESCL also excludes surface or deep mining from its definition of land-disturbing activities. Section 10.1-571 of the Virginia Code specifically provides that the ESCL shall not limit the powers or duties exercised by the Department of Mines, Minerals and Energy (DMME) as they relate to strip mine reclamation under Chapter 16 and 17 of Title 45.1 or oil and gas exploration under the Virginia Oil and Gas Act.

Pursuant to the Mineral Program, which covers all mining activities other than coal, DMME has promulgated regulations addressing erosion and sediment control measures. The issuance of mining permits and monitoring of compliance with mining plans is performed by state officials in most instances. However, counties, cities and towns may apply for a waiver of the

state program where they have established standards and adopted regulations dealing with the same subjects covered by the mineral mining law, provided that the local standards and regulations are at least as stringent as those adopted by the state. If granted, a waivered locality assumes responsibility for enforcing the program. DMME nevertheless retains oversight for the local program, and may rescind the waiver if the locality fails to strictly comply with and enforce the state requirements (§ 45.1-197). Only three counties and one city have been waivered from the DMME regulatory program. One county relinquished its waiver in September 1990.

E. Other States' Erosion and Sediment Control Laws

Other states have adopted a variety of approaches to the issue of erosion and sediment control. The following review of erosion and sediment control legislation in several states in this region focus on differences in the structure of the laws as they relate to the allocation of administration and enforcement responsibilities.

1. Maryland

The Maryland Sediment Control Law requires counties and municipalities to adopt an ordinance providing that grading and building permits will not be issued without an approved erosion and sediment control plan. The state program involves four elements--inspection, enforcement, pemitting and plan review. If a locality chooses not to request delegation, the state administers all four elements. The state may delegate inspection and enforcement elements to localities which are found to be capable of enforcing compliance with the law, or to have enforcement capability which is comparable to that of the Department of the Environment.

State delegations of program elements are valid for one or two years, and may be renewed. Thirteen of 23 Maryland counties, and eight of the largest municipalities, have been delegated program elements. State delegation may be suspended, after a hearing, if a locality falls below the comparable effectiveness standard. According to Ron Gardner of the Maryland Department of the Environment, the state has suspended its delegation of a program element one time.

The 1990 amendments to the Maryland Sediment Control Law have expanded the state's role in program enforcement. If a locality has a delegated enforcement responsibility, and the state receives a complaint of a violation, the state must respond to the complaint and refer it to the locality. If the locality fails to act, the state may issue a complaint or a stop work order.

Section 4-116 of the Maryland law provides that injunctions to stop violations may be obtained by the state, the locality, or any interested person. The law also provides that civil penalties are allowed for double the cost of corrective action and, if the Department takes legal action, the state may recover additional penalties.

2. North Carolina

The Sedimentation Pollution Control Act of 1973 authorizes localities to adopt ordinances for local control programs, which will be approved if they meet or exceed the standards of the model local erosion control ordinance. If a local program is not administered or enforced properly, and the locality fails to cure the deficiency after notice and an opportunity to cure, the Commission "shall assume enforcement of the program until such time as the local government indicates its willingness and ability to resume administration and enforcement." N.C.G.S. § 113A-61.

According to David Ward of the Division of Land Resources, 16 of the 100 counties, and 25 cities, have local programs. Since the inception of delegation of programs to localities, two programs have been "taken back" by the state.

The Act gives the Commission concurrent jurisdiction with local governments over all private land-disturbing activities, and authorizes the Commission to inspect all activities and to request the Attorney General to prosecute any violations.

Private enforcement actions are authorized by the North Carolina law. Any person injured by a violator of the law or any ordinance may sue for injunctive relief, orders enforcing the law, and damages. If the damages suffered are $5,000 or less, the plaintiff may also recover attorney's fees.

3. Georgia

Pursuant to the Erosion and Sedimentation Act of 1975, local governing bodies in Georgia are required to adopt ordinances governing land-disturbing activities, which must be consistent with standards established by the state. If a locality fails to do so, the Board of Natural Resources will adopt procedures for them. Localities may be certified as issuing authorities by the Environmental Protection Division of the Department of Natural Resources if they have enacted satisfactory ordinances which are enforceable by the locality. If a locality is certified, it is responsible for issuing permits for land-disturbing activities; if not, the Division has jurisdiction to issue permits for land-disturbing activities.

The Georgia law was amended in 1985 to provide that the Environmental Protection Division may periodically review the actions of certified localities, including their administration and enforcement. If the review indicates that the locality has not administered or enforced its ordinance or has not conducted its program, the Division will notify the locality and, if correction action is not taken in 30 days, the Division may revoke the certification of the locality as an "issuing authority."

Terry Green of the Environmental Protection Division reported that 115 of 159 Georgia counties, and 220 of 535 incorporated municipalities, may certify local programs. A unique feature of Georgia's law provides that in certified localities the local government is charged with implementation, including processing application and conducting inspections and enforcement. However, plan review and approval is conducted in all but about 20 localities by the soil and water conservation district.

The Georgia law grants localities primacy over program enforcement. However, if a local issuing authority is not responsive to a complaint, the district or the state may intervene. If a complaint is not resolved, it may be referred to the Environmental Protection Department with recommendations for local program decertification or selective enforcement, which allows the Department to intervene, fine violators, and assess the unresponsive locality for the state's costs, including attorneys' fees, pursuant to § 12-7-8(d).

4. West Virginia

West Virginia does not have an erosion and sediment control law regulating land disturbing activities in a manner analogous to Virginia's program. West Virginia has addressed erosion control by declaring sediment to be a pollutant, and providing that excessive sediment loading in state waters is a violation of the water quality laws.

Article 21A of Title 19 (Agriculture) provides for the creation of soil conservation districts, and empowers the districts to prepare and enforce land use regulations to control erosion. A state soil conservation committee is charged with providing assistance to, and coordinating the programs of soil conservation districts.

5. Tennessee

The Soil Conservation Districts Law is similar in structure to West Virginia's law, and both were originally adopted in 1939. The state's role is principally limited to assisting and coordinating soil conservation districts in their implementation of programs. Soil conservation districts administer soil conservation and erosion control projects within their jurisdiction. A district may also formulate land use restrictions aimed at controlling soil erosion, which become law if approved by two thirds of the voting landowners in a referendum. Supervisors of a district are responsible for enforcing the ordinance against non-complying owners or occupiers of land.

6. Delaware

Delaware adopted an Erosion and Sediment Control Law in 1990 which combines soil erosion and stormwater control. The law allows localities to obtain delegation of one or more of the program elements of plan review, inspection, enforcement, and education and training. Soil and water conservation districts are given the right of first refusal to adopt local

programs; if the district does not do so, a county, city or town may seek delegation of program elements. If delegation is approved, it is valid for three years unless renewed.

If the Department of Natural Resources and Environmental Control finds that a district or locality has failed to implement program elements that have been delegated, the Department will notify the entity and give it 120 days to take corrective action. If the corrective action is not taken, the Department may suspend or revoke the delegated authority. Earl Shaver of the Department reported that to date the Department has not revoked any delegated authority to implement program elements.

Section 4012 of the Delaware law allows localities to refer site violations to the Department for corrective action. The first step in any enforcement complaint is to notify the locality. If the locality does not act, the Department can take action. Individuals have standing to seek injunctions, but not to obtain damages or civil penalties.

7. South Carolina

A new law regulating erosion and sediment control went into effect in South Carolina on May 27, 1992. Prior to this law, the state had enabling legislation allowing localities to adopt a program, and 19 of 46 counties had exercised this option. However, Ford Holbrook of the South Carolina Land Resource Commission stated that even where localities had programs under the old law, there was a problem with lack of enforcement, especially in the midlands area of the state.

The new law is in the process of being implemented, and all counties will not have submitted complete programs until July 1995. If a locality does not submit a program, the state will operate an erosion and sediment control program for it. Once a program is submitted by a locality and approved by the state, administrative responsibilities are delegated to the locality for a three-year period. Delegation can be revoked if a locality does not perform its responsibilities under the delegated provisions of the program.

Where a locality does not enforce its program, the state is empowered to bring an enforcement action directly against a person conducting land-disturbing activities in violation of the program. The South Carolina law does not authorize third-party, private suits for injunctive relief or damages.

IV. SUBCOMMITTEE ACTIVITIES

The joint subcommittee held four meetings, five public hearings, and two work sessions. In addition to receiving the background information reviewed in the preceding section of this report, the joint subcommittee obtained reports on additional issues relating to the effectiveness of the Commonwealth's programs for the control of erosion and sedimentation.

A. Effects of Sedimentation on Water Quality

Russell W. Baxter, Virginia Director of the Commission, testified at the joint subcommittee's initial meeting that effective erosion and sediment control is valuable not only to the Chesapeake Bay, but to all waters of the Commonwealth, and that the state can learn much about controlling erosion and sedimentation by reviewing the lessons learned in the Bay program.

Erosion and sediment control has been recognized as important to water quality in the Chesapeake Bay since the Chesapeake Bay Commission's inception in 1980. In 1984, the Commission conducted a study which recommended improving erosion and sediment control programs by providing additional resources and statutory authority. In 1987, the Commonwealth and the Commission signed the Chesapeake Bay Agreement, by which jurisdictions in the Bay region undertook to develop pollution control strategies, including effective erosion and sediment control programs. At that time, Virginia adopted a goal of achieving a forty percent reduction of nonpoint source phosphorous pollution in the Bay.

Sediment deposition can detrimentally affect fish, shellfish and plant life. Sediment clouds the water, which blocks sunlight needed by submerged aquatic vegetation, used as food and habitat for many species. Suspended solids can clog the gills of small fish and invertebrates, smother oysters and clams, and make it more difficult for oyster spat to set.

In addition to the damage caused by solids being deposited in the waters, damage results from nutrients and toxics contained in topsoil. Nutrients such as nitrogen and phosphorous are the principal pollutants in the Bay system. Fifty to sixty percent of nutrient overenrichment in the Bay comes from nonpoint sources, and much of that comes from soil deposition. Because phosphorous binds to soil particles, efforts to control nonpoint sources of phosphorous have focused on erosion and sediment control. Though not as effective as with phosphorous, erosion and sediment control programs also capture some of the nitrogen associated with surface runoff.

In addition to nutrient overenrichment, toxic pollution can be traced to sediment deposition. The Bay program's toxic reduction strategy recognizes that efforts to control nutrients and sediment transport will contribute to the control of toxics in the Bay. Mr. Baxter noted that certain toxic chemicals, particularly pesticides, bind to soil particles and enter waters through erosion.

In addition to nutrients and toxics, conventional pollutants (including oxygen-demanding pollutants, suspended solids, pH, temperature pollution, and bacterial contaminants) enter the water as the result of erosion and sedimentation. Conventional pollutants cause many of the same water quality problems attributed to nutrient overenrichment and toxics.

B. Case Studies of Local Programs

At the second meeting of the joint subcommittee in Harrisonburg in August 1993, James W. Cox, chief of the Bureau of Technical Services of the Division, provided evidence of the relationship between an effective erosion and sediment (E&S) control program and levels of water pollution. Appendix G depicts the benefits of implementing E&S control measures prior to the commencement of land-disturbing activities. The goal of any erosion control program should be to minimize the length of time uncontrolled earth is exposed. Once a site is stabilized by seeding or mulching, sedimentation is reduced to one-sixth of what it would be for an uncontrolled site. Soil loss from an uncontrolled site can range from 35 to 45 tons per acre per year.

In response to questions raised at the June subcommittee meeting regarding the connection between the Division's rating of the effectiveness of local programs and the amount of soil loss, Mr. Cox presented an analysis of the potential sediment loading in all localities. By combining the program ratings with the amount of disturbed areas, the division assigned priorities to programs based on the relationship between the quality of the E&S control program and the amount of land disturbing activity.

Several case studies were presented to indicate the variety of erosion problems across the Commonwealth. The case studies were drawn from over 2,900 cases of technical assistance provided by the division in fiscal year 1991, of which 283 were complaint responses. This compares with 282 complaint responses in 1991 and 193 thus far in 1992. The case studies included:

- A site in the City of Harrisonburg, which has never been effectively stabilized or controlled. The city has not required the developer to take corrective action, despite several requests by the Department.

- A site near Aylett in King and Queen County suffering soil erosion resulting from inadequate stabilization along the Mattaponi River. Though the county took enforcement action by issuing a stop work ordinance, the local program contributed to the problem by approving an inadequate erosion control plan and allowing construction to start without inspecting to determine whether control measures were in place.

- A site near Tappahannock in Essex County, where the initial erosion control plan approved by the program administrator was inadequate. The measures required by the initial plan were not implemented. Ultimately, the soil and water conservation district advised the locality of problems with the stormwater retention pond. The county relied on Division personnel, who lack authority to enforce the local ordinance, to work with the developer in resolving the problems.

- The Tazewell County airport site, developed by the airport authority. The local program rated highly in the division's program review. However, erosion control plans for the site were not reviewed due to confusion over the county's responsibility for the airport authority's project. Stormwater from the airport has inundated adjacent properties.

- The Floyd County park project, which was funded in part by a grant from the Department of Conservation and Recreation. The county park authority did not install adequate E&S control measures. In this case, the problem was resolved by the Department's withholding payments until corrective measures were completed.

- A site in Augusta County, which has a highly rated program. However, the county did not hold a bond to assure completion of E&S control improvements, and the project's developer filed for bankruptcy. The county brought an action to enforce its program, but the case was dismissed by the judge at trial on grounds that the local ordinance was defective because it had not been amended to reflect changes enacted in 1988 to the ESCL.

Problems with the existing system identified by Mr. Cox include the absence of a method of automatic updating of local ordinances by reference to the state law (as exists with the state building code), inability to require localities to enforce their programs, and a lack of training of local officials.

C. State Highway Projects

The joint subcommittee received a report on erosion programs for highway projects at its second meeting. The Virginia Department of Transportation (VDOT) has had a siltation program in place since the 1950s. VDOT's program was implemented as a means to save money by avoiding the need to regrade roadway beds rather than to protect the environment from erosion and siltation. Upon the passage of the ESCL in 1973, the department introduced the Division of Soil and Water Conservation's standards into its specifications and standards.

Earl T. Robb, state environmental engineer at VDOT, described the department's four-stage policy of controlling erosion and siltation. Whenever possible, E&S control plans attempt to avoid siltation by preventing soil from leaving a construction site and entering a waterway. If siltation cannot be avoided, its impact is minimized. Where damage occurs, it is mitigated by restoration of the site. Finally, where mitigation is not possible, the environment should be compensated for any damage by, for example, creating replacement wetlands.

The erosion and sediment control law provides that land-disturbing activities undertaken by VDOT and other state agencies are exempt from the plan-approval requirement of local E&S control programs. VDOT and other state agencies must receive the approval of the Division for specifications

annually or for conservation plans for each project. VDPT's road construction contracts contain requirements that E&S control measures be implemented.

If a road contractor fails to follow an approved E&S control plan during construction, VDOT project inspectors can shut down the job. VDOT can perform any required erosion control measures and charge the cost of the work against fees due to the contractor. In addition to inspection by VDOT personnel, Division employees are involved in reviewing plans and inspecting projects. A helpful policy implemented by VDOT prohibits a contractor from disturbing more land than will be controlled within the following 30 days.

Tools and techniques utilized by VDOT to prevent erosion and sedimentation in construction projects were described by Mr. Robb. Mr. Robb conceded that there is a continuing erosion and siltation problem with unpaved secondary roads and acknowledged that the problem will continue until funds for paving and making other improvements to these roads become available.

D. Coastal Zone Management Act Requirements

At its joint subcommittee's third meeting in Danville, Anne D. Brooks of the Council on Environment presented a report on the relationship between the Coastal Zone Management Act of 1972 (CZMA) and Virginia's Erosion and Sediment Control Law.

Section 6217, which was added by 1990 amendments to CZMA, requires states to develop and implement an "approvable" nonpoint source pollution management program to restore and protect coastal waters. An approvable program must include "enforceable policies," which are the methods by which the state assures the federal government that its proposed actions can be implemented. The consequences of a state's failure to develop and implement an approvable program include the withholding of up to 30 percent of the state's grant funds under Section 319 of the Water Pollution Control Act and Section 306 of CZMA.

Ms. Brooks outlined the operation of the CZMA in Virginia and warned that the existing E&S law may not pass federal scrutiny. The CZMA requirement that a state exert control over private and public land and water uses and natural resources in the Coastal Zone may be met by one of these methods: state establishment of criteria for local implementation, direct state water and land use planning, or case by case review of land and water use decisions. Virginia's Coastal Resources Management Program is a "networking" program, under which the Council on the Environment coordinates six state agencies and eight programs. The Program was approved by the Environmental Protection Agency and the National Oceanic and Atmospheric Administration (NOAA) in 1986, and currently provides Virginia with federal funding of over $2.3 million. One of the eight activities included in Virginia's Program is Nonpoint Pollution Control, administered by the Department by setting state standards for local implementation.

Federal regulations provide that where the state sets standards for local implementation of a program, it must be able to assure compliance. The E&S law was approved with the assumption that the state could control local activities to assure compliance. Ms. Brooks expressed concern that, with the implementation of Section 6217 of the CZMA, federal review will focus on the state's E&S program. Adequate local enforcement of E&S programs will not satisfy the enforceable policies requirement of Section 6217; the issue that NOAA and EPA will address is whether the state has the ability to stop violations.

E. Characterization of Complaints Received by the Division

The third meeting of the subcommittee also featured a presentation by James W. Cox of the Division analyzing the 193 complaints received by the division in the 1991-1992 fiscal year. A summary of the complaints, with examples of types of complaints, is attached as Exhibit H. In 44 instances, the complaint was found not to involve a violation of a local ordinance or state law. Several complaints were found to involve more than one type of violation. The most common violations were found to be inadequate inspections (78), followed by inadequate enforcement (72), projects started without an approved E&S plan (58), and inadequate plan review (42). Other problem areas included post-development runoff problems (35), possible conflicts of interest (24), and inadequate local ordinances (4).

Mr. Cox also submitted a list of possible options to address each of the problem areas identified for consideration by the joint subcommittee. Options mentioned included increased training of inspectors and plan reviewers; certification programs for reviewers, inspectors and contractors; increasing the state role in enforcement; and rescinding state approval of inadequately implemented local program elements.

F. Testimony at Public Hearings

The joint subcommittee heard testimony on a wide variety of issues relating to the effectiveness of erosion and sediment control programs at its five public hearings.

1. Harrisonburg.

Following the second meeting, the subcommittee conducted a public hearing at the Convocation Center at James Madison University. Harold Weikle, assistant director of water production for the City of Salem, described the effect of soil erosion on water treatment plants. A high degree of suspended particles, or turbidity, in raw water increases the costs and the time required to treat water. The city traced the increased sediment in its water source, the North Fork of the Roanoke River, to soil erosion from developments in upstream jurisdictions.

Bob and Carol Whitesid of Roanoke County described their problem with inadequate enforcement of the local erosion control program. They complimented personnel of the Division of Soil and Water Conservation for their assistance. However, their problem has not been solved because the division cannot require the locality to take enforcement actions to ensure compliance with its E&S control program.

2. Danville.

At the Joint subcommittee's second public hearing in Danville, fifteen speakers commented on various aspects of E&S programs. Issues raised included the need for more training of local officials and education of contractors, the exemptions for certain single-family dwellings and agriculture, and the need for the state to step in where a locality cannot or will not administer its program effectively. John Barr, Napier Deals, Liz Parcells and William Leary expressed concern about the increased sedimentation in Smith Mountain Lake. Craig Bell applauded the growing awareness of the issue, and cited new ordinances in Bedford and Franklin Counties as positive steps to controlling erosion and sedimentation.

3. Abingdon.

Eleven citizens addressed the joint subcommittee at its third public hearing held in Abingdon on October 15, 1992. Two speakers expressed concern that rapid residential subdivision development in the Cloverdale region of Botetourt County has caused serious erosion and sedimentation. Specific recommendations included (i) granting the responsible state agency the authority to enforce implementation of developers' plans if the county fails to do so; (ii) reviewing (and perhaps strengthening) the minimum requirements for erosion and sediment control measures as established by the state; and (iii) clarifying vague phrases (such as "adequate channel") in the state regulations.

Rita Gardner of Carroll County identified problems with approval of an inadequate E&S control plan and county reluctance to enforce its program. She recommended that E&S control plans be required to be prepared and certified by a professional engineer.

Joe Kelly of the Big Walker Soil and Water Conservation District agreed that there are problems with the current system, notably including poor enforcement, inconsistent application of the ordinance, and lack of knowledge of the legal requirements of the program. He urged that agriculture and single family dwellings remain exempt from E&S programs because the existing federal agricultural laws create sufficient incentives for the implementation of erosion control measures.

Neal Kilgore of Abingdon, an employee of the Division of Soil and Water Conservation, suggested that the major problem of lack of program enforcement could be helped by giving soil and water conservation districts responsibility for signing off on developer compliance. This procedure would, according to Mr. Kilgore, help avoid situations where a conflict of interest by members of a governing body has contributed to lax enforcement.

George Howard of Westgate argued that the reason E&S control programs are not being enforced is that the law is not fair. The exemptions for some single family homes, agriculture, forestry and other land disturbing activities, he argued, result in discrimination against the construction industry.

Pam Robins of Cedar Bluff complained that the lack of stormwater drainage measures at the Tazewell County Airport has resulted in contamination of the spring which provided her water supply. Some responsibility for the problems is attributable to the status of the airport authority which developed the property and uncertainty as to the county's power to require the authority to abide by its program. Neither the county nor the authority have funds available to assist persons damaged by the absence of adequate permanent stormwater control measures.

Two Abingdon residents described an unfortunate situation where land was cleared for development, but the developer filed a bankruptcy proceeding before stabilizing the area. The developer posted a bond for E&S control, but the bond was allowed to expire. Recommendations for addressing this type of occurrence included giving the Division authority to enforce the state law, and holding local officials accountable if they let a bond expire.

Bernard Smith, who serves on the Department of Forestry's water quality task force, urged that forestry continue to be exempted from the state E&S Control Law. He based his arguments on the success of the department's voluntary best management practices program, which has had success in reducing stream siltation. Mr. Smith noted that it may be necessary to authorize the State Forester to shut down operators whose failure to implement BMPs results in serious erosion and sedimentation.

4. <u>Williamsburg.</u>

The subcommittee heard from 20 speakers at its fourth public hearing in Williamsburg. Several speakers complained that the current system does not adequately prevent soil erosion and sedimentation. Specific complaints include the reluctance of local government to exercise remedies against developers who violate E&S guidelines; the propriety of the existing exemption for forestry, including small-scale urban logging operations; the lack of authority of the Division to levy fines and institute legal proceedings against developers who violate local program requirements; disregard of local ordinances by the officials responsible for administering the ordinances; conflicts of interest between developers and local government officials; and the burdensome nature of current procedural requirements in issuing stop-work orders and other enforcement actions.

Specific recommendations of proponents of greater enforcement of local E&S programs included more education of both staff and the public; granting the Division the power to fine violators and take other enforcement actions; requiring contractors to retain an employee certified in E&S practices; establishing a toll-free line to report violations; streamlining the process for

issuance of stop work orders; raising the $1,000 cap on plan review fees to help defray the cost of program administration; and increasing the limit on civil penalties from $100 to $300 per violation.

Not all speakers concurred that corrective steps were appropriate. A representative of the Peninsula Homebuilders Association warned that requiring increases in the implementation of E&S measurers could increase the cost of housing, and noted that a great deal of the nutrient pollution in the Chesapeake Bay results from air emissions from the midwest. Representatives from James City County and the City of Chesapeake objected to giving the Division the ability to prosecute violators of E&S programs at the local level. Other speakers also defended the existing exemptions of agriculture and forestry from the state E&S law. Opponents of greater state authority to institute enforcement actions recommended that the subcommittee focus its attention on providing assistance and educating contractors.

5. **Richmond.**

Ten people addressed the joint subcommittee at its final public hearing in Richmond on December 11 1992. Representatives of local government complained that the current cap of $1,000 on the fee that may be charged for plan review and approval deprives localities of the ability to operate self-funding programs. The representatives also noted that the $100 limit on a civil penalties is too low to deter program violators, particularly due to the provision that a civil penalty can only be assessed for a continuing violation once every ten days.

Blair Wilson of York County added that the current procedure for issuance of stop work orders was inadequate, and should allow localities to stop building construction as well as land-disturbing activities. He also supported giving the Division the ability to administer programs that fail to meet minimum standards and the authority to issue stop work orders if a locality fails to enforce its program after written notice. He endorsed a statewide certification requirement for program administrators and inspectors.

Larry Land, speaking on behalf of the Virginia Association of Counties, and Barbara Wrenn, representing the Virginia Municipal League, urged that localities retain program control, and stressed the need for stronger educational programs and training opportunities. Recommendations included establishing a matching grant program for localities, removing exemptions for types of land-disturbing activities, requiring state projects to meet local program requirements, and allowing representatives of local government to sit on the Soil and Water Conservation Board. In addition, a model ordinance containing minimum program requirements should be established.

Ed Hurley, a member of the Amelia County Board of Supervisors, echoed comments made by Don Schardine of Stafford County regarding the stop work order process. The requirement that "substantial" violations exist has been construed by a court as too vague a standard.

Norman Jeffries and Gil Miles suggested that soil and water conservation districts be given a more significant role in administering erosion and sediment control law. Jeff Perry, a Henrico County employee, expressed concern that the study was focusing on localities while the source of problems is the activities of contractors. He stated that requiring contractors to be certified would be preferable to giving the DSWC the authority to take over unsatisfactory programs. Patty Jackson of the Lower James River Association noted that the intent of the state law is not being met, and urged that the DSWC be given greater powers, including the ability to issue stop work orders, in order to prevent damage to the state's streams and rivers.

V. FINDINGS AND RECOMMENDATIONS

The joint subcommittee, together with the advisory council, found that erosion and sediment control programs are not being uniformly administered across the Commonwealth. While many local programs are effective in controlling soil erosion and sedimentation, others do not satisfy the minimum program requirements established by the Erosion and Sediment Control Law and regulations of the Board of Soil and Water Conservation.

The joint subcommittee concluded that the ESCL should be amended to address several shortcomings. The suggested amendments to the ESCL are contained in proposed legislation introduced in the 1993 Session as House Bill 1574, a copy of which is included as Appendix I. A discussion of individual findings and recommendations follows. The recommendations include reference to the section of the proposed legislation which address the recommendation.

A. Approval of Local Programs

The ESCL provides that after the Board has approved a local program, no mechanism exists to ensure that the locality administers its program. If the Commonwealth's goal of reducing erosion and sedimentation from land-disturbing activities state-wide is to be implemented, those localities which do not operate programs that meet minimum performance standards, due to either a lack of resources or willingness, should not be allowed to retain sole responsibility for program administration.

The ESCL's current structure of giving soil and water conservation districts the obligation to operate E&S control programs unless a county, city or town has adopted a program should be maintained. However, if the locality and the district do not administer programs that meet minimum statewide performance standards, the Board should be able to develop and administer an E&S program for the jurisdiction. The current program review authority of the Board does not provide any mechanism to address any deficiencies that may be discovered. The joint subcommittee rejected the option of dividing programs into discrete elements and allowing local programs to be certified in one or more elements.

Recommendation 1: The Board should establish minimum standards of effectiveness for erosion and sediment control programs statewide. (Subsection D of § 10.1-561).

Recommendation 2: The Board should develop a schedule, criteria and procedures for reviewing and evaluating the effectiveness of all erosion and sediment control programs. The Board should periodically review and evaluate all E&S control programs to determine if they meet the minimum effectiveness standards. (Subsection E of § 10.1-561).

Recommendation 3: If the Board's review of a local program reveals that the program is not being administered, enforced or conducted in a manner that meets the minimum effectiveness standards, and the deficiencies are not corrected after technical assistance is offered, the Board shall revoke its approval of the program. The locality is entitled to a hearing and judicial review before its program approval can be revoked. (Subsection E of § 10.1-562).

Recommendation 4: If a local program of a county, city or town loses approval, the soil and water conservation district shall adopt an erosion and sediment control program for the locality. (Subsection F of § 10.1-562).

Recommendation 5: Where there is no district, or where the district does not adopt and operate a program meeting state standards, the board shall adopt an E&S control program for the district or locality.

B. Education and Technical Assistance

Many of deficiencies in the administration of local erosion control programs are attributed to a lack of training and assistance from the state. The Department should place a greater emphasis on improving the effectiveness of local programs by increasing the level of education and technical assistance provided to localities.

Recommendation 6: The Board should re required to provide technical assistance to localities, and to conduct educational programs for localities. (Subsection B of § 10.1-561).

C. Compliance by Government Agencies with Local Requirements

State agencies are required to conduct projects involving land disturbance in accordance with statewide regulations promulgated by the Board. Localities are now authorized to enact programs with more stringent requirements than those of the state program. Granting localities jurisdiction over state projects would not be feasible. Though they are not required to do so, federal agencies generally submit plans to the Department for approval. In these cases, the government agency should comply with local requirements.

Recommendation 7: The Department should not approve plans submitted by a state or federal agency which do not satisfy the more stringent requirements of a local program. The restriction applies only if the locality submits its requirements to the Department. (Subsection B of § 10.1-504).

D. Updating Local Ordinances

The Division estimated that one-half of the 171 local program ordinances have not been updated to reflect the changes made to the ESCL in 1988. The joint subcommittee agreed that ordinances should be updated promptly. However, it rejected suggestions that local programs be required to adopt a model statewide ordinance or provide for automatic revisions to local programs.

Recommendation 8: The Board is urged to consider whether a local ordinance reflects current laws and regulations in determining whether a local program satisfies minimum standards of effectiveness; no changes to the law were recommended.

E. Certification of Local Program Personnel

The joint subcommittee identified inadequate plan reviews and project inspections as problems in the implementation of E&S control programs. Currently, the Division offers a voluntary certification program for local government personnel. The subcommittee concluded that requiring certification of local program personnel, as is required now of local building code personnel, would increase the effectiveness of programs. In addition, any person preparing a plan, included licensed professional engineers, should be certified in plan preparation and review. This would reduce the problem of local program plan reviewers spending resources on inadequate plans. Local programs need one year to phase in the mandatory certification requirements. If a locality chose not to have certified personnel operating its program, the program could have its approval revoked by the Board.

Recommendation 9: The Board's voluntary certification program should be expanded to (i) offer programs in program administration, plan preparation and review, and project inspection to personnel of localities and districts and other persons, (ii) offer education and training programs, and (iii) allow the Board to charge attendance fees to cover the costs of the program. (Subsection F of § 10.1-561.1).

Recommendation 10: The minimum standards of program effectiveness to be established by the Board should contain a requirement that, within one year following the updating of the local program ordinance to comply with the new requirement, each program must have a certified plan administrator, a certified plan reviewer, and a certified project inspector, who may all be the same person. Any program employee or agent currently certified by the Board will be "grandfathered." (§ 10.1-561.1).

Recommendation 11: The requirement for a certified plan reviewer, certified program administrator, and certified project inspector should include persons certified by the Board or employed by the program authority for less than one year if they are enrolled in the Board's training program. (§10.1-560).

Recommendation 12: All erosion and sediment control plans, except those for state agency projects should be prepared by a person certified by the Board in the area of plan preparation and review. (Subsection A of § 10.1-563).

Recommendation 13: The Board is urged to develop a voluntary training and certification program for employees of contractors at the site foreman level; no changes to the current law are recommended.

F. State Intervention to Enforce Programs

Property owners are often frustrated when violations of a local program are damaging their property and program officials do not enforce the program against violators. Localities should retain primary responsibility for enforcement of their programs. However, when a locality cannot or will not take enforcement action, the Department or the Board should be able to institute action against the violator. Before the state can act, the locality must be given notice and 30 days to act. Only owners of land damaged as a result of a program violation should be able to request state intervention. This remedy should be in addition to the Board's ability to revoke approval of local programs because a program may in the aggregate meet the minimum statewide effectiveness standards but fail to address specific violations. Where the violation occurs after land disturbing activities have been completed, the Board, rather than the Department, should be empowered to institute enforcement actions.

Recommendation 14. The Department should be empowered to issue a stop work order against program violators if a locality fails to respond to a program violation which is damaging someone's property. Before the Department can take action, (i) thirty days must have elapsed since the locality received notice from the landowner of the violation without acting, (ii) the state must give the locality notice of its intent to take action and give the locality ten days to institute enforcement action. The remedies the Department may exercise should be analogous to those available to the locality, including issuing emergency stop work orders, obtaining injunctions, and seeking civil penalties not to exceed $2,000 for violations of an order or injunction. (§ 10.1-569.1).

Recommendation 15: The Board should be empowered to take enforcement action against program violators, under the same conditions discussed under recommendation 14, where land-disturbing activities have been completed. In these situations, a stop work order issued by the Board should cover all construction activities on the site of the violation. (§ 10.1-569.2).

G. Clarifying the Procedure for Issuance of Stop Work Orders by Localities

Localities who attempt to enforce their programs by issuing stop work orders have found the procedure to be unduly cumbersome. The requirement that only the chief executive officer may issue the orders is unnecessary. Allowing localities to issue stop work order covering all construction activities, rather than only land-disturbing activities, would increase the effectiveness of the remedy. In many cases construction may continue after site work has ceased. Courts have found that the requirement that a violation justifying issuance of a stop work order be "substantial" is vague. Requiring that the site owner or operator be given notice and the right to accompany local officials on any inspections further impedes a locality's ability to enforce its program.

The current law requires that complaints of violations be received from the "designated enforcement officer;" clarifying this requirement would resolve any ambiguity. The current law may also be ambiguous with respect to the ability to issue stop work orders against persons who have commenced land-disturbing activities without obtaining an approved erosion control plan. The procedure now contemplates that the violator be sent a notice to comply with his plan. If the developer has not obtained a plan, it is not clear that a locality may issue a stop work order to cease his activities.

Recommendation 16: The requirement that the owner, occupier or operator be given notice of inspections and the opportunity to accompany inspectors should be deleted. (Subsection A of § 10.1-566).

Recommendation 17: The requirement that a violation of the law be "substantial" before a stop work order can be issued should be deleted. (Subsection C of § 10.1-566).

Recommendation 18: The language requiring that sworn complaints be received from the "designated enforcement officer" should be changed to include the person responsible for ensuing program compliance. (Subsection C of § 10.1-566).

Recommendation 19: The designee of the chief administrative officer of the locality, district, or Board, as applicable should be able to issue stop work orders. (Subsection C of § 10.1-566).

Recommendation 20: Where land-disturbing activities have commenced without an approved plan or permit, the law should clearly allow the issuance of stop work orders. (Subsection C of § 10.1-566).

Recommendation 21: Localities should be authorized to issue stop work orders covering all construction activities on the site if the owner has not completed corrective work (or obtained an approved plan or permit) within seven days following the issuance of an order requiring the cessation of land-disturbing activities. (Subsection C of § 10.1-566).

H. Commencement of Land-Disturbing Activities Without an Approved Plan

Many of the complaints received by the Division involved the commencement of land-disturbing activities by a developer who did not obtain an approved erosion and sediment control plan for the site. Increasing the penalty for starting work without a plan would decrease the frequency of this type of violation. Civil penalties provide a greater disincentive for violations than do the threat of criminal prosecutions. Localities are now authorized to adopt ordinances adopting a schedule of civil penalties for program violations, but the cap of $100 per violation is too low to effectively discourage such activities.

> *Recommendation 22*: The cap on civil penalties for starting land-disturbing activities without a plan should be increased to $1,000 per violation and $10,000 for a series of violations. (Subsection J of § 10.1-562).

I. Frequency of Assessment of Civil Penalties

The 1992 amendment to the ESCL authorizing localities to adopt ordinances establishing a schedule of civil penalties for program violations established a ceiling of $100 on the penalty for any violation. It also provides that violations arising from the same operative set of facts cannot be charged more frequently than once in any ten-day period. This limitation reduces the penalty to a $10 per day charge, which is insufficient to deter violations.

> *Recommendation 23*: The restriction on charging violators with a civil penalty no more often than once every ten days should be eliminated. (Subsection J of § 10.1-562).

J. Fees for Program Administration

Local programs may not charge applicants more than $1,000 for permits or plan approval. Many localities are not able to finance the costs of administering their programs with this cap on the fees.

> *Recommendation 24*: The $1,000 limit on application fees should be eliminated, and local programs should be able to charge applicants an amount adequate to cover the costs of program administration, subject to the current restriction that fees not exceed an amount commensurate with the services rendered.

K. Exemptions from the Erosion and Sediment Control Law

The existing exemptions for agricultural and forestry activities are controversial. These activities may result in greater amounts of soil loss than development. Exempting these activities has been called inequitable because the law applies primarily to builders and contractors.

Farmers with highly erodible land are required to prepare erosion control plans by 1995 to comply with requirements of the 1985 Food Security Act. This program should be given an opportunity to be implemented before revoking the agricultural exemption.

The voluntary erosion control program conducted by the Department of Forestry has achieved many of its goals. Consequently, there is no compelling reason for removing the exemption at this time.

The exemption for single family homes not built in conjunction with multiple construction in subdivision development is problematic. No justification has been provided for allowing certain localities in Northern Virginia and the Smith Mountain Lake drainage area to regulate these single family homes, but not giving other localities this power. Single family homes build outside of subdivisions may disturb large areas of land, and any exemption should be based on the size of the disturbed area. The current exemption for disturbed land areas of less than 10,000 square feet, or approximately one-quarter area, is too large; an area half that size would be more appropriate.

Recommendation 25: The existing exemption for agriculture activities should not be changed, though this issue should be reexamined after implementation of the requirements of the Food Security Act of 1985; no changes to the current law are recommended.

Recommendation 26: The existing exemption for forestry activities should not be deleted; no changes to the current law are recommended.

Recommendation 27: The exemption for single family homes, regardless of the size of the disturbed area, which are not built in conjunction with subdivision development, should be removed. (§ 10.1-560).

Recommendation 28: The exemption for land areas of less than 10,000 square feet should be reduced to areas of less than 5,000 square feet.

L. Enforcement by Aggrieved Landowners

Owners of property which sustains or is threatened with economic damage as a result of a violation of a local program are not entitled to remedies under the erosion and sediment control law. Such aggrieved landowners may bring expensive and uncertain civil cases against the violator under common law doctrines of trespass or nuisance. These options are not adequate. However, to avoid the possibility that people with indirect or hypothetical injury might bring frivolous suits, these remedies should be limited to aggrieved owners of property sustaining or threatened with economic damage as the result of a violation of a local program.

Recommendation 29: Aggrieved owners of property sustaining or threatened with economic damage as the result of a violation of a local program should be able to apply for an injunction to stop the violation. (Subsection C of § 10.1-569).

Recommendation 30: Aggrieved owners of property sustaining or threatened with economic damage as the result of a violation of a local program should be able to pursue a civil action against the violator for damages. (Subsection D of § 10.1-569).

M. Agreements in Lieu of Plans for Single Family Homes

The preparation of an E&S control plan may be unduly expensive and burdensome for the construction of a single family home. One option to reduce this burden is to allow the owner and the locality to enter into an agreement specifying conservation measures which must be implemented in the home's construction.

Recommendation 31: Owners should be able to substitute an agreement in lieu of an erosion and sediment plan for the construction of a single family residence if the agreement is signed by the plan-approving authority. (Subsection A of § 10.1-563).

VI. CONCLUSION

The legislation produced by the joint subcommittee, House Bill 1574, was passed by the 1993 Session of the General Assembly, but not in the same form as introduced. A summary of the substantive changes in the bill as introduced and as passed by the Senate and House of Delegates is attached as Appendix J.

The members of the joint subcommittee established pursuant to HJR 178 believe that their study of the necessity of improvement in erosion and sediment control programs was necessary due to the importance of effective control of erosion and sedimentation in protecting the lands and waters of the Commonwealth. The testimony and materials provided to the subcommittee by all contributing individuals and organizations were invaluable to all in understanding and evaluating the issues. The joint subcommittee is grateful to the members of the advisory council for their participation in its deliberations.

Respectfully submitted,

The Honorable W. Tayloe Murphy, Jr., *Chairman*
The Honorable Joseph V. Gartlan, Jr., *Vice Chairman*
The Honorable Howard E. Copeland
The Honorable James H. Dillard III
The Honorable George W. Grayson
The Honorable Charles R. Hawkins
The Honorable Jackson E. Reasor, Jr.

1992 SESSION

LD4317376

HOUSE JOINT RESOLUTION NO. 178

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Senate Committee on Rules
on March 2, 1992)

(Patron Prior to Substitute—Delegate Murphy)

Establishing a joint subcommittee to examine the necessity of improvement in erosion and sediment control programs.

WHEREAS, in 1973, the Virginia General Assembly adopted the erosion and sediment control law and revisions were made in 1988; and

WHEREAS, each local government in Virginia is required to adopt and enforce an erosion and sediment control ordinance; and

WHEREAS, effective control of erosion and sediment is a necessary component of Virginia's commitment to the Chesapeake Bay cleanup and the nonpoint source pollution goals and commitments of the 1987 multistate Chesapeake Bay Agreement as well as water quality outside of the Chesapeake Bay watershed; and

WHEREAS, since May 1989 staff of the Technical Services Bureau of the Division of Soil and Water Conservation has conducted individual program reviews of all 171 local erosion and sediment control programs and a full report was made to the Soil and Water Conservation Board in 1991; and

WHEREAS, the report stated that only 23 percent of existing local programs meet standards for adequacy; and

WHEREAS, since revision of the law in 1988 requiring update of local ordinances, only 47 percent of local ordinances have been updated; and

WHEREAS, the report determined that inspection and enforcement at the local level are the weakest elements of the program; and

WHEREAS, many citizens still prefer that inspection and enforcement remain at the local level where accesssibility to assistance is greater; and

WHEREAS, specific statutory authority necessary to ensure program compliance with the erosion and sediment control law does not currently exist, various options for improvements have been considered by staff and the Board, and barriers to effective implementation whether at the state or local level should be fully examined; now, therefore, be it

RESOLVED by the House of Delegates, the Senate concurring, That a joint subcommittee be established to examine the necessity of improvement in erosion and sediment control programs statewide including, but not limited to, finding ways that the Soil and Water Conservation Board can assist the local governing body in developing, enforcing and improving existing erosion and sediment control programs.

The subcommittee shall be composed of seven members as follows: four members from the House of Delegates to be appointed by the Speaker of the House and three members of the Senate to be appointed by the Senate Committee on Privileges and Elections. In addition, an advisory council to the subcommittee shall be convened upon the request of the joint subcommittee and may consist of representatives of local governing bodies, the Virginia Association of Counties, the Virginia Municipal League, the building industry, the general contracting industry, and the conservation districts and the conservation community.

The Division of Soil and Water Conservation and the Virginia office of the Chesapeake Bay Commission shall provide assistance upon request of the subcomittee.

The joint subcommittee shall complete its study in time to submit its findings and recommendations to the 1993 Session of the General Assembly as provided in the procedures of the Division of Legislative Automated Systems for the processing of legislative documents.

The indirect costs of this study are estimated to be $10,860; the direct costs of this study shall not exceed $5,040.

Implementation of this resolution is subject to subsequent approval and certification by the Joint Rules Committee. The Committee may withhold expenditures or delay the period

for the conduct of the study.

Official Use By Clerks	
Agreed to By The House of Delegates	**Agreed to By The Senate**
without amendment ☐	without amendment ☐
with amendment ☐	with amendment ☐
substitute ☐	substitute ☐
substitute w/amdt ☐	substitute w/amdt ☐
Date: _____	Date: _____
_____	_____
Clerk of the House of Delegates	Clerk of the Senate

Appendix B

ADVISORY COUNCIL
(HJR 178)

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Appendix C

Adopted by the Virginia Soil & Water Conservation Board
July 11, 1990

BOARD POLICY

Subject: Erosion and Sediment Control Law - Enforcement

Objectives:

To Provide for:

1. Role clarification to the Department of Conservation and Recreation staff for implementing the Erosion and Sediment Control Law and Regulations.

2. The Board's procedure of handling erosion and sediment control referrals from the staff.

Policies:

1. Role of staff for implementing the E&S Law and Regulations:

   A. Schedule a periodic review and evaluation of each erosion and sediment control program pursuant to Section 10.1-561.

   B. During the inspection, the reviewer should discuss with the local contact the general compliance of the local program with special emphasis on any problems or concerns.

   C. A written report of the inspection should be prepared and a copy furnished to the locality.

   D. Where a local program is not being enforced to the Board's standard, the report should list the deficiencies in detail and specify the necessary corrective actions. The report should be sent to the chief executive of the locality with a request for a meeting to discuss the contents of the report. Agreement should be reached at that meeting regarding the actions the locality will take to correct the deficiencies and the timetable for these actions. The staff should follow this meeting with a letter memorializing this detailed agreement.

E. If the locality is unwilling to agree to take the necessary corrective actions, or if it fails to make good faith effort to meet the agreed upon schedule, the situation should be referred to the Board.

2. Board Procedure for Handling Erosion and Sediment Control Referrals:

A. A careful reading of the existing Erosion and Sediment Control Law reveals that it is intended that the Board be able to enforce the Law although a clear set of options for doing so are not delineated.

Under the present law, upon receipt of a referral from the staff, the board will write a letter to the chief executive officer of the locality or local governing body. This letter will review in content or by reference the deficiencies in the local program and again request that the locality work with the staff to achieve full program compliance. This letter should be signed by the Board Chairman.

September 3, 1991

"Evaluation of Virginia's Local Erosion and Sediment Control Programs"

Technical Services Bureau
Division of Soil and Water Conservation
Department of Conservation and Recreation

Background

Since May, 1989, Bureau staff have been conducting individual reviews, as required by the revised 1988 Law, of all 171 local erosion and sediment (E&S) control programs.

At the July, 1990, Soil and Water Conservation Board (SWCB) meeting in Blacksburg, a summary of the Martinsville and Harrisonburg programs was presented as examples of the weakness in the state law relative to forcing localities to enforce their programs. At that time, the statewide review had only covered some 60 programs, and it was determined that a full report on the 171 programs would be presented to the Board in May, 1991, to allow for a comprehensive analysis of the local E&S programs in total. Those reviews were completed April 1, 1991.

Program reviews consist of a meeting between the regional E&S Specialist and the local Program Administrator and his/her staff in which the following items are discussed:

1. Changes needed in the local ordinance in order to comply with the state law and regulations.

2. The plan review and permitting process.

3. The inspection process.

4. The enforcement procedures followed by the locality.

Following the office meeting, division staff accompany the local officials on a tour of local sites to evaluate the way in which the program is actually implemented in the field. Each of the 171 reviews was followed up with a written document prepared by the Specialist in which each aspect of the local program was thoroughly evaluated and specific recommendations for improvement were provided.

During the review process, the program review information was consolidated into a database which could be used to rate the adequacy of local E&S programs; highlight the strengths and weaknesses; and direct future work efforts. The criteria used in rating each aspect of the program is available upon request. An ideal program would score 20 points. An adequate program would score 15 points distributed as follows:

Ordinance	4
Plan Review/Permitting	4
Inspection	4
Enforcement	3
	15 (out of 20 point maximum)

Analysis

As of April 1, 1991, 40 of 171 (23%) local programs met the 15 point standard for adequacy. The ratings ranged from 0 to 19 points. Because this is the first time a comprehensive survey of this nature has been performed, there is no means to evaluate a "trend" in local program implementation. A closer look at some statistics does reveal a consistent profile of the present status of the implementation of these programs statewide.

Ratings by Individual Elements

	Meets Standards	Does Not Meet Standards
1. Ordinance	47%	53%
2. Plan Review	54%	46%
3. Inspection	28%	72%
4. Enforcement	42%	58%

The above ratings have also been displayed graphically as bar graphs.

Four bar graphs are attached to better illustrate the ratings distribution.

Ratings vs. Growth

Population growth data for 1980-1990, as published by the Virginia Department of Economic Development, were used to evaluate the bottom, middle and top 20 growth rate localities against their program ratings.

Five of the bottom 20 localities, one of the mid-20 and ten of the top 20 localities exceeded 15 points.

The bureau believes that this supports the theory that improved programs are a direct result of local response to growth pressures and citizen awareness. The slow-growth communities have very little activity and can run a very simple program well. The high-growth communities have responded with improved programs and are often self-sufficient. The middle growth communities are struggling to improve their programs and are frequently unprepared to control several medium-to-large projects that are being constructed concurrently. Areas adjacent to the "urban crescent" and Roanoke metropolitan area fit the profile of mid-growth communities and are typically where technical assistance by this staff is most useful.

Program Ratings vs. Disturbed Acreage

The bureau has been collecting information on disturbed acreage for 1990 by locality as a means to measure the pollution reduction impact of the urban programs overall. As a supplement to the growth analysis, disturbed acreage was also plotted against program ratings. The general trend revealed that increased disturbed acreage and better programs are related.

Enforcement Ratings vs. Disturbed Acreage

As a subset of the previous category, a comparison of the lowest, middle and top disturbed acreage communities and enforcement rating was developed. Once again, the trend is that enforcement ratings improve as more acreage is disturbed.

Conclusions

The evidence developed during the course of this statewide survey generally leads to the following conclusions:

1. According to the analysis method adopted by the bureau, only 23% of existing local programs meet the standards for adequacy.

2. The process of program reviews has been intensified since 1990. The law requiring updated ordinances came into effect July 1, 1988. To date, only 47% of the ordinances have been updated. Other program elements based upon outdated ordinances are actually even less effective than rated at fulfilling legislative intent.

3. Inspection and enforcement at the local level are the weakest elements of the program. Inspector training and certification should eventually improve the inspection element; enforcement is more difficult to influence. The present law acts to restrain the bureau from being able to direct a locality to improve its program with the threat of some penalty.

LOCAL PROGRAM RATING GUIDE

Ordinance

0 - Unable to locate ordinance.

1 - Ordinance not updated since it was originally passed (based on 1973 Law).

2 - Ordinance updated by 1982 to include General Criteria and reference to 1980 E&S Handbook.

3 - Ordinance revised after 1988 Law changes in effect but contains errors and/or no available local options included.

4 - Ordinance revised after 1988 Law changes, mostly correct but not all local options included.

5 - Ordinance revised after 1988 Law changes, virtually no errors and includes all options available.

Inspections

0 - E&S inspections not performed.

1 - Inspections performed only when there are complaints.

2 - Inspections performed at beginning (initial installation of controls) and/or end of project (final stabilization).

3 - Inspections performed at beginning and end of project and at irregular unplanned intervals.

4 - Inspections performed at beginning and end of project, after runoff producing storm events and at a regular frequency (but not at least once every two weeks).

5 - Inspections performed at beginning and end of project, within 48 hours after runoff producing storm event and at least once every two weeks during construction.

Enforcement

0 - No use of available enforcement options when there are repeated E&S violations and/or projects frequently start without approved E&S plans.

1 - Use of inspection reports and verbal warning only to deal with repeated violations

2 - Use of notice to comply after repeated violations are noted on inspection reports; however, no use of further enforcement when necessary.

3 - Use of notice to comply and when notice to comply is ignored or not adequately satisfied, permit revocation.

4 - Use of notice to comply and "stop work order" when notice to comply is ignored; however, local government does not go any further with enforcement when necessary (i.e., pull bond and or court).

5 - In addition to all above-noted enforcement procedures, the local government will pull bond, administer administrative fines and/or go to court when necessary.

Plan Review/Permitting

0 - Plans are not reviewed as total responsibility is thought to rest on designer's shoulders.

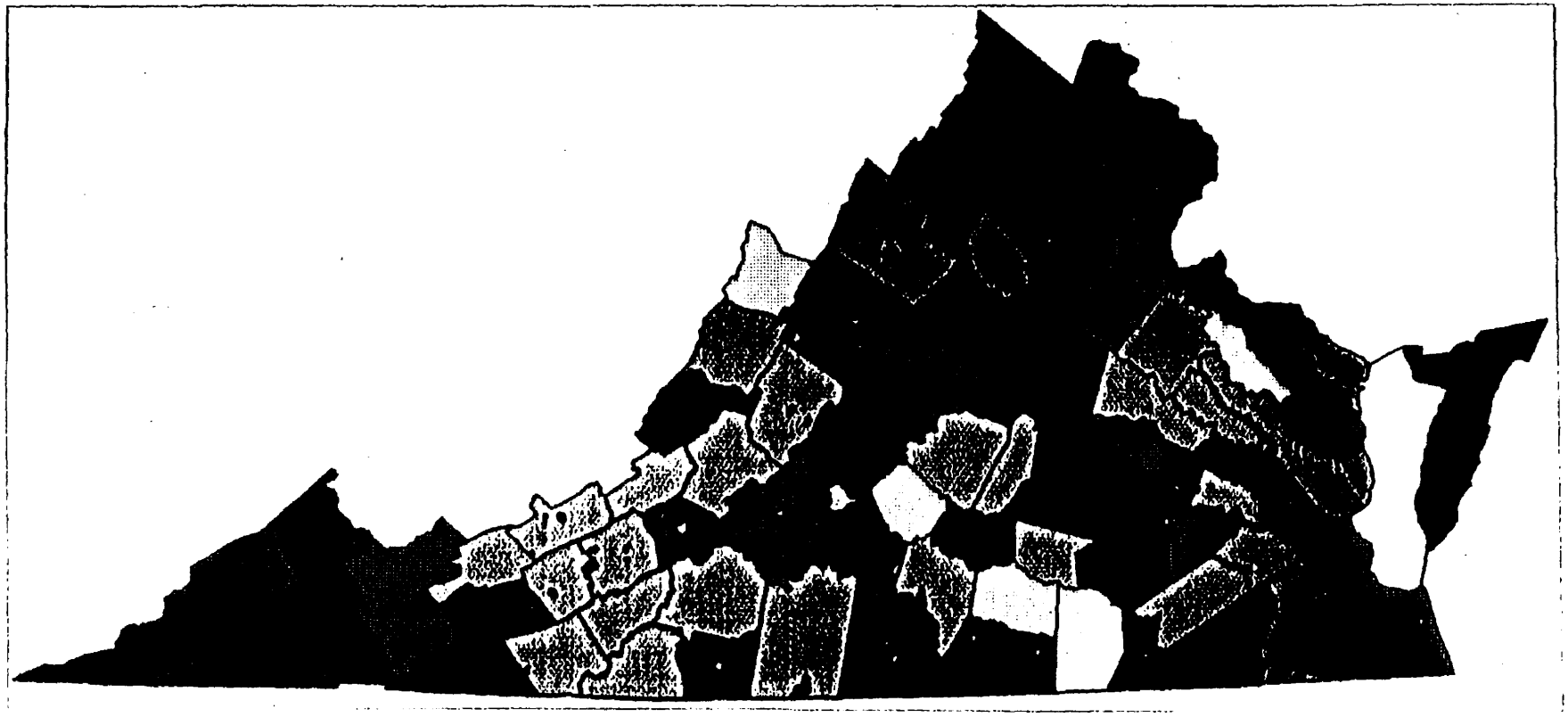
1 - Plans are reviewed but not according to state minimum criteria.

2 - Plans are reviewed according to state minimum criteria for temporary E&S measures but not for post-development stormwater management considerations.

3 - Plans are reviewed according to state minimum criteria, but land-disturbing permit and/or building permits are issued before plan is approved (or permit fees do not adequately reflect locality's cost for plan review, inspection and permitting).

4 - Plans are reviewed according to state minimum criteria and permits are issued properly.

5 - Plans are reviewed by more stringent standards than the state minimum standards and permitting process is adequate.



Local E&S Program Rating Distribution

May, 1991

- 0 - 4 Total Points
- 5 - 9 Total Points
- 10 - 14 Total Points
- 15 - 20 Total Points

RESULTS OF REVIEWING 171 LOCAL E&S PROGRAMS

DOES NOT MEET STANDARDS

1.	ORDINANCE	53%
2.	PLAN REVIEW/PERMITTING	46%
3.	INSPECTION	72%
4.	ENFORCEMENT	58%

CONCLUSIONS

The evidence developed during the course of this statewide survey generally leads to the following conclusions:

1. According to the analysis method adopted by the bureau, only 23% of existing local programs meet the standards for adequacy.

2. The process of program reviews has been intensified since 1990. The law requiring updated ordinances came into effect July 1, 1988. To date, only 47% of the ordinances have been updated. Other program elements based upon outdated ordinances are actually even less effective than rated at fulfilling legislative intent.

3. Inspection and enforcement at the local level are the weakest elements of the program. Inspector training and certification should eventually improve the inspection element; enforcement is more difficult to influence. The present law acts to restrain the bureau from being able to direct a locality to improve its program with the threat of some penalty.

4. Additional analysis of the law is necessary in order to streamline implementation of new changes to the law and to bring all programs up to an adequate standard.

OPTIONS TO BE CONSIDERED

1. No change.

2. Modify the current law to give the Board clear authority to institute legal actions to ensure compliance by local governing bodies with their ordinances.

3. Modify the current law to empower another state agency to enforce the state law in specific cases of non-compliance upon request of the Board. An example would be the Virginia Water Control Board's authority associated with the State Water Control Law.

4. Modify the law to allow the Board to re-assume responsibility for any program which, following a formal review and written warning, does not meet the minimum standards noted in the law and regulations.

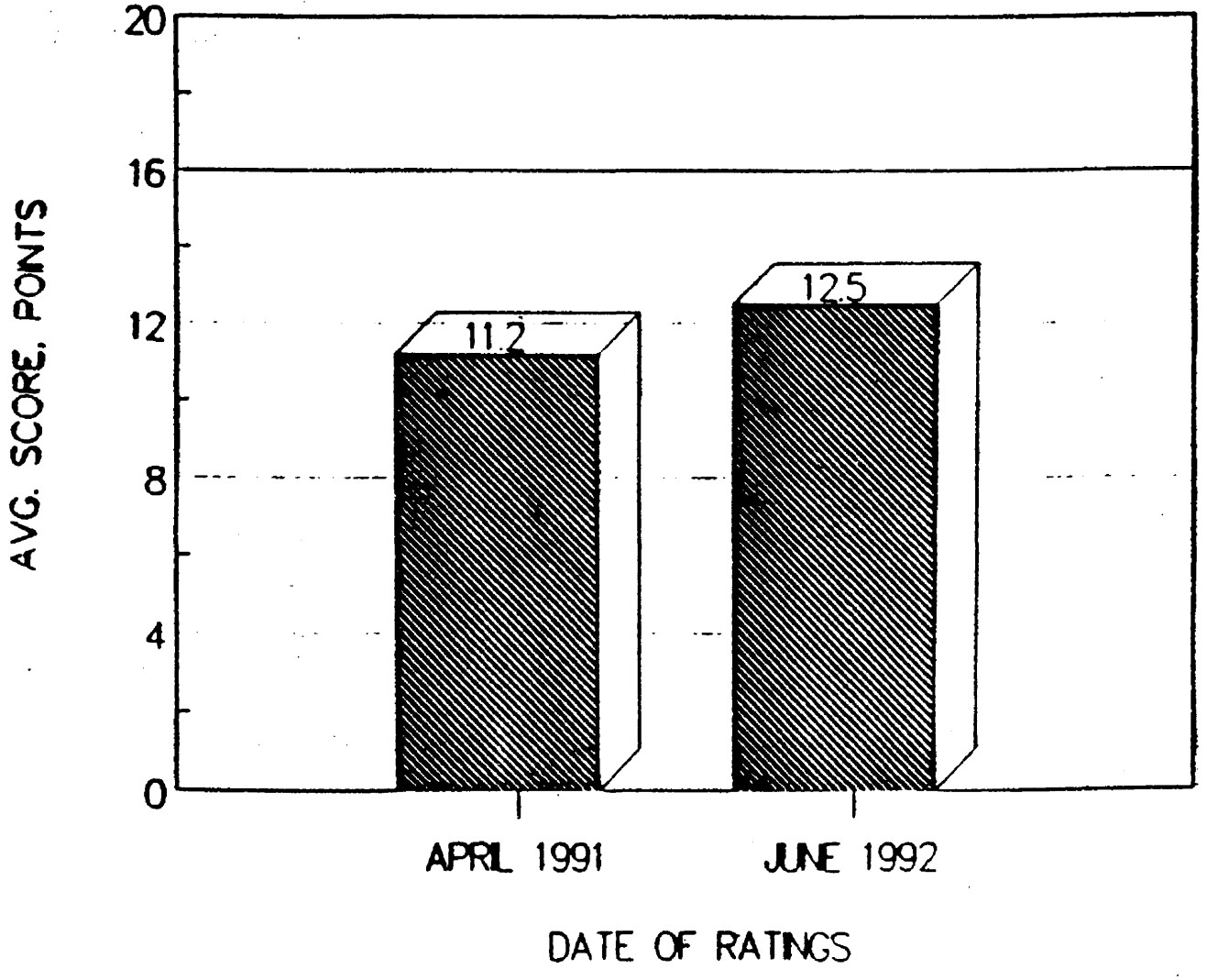
5. Modify the law to create a situation of dual administration of local programs. Specifically, allow the Board to issue "stop work" orders or levy administrative fines in a case where the local programs either cannot or will not take effective action.

6. Modify the law to allow local programs to be returned to the state for overall administration.

LOCAL E&S PROGRAM COMPLIANCE SUMMARY

	% PROGRAMS IN COMPLIANCE, 4 - 91	% PROGRAMS IN COMPLIANCE, 6 - 92
ORDINANCE	47%	48%
PLAN REVIEW/PERMITTING	54%	62%
INSPECTIONS	28%	39%
ENFORCEMENT	42%	59%
TOTAL PROGRAM	23%	28%

COMPARISON OF LOCAL E&S PROGRAM RATINGS



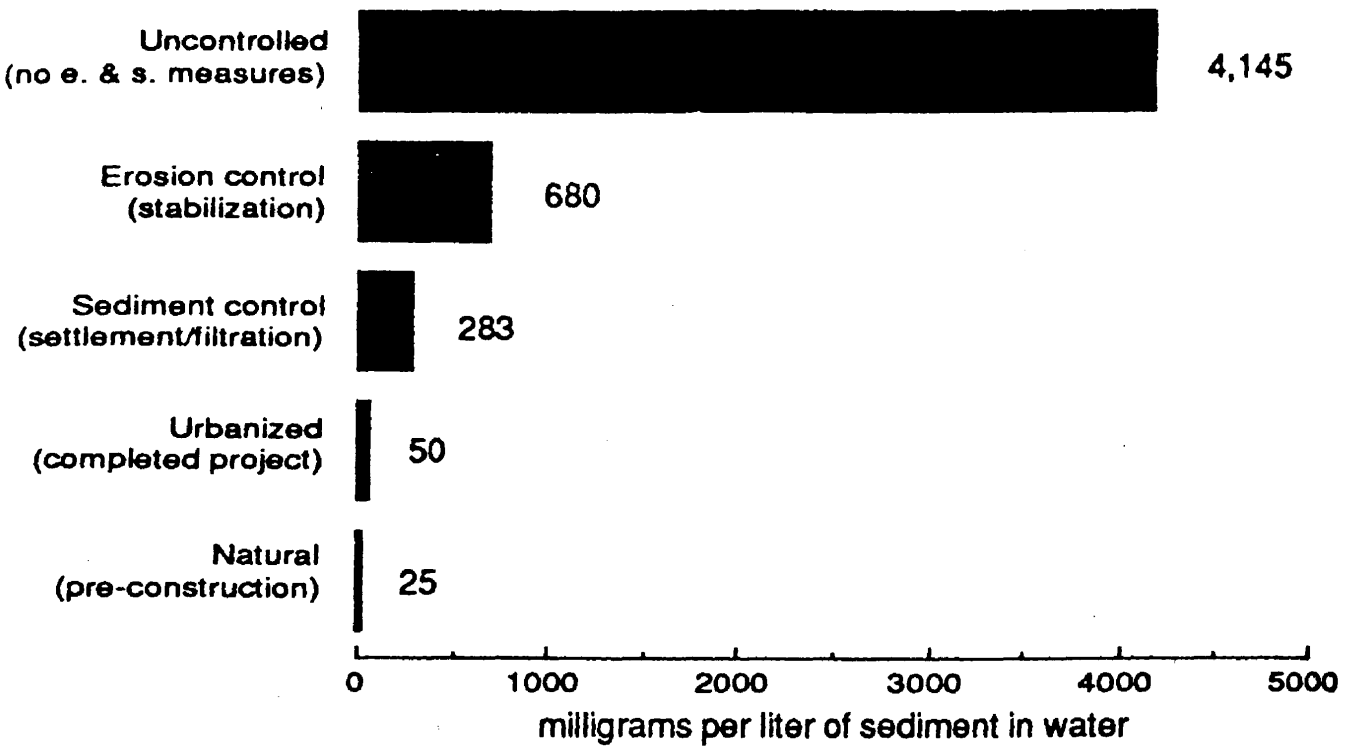


Figure 1. Effectiveness of erosion and sediment control activities in reducing soil loss. Source: James W. Cox, Division of Soil and Water Conservation.

Appendix H

CHARACTERIZATION OF E&S COMPLAINTS

(FY 91-92)

TOTAL	REASON*	# OF COMPLAINTS APPLICABLE (BY REGIONAL OFFICE)							
		ABI	CHA	DUB	RIC	STA	SUF	TAP	WAR
4	Ordinance Inadequacies	3	0	0	0	1	0	0	0
42	Plan Review Inadequacies	3	1	10	6	14	1	3	4
78	Inspection Inadequacies	6	6	16	13	12	7	13	5
72	Enforcement Inadequacies	3	5	17	12	9	8	17	1
58	Project Started Without Approved Plan	4	5	16	4	8	0	18	3
35	Post-development Runoff Problems	2	1	8	7	7	3	4	3
24	Conflict of Interest	2	3	10	1	2	0	6	0
44	Project Not a Violation of Local Ordinance or State Law (False Alarm)	1	1	8	3	14	3	2	12
357		*24*	*22*	*85*	*46*	*67*	*22*	*63*	*28*

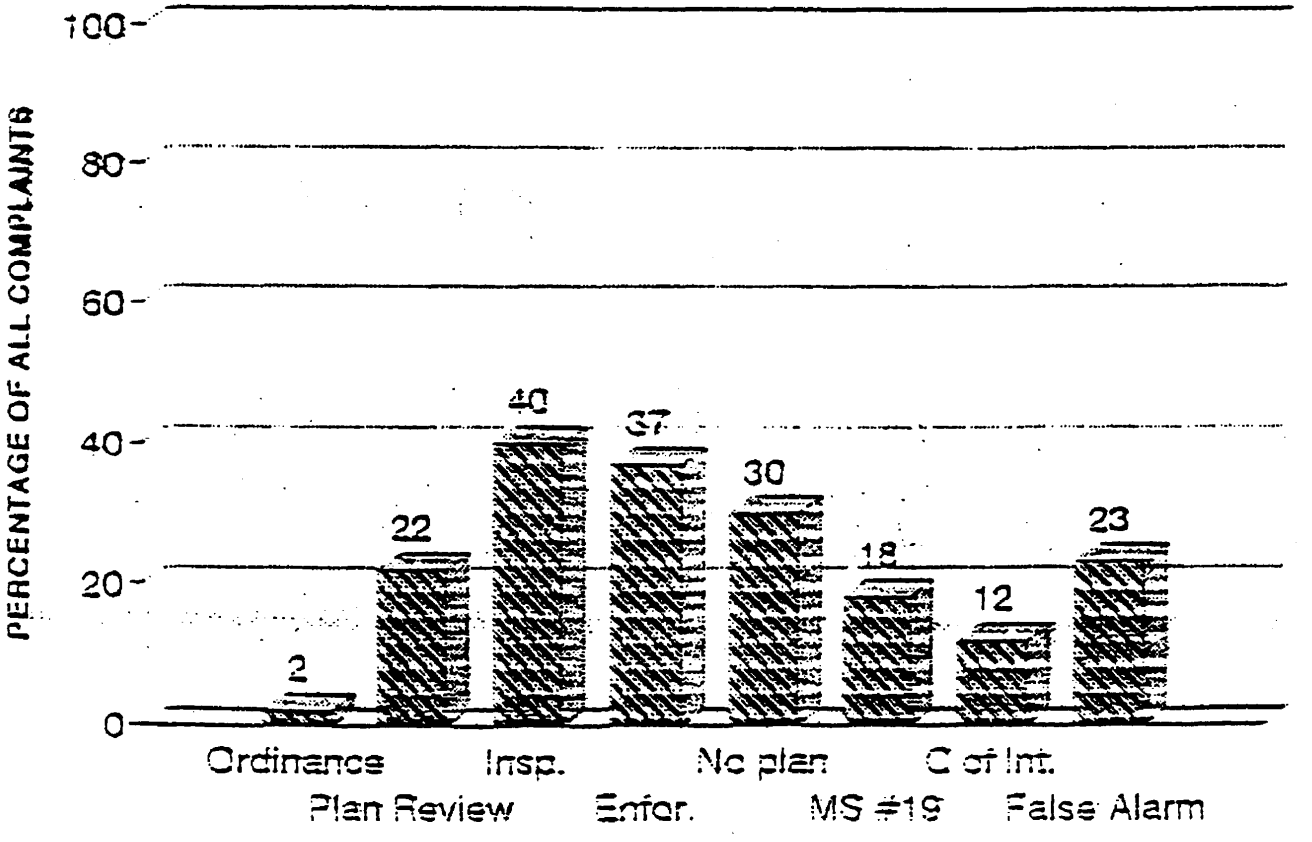
*Individual complaints received may have fallen into a number of categories.

KEY TO REGIONAL OFFICE ABBREVIATIONS:

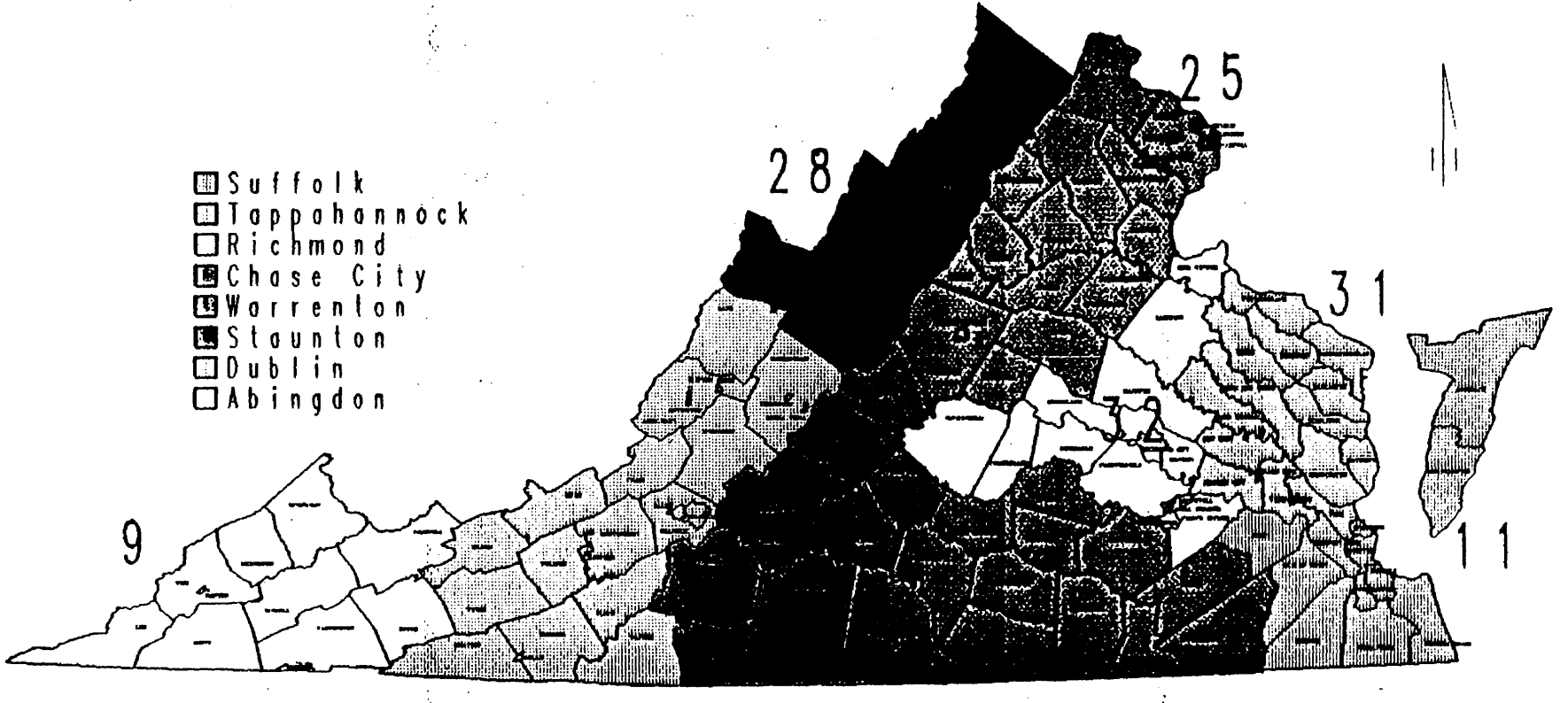
ABI = Abingdon
CHA = Chase City
DUB = Dublin
RIC = Richmond
STA = Staunton
SUF = Suffolk
TAP = Tappahannock
WAR = Warrenton

PROFILE OF E&S COMPLAINTS

RECEIVED IN FY 91-92



Virginia Erosion and Sediment Control Program Areas and Complaints, FY 91-92



23 Sep 92

Characterization of E&S Complaints (FY 91-92)

EXAMPLES FROM FIELD

ORDINANCE INADEQUACIES

1. Russell County - The ordinance has not been revised since 1975. A site which is causing erosion problems would now qualify as an erosion impact area, but this option is not included in the ordinance. Also, the ordinance does not require inspections. It states: "The office of Building Official may periodically inspect the land disturbing activity...."

2. Augusta County - The locality failed to halt construction of a project (which was causing serious damage to a large stream) under the imminent danger clause due to the fact that it was not provided in the current E&S ordinance. The activity was finally halted under "stop-work" following receipt of a sworn complaint.

3. Charles City County - A project started under an ordinance which was adopted in 1980 and had not been updated to include any law and regulation changes which have followed. It involved a residential dwelling in a subdivision which the County erroneously thought was exempt. As a result, there were substantial erosion problems and a subsequent citizen complaint.

PLAN REVIEW INADEQUACIES

1. Roanoke County - The Spring Hollow Reservoir Project is long term (3 years to completion). The disturbed land now exceeds 40 acres and drains directly into the Roanoke River. The approved plan had no provision for necessary larger controls (e.g., dikes, sediment basins). The construction is a municipal project.

   When advised by DSWC to reevaluate the E&S plan for compliance with VESCR, the plan was not properly modified. Follow-up inspections and recommendations by county officials have not improved conditions at this site as the E&S plan remains inadequate.

2. Prince William County - VDOT widened a road and constructed a 36-inch pipe for outfall of the roadside drainage. After leaving a small easement area, the flow was directed through the complaint's property. Planning for this project did not take into account that the receiving area was not an "adequate channel" for a post-development increase of 4.4 cfs. Following a site meeting with DSWC, VDOT agreed to construct a stormwater management basin to attenuate increased flows to prevent damage to the complaint's property.

PLAN REVIEW INADEQUACIES cont.

3 Prince William County - Complaint was received concerning sediment loss from a county project which affected adjacent property, including wetlands. The project, which was a huge tract of disturbed area (all denuded at one time), was to be controlled with only berms and sediment traps. Planning did not take into account pre-development drainage patterns and did not provide for the use of substantial measures such as sediment basins. The complaint came when the trap areas blew out.

4. Lancaster County - There was a site under construction for commercial use by Cornwell Construction Company with 4.5 acres of disturbed area and approximately 30 acres which drain through the site. The plan was submitted with only silt fence and a sediment trap for E&S controls. The plan submitted was done in "colored markers" with no calculations or details of practices. Several failures occurred to practices and considerable amounts of sediment have been deposited onto adjacent property and into a tributary of the Corrotoman River. To date, this site is still not stabilized.

INSPECTION INADEQUACIES

1. Lee County - This complaint involved a borrow area that was needed for a nearby project. During the first site review, DSWC discovered there were not any controls installed and there was not evidence that any controls had been used prior to that time. The site had been active for approximately two years and an existing pond, downstream from the project, was heavily damaged with sediment. The local inspector was unaware of problems until DSWC brought them to his attention.

2. Roanoke County - A subdivision project has been on-going for more than three years. The project began without an approved E&S plan. The plan was eventually submitted and approved, but provisions for E&S were inadequate and not in compliance with VESCL at time of approval.

   The developer was allowed to continually postpone corrective action. Corrective measures were totally inadequate. The county failed to follow through with enforcement action when the developer did not meet deadlines. County inspections failed to discover obvious erosion problems, leading to extensive damage to private pond.

3. Town of Craigsville - The lack of proper inspection by a locality promoted a complaint from a downstream property owner claiming sediment damage to his yard and a creek adjacent to his home. Upon viewing the project, the controls in place were inadequate and in need of maintenance. It was later determined that the locality did not feel compelled to meet

INSPECTION INADEQUACIES cont.

their inspection responsibilities. Routine inspection would have revealed the need for corrective actions.

4. Virginia Beach - There was a municipal project (sewer line installation) where the city inspector did not properly inspect the project. The contractor was allowed to put excess material onto an adjacent homeowner's lot, without controls and next to a tidal watercourse. During subsequent storm events, the material eroded into the watercourse and citizen complaints followed.

5. Essex County - This project involved converting agricultural land into individual lots for a trailer park. No E&S controls were installed as required on the approved plan. Sediment was continually being transported into an unnamed tributary of the Rappahannock River. No initial inspection of E&S controls was made, and very few interim inspections were conducted on maintenance of controls.

ENFORCEMENT INADEQUACIES

1. Wise County - This problem relates to construction activity that has been continuing for the past 8 years. Severe erosion has been occurred on a downslope property, with no attempts to control increased runoff or prevent further damage by the responsible property owner. DSWC has spoken with the local E&S Program Administrator on several occasions, each time to be told, "there has been no progress as of yet, but we'll probably have to go to court."

2. Amelia County - A developer was allowed to clear the entire site of approximately 200 acre landfill without establishing proper controls. Plan was adequate and permit properly issued, but contractor was allowed to proceed without following schedule of control installation spelled out in plan. The result was a lot of sedimentation damage to the Maplewood Branch of North Buckskin Creek.

3. City of Harrisonburg - Locality has received years of criticism, both from DSWC and concerned citizens concerning their lack of enforcement of E&S Law/Local Ordinance on large number of projects in "mall area." Although there have been continuous efforts by DSWC to remedy the situation through various means, the locality can document only 1 case (pending) of enforcement action beyond a Notice to Comply.

4. Spotsylvania County - There has been a failure to take proper action to enforce the Local E&S Ordinance/E&S Law at a large commercial site. The site was denuded and remained unstabilized for about two years. The site, approximately 100 acres in size, was originally surrounded by 3 large sediment

ENFORCEMENT INADEQUACIES cont.

basins which did an adequate job of retaining sediment on the site. As of June 17, 1992, all of the basins were in need of maintenance and/or repair. The site also had gullies that were up to 15 feet deep. The site had never been seeded or mulched. Since receiving a citizen complaint and meeting at the site, some improvements have been made, but stabilization remains a problem. The County did not take any advanced enforcement actions, even when the developer did not respond to inspection reports and verbal requests.

5. Lancaster County - This project, previously discussed in Plan Review Inadequacies, continues to be in violation of the E&S Law/Regulations. The local officials have never sent the owner a written Notice to Comply or other correspondence relating to the erosion problems. DSWC has made site visits with local officials and with the owner, in which the corrective actions needed were discussed with both parties and followed up with a written record of the visits. During the visits, DSWC made the local officials aware of enforcement actions which should be taken; To date, they have not followed through. There continues to be erosion of the site and sediment deposition onto adjacent property.

PROJECT STARTED WITHOUT APPROVED PLAN

1. Washington County - A developer contacted the DSWC office to request assistance on his project prior to the complaint being received. He had first contacted the county offices to inquire about permitting and plan submittal, as he was concerned about adequate protection of an adjacent stream and compliance with applicable regulations. He was told by county employee to proceed at will with the land-disturbing activity. When the DSWC informed the E&S Program Administrator of this problem, no further action was taken to obtain an E&S plan or to issue the proper permit. The project went on without implementation of controls, and a citizen complaint came to DSWC.

2. Amelia County - At Amelia Elementary School, clearing, grubbing and topsoil removal was under-way when DSWC arrived at site with the district conservationist to look at site during plan review. No permits had been issued since plans were not yet approved. County should not have allowed contractor to begin without approved plan. The plan did not address MS #19 and existing plan was not being followed.

3. Roanoke City - There was a municipal project which involved 3200 linear feet of streambank work in Peters Creek. There were no E&S controls on project and no approved E&S plan - leading to sedimentation of creek.

PROJECT STARTED WITHOUT APPROVED PLAN cont.

4. Northumberland County - This project involved construction of an 18-hole golf course and clubhouse, and increasing the size of an existing pond. No erosion control plan was on file or had been submitted. During a visit at the county office, the owner submitted a plan which consisted of a blown up U.S.G.S. survey map with "magic marker" colors indicating silt fence as the only E&S control proposed. This project involved at least 80 acres of area which would be disturbed for golf course construction. The local program administrator would not stop work because "he felt like the owner would do the right thing" and he was going to meet with him to discuss the submitted plan. Eventually, after significant sediment had left the site and moved into adjacent watercourses, a plan was submitted and approved.

POST-DEVELOPMENT RUNOFF PROBLEMS

1. Wise County - This problem, previously noted in the "Enforcement Inadequacies," relates to land disturbance that has been continuing for the past 8 years. The activity continues to cause severe erosion on a downslope property, with no attempts to control runoff (MS #19) or prevent further damage by the responsible property owner.

2. Halifax County - Development of a commercial site took place without an approved plan. Stormwater calculations were not required. Increased runoff now floods parking lot of trucking company. County now must consider buying land to construct a stormwater management basin.

3. Pulaski County - A small private landfill was in the process of "closure." Due to inadequate stormwater controls (MS #19) following closure, a portion of the New River Trail State Park was damaged by stormwater runoff. After discovering that there was no E&S plan on file for this project, DSWC met with the site and worked out a solution. Hercules then compensated the Park for the damage their runoff had caused.

4. Northumberland County - A complainant experienced damage to her front yard due to an increase in runoff resulting from construction of a subdivision road across from her property. She stated that she contacted the County concerning the problem and had not received adequate results. Upon investigation, it was determined that requirements of MS #19 had not been addressed in plan review and approval. Corrective measures were recommended by DSWC and a plan was eventually submitted to provide stormwater management.

CONFLICT OF INTEREST

1. Wise County - The E&S complaint is the same situation noted in #1 of "Post-Development Runoff Problems." According to the complainant, nothing was done to correct this problem because the responsible property owner was the County Attorney's uncle.

2. Roanoke City - Previously noted stream alteration project on Peters Creek started without approved E&S plan. DSWC advised E&S Administrator to issue notice of permit requirement to City Engineer. Also advised E&S Administrator that project posed an immediate threat to stream and that all land-disturbing activities should be halted and controls installed. No action was taken. DSWC was on the project on various occasions and noted the City made no obvious effort to correct conditions. DSWC insisted that the E&S Administrator take action. DSWC received a copy of a Stop Work Order. A day later, a DSWC representative was on the project and questioned the project inspector about the certain activities that appeared to be violating the stop work order. Neither the project inspector nor the contractor were aware of any stop work order.

3. Goochland County - Numerous complaints to county officials, SWCD directors and DSWC on major erosion problems at a golf course site did not prompt any action by the county. One of the owners of the project was a County Supervisor. Plan was approved without adequate protection of river which ran through the property.

4. Essex County - Previously noted trailer park project was an example of total disregard for E&S measures, resulting in damage to a watercourse. The developers of this project were current members of the Board of Supervisors in Essex County.

PROJECT NOT IN VIOLATION OF LAW/LOCAL ORDINANCE ("FALSE ALARM")

1. Buchanan County - The disturbed area for a small project was less than 10,000 square feet. The cause of the complainant's concern was the fact that the disturbance was adjacent to a stream and inside the floodplain.

2. Appomattox County - Citizen called to complain about large disturbed area that had been left bare for long period of time. Site was being disturbed for single-family dwelling, not in a subdivision.

3. Roanoke County - Damage to private road of complainant caused by stormwater that neighbor had redirected.

PROJECT NOT IN VIOLATION OF LAW/LOCAL ORDINANCE ("FALSE ALARM") cont.

4. Chesterfield County - Citizen reported massive quantity of mud on state highway, no erosion and sediment control measures in place, adjacent properties receiving sediment, and major erosion occurring on logging site of over 640 acres. As a result of the disturbance being a logging operation, the Virginia E&S law does not regulate it. State Forest Ranger told DSWC he was trying to get the loggers to comply with voluntary forestry BMP's.

5. City of Charlottesville - DSWC investigated a situation in the city with the complainant, whose property bordered a "blueline" stream. Many properties bordering the stream, including the complainant's, experienced frequent flash flooding. Large flows had eroded the stream base to expose sewer lines. Bank erosion had damaged many private yards. The problems with this stream appear to have developed over 40 years, as its watershed became more and more developed. The city was aware of the stream and its problems. However, there was no activity in the watershed which could currently be regulated or modified by the provisions of the E&S Law/Regulations (MS #19) which could really alleviate the problem - it was typical of an area which could have benefited from a comprehensive stormwater management program. DSWC offered Ms. Weber recommendations to protect and stabilize her yard.

1993 SESSION

LD6756376

HOUSE BILL NO. 1574

Offered January 21, 1993

A BILL to amend and reenact §§ 10.1-560 through 10.1-564, 10.1-566, and 10.1-569 of the Code of Virginia and to amend the Code of Virginia by adding sections numbered 10.1-561.1, 10.1-569.1, and 10.1-569.2, relating to erosion and sediment control; penalties.

Patrons—Murphy, Copeland, Dillard and Grayson; Senators: Gartlan, Hawkins and Reasor

Referred to the Committee on Conservation and Natural Resources

Be it enacted by the General Assembly of Virginia:

1. That §§ 10.1-560 through 10.1-564, 10.1-566, and 10.1-569 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding sections numbered 10.1-561.1, 10.1-569.1, and 10.1-569.2 as follows:

§ 10.1-560. Definitions.—As used in this article, unless the context requires 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.

"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.

"Certified inspector" means an employee or agent of a program authority who (i) holds a certificate of competence from the Board in the area of project inspection, or (ii) has less than one year of experience and is enrolled in the Board's training program for project inspection.

"Certified plan preparer" means a person who holds a certificate of competence from the Board in the area of plan preparation and review.

"Certified plan reviewer" means an employee or agent of a program authority who (i) holds a certificate of competence from the Board in the area of plan preparation and review or (ii) has less than one year of experience and is enrolled in the Board's training program for plan preparation and review.

"Certified program administrator" means an employee or agent of a program authority who (i) holds a certificate of competence from the Board in the area of program administration or (ii) has less than one year of experience and is enrolled in the Board's training program for program administration.

"Conservation plan," "erosion and sediment control plan," or "plan" means a document containing material for the conservation of soil and water resources of a unit or 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 assure that the entire unit or units of land will be so treated to achieve the conservation objectives.

"District" or "soil and water conservation district" means a political subdivision of this Commonwealth organized in accordance with the provisions of Article 3 (§ 10.1-506 et seq.) of this chapter.

"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 ~~one acre~~ *5,000 square feet* or less used for residential purposes or to shorelines where the erosion results from wave action or other coastal processes.

"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, clearing, grading, excavating, transporting and filling of land, except that the term shall not include:

1. Minor land-disturbing activities such as home gardens and individual home landscaping, repairs and maintenance work;

2. Individual service connections;

3. Installation, maintenance, or repair of any underground public utility lines when such activity occurs on an existing hard surfaced road, street or sidewalk provided the land-disturbing activity is confined to the area of the road, street or sidewalk which is hard surfaced;

4. 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;

5. Surface or deep mining;

6. Exploration or drilling for oil and gas including the well site, roads, feeder lines and off-site disposal areas;

7. 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;

8. Repair or rebuilding of the tracks, right-of-way, bridges, communication facilities and other related structures and facilities of a railroad company;

9. 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 provisions of the Dam Safety Act, Article 2 (§ 10.1-604 et seq.) of Chapter 6 of this title, ditches, strip cropping, lister furrowing, contour cultivating, contour furrowing, land drainage and land irrigation;

~~10. Preparation for single-family residences separately built, unless in conjunction with multiple construction in subdivision development; however, the governing body of any county which has adopted the urban county executive form of government, any city adjacent to such county, and any county contiguous to such county with the county executive form of government or any town within the contiguous county, and any city completely surrounded by such county, and portions of the Counties of Bedford, Franklin, and Pittsylvania which lie in the Smith Mountain Lake drainage area may regulate land-disturbing activities related to single-family residences separately built whether or not they are developed in conjunction with multiple construction in subdivision development;~~

~~11~~ *10* . Disturbed land areas of less than ~~10,000~~ *5,000* square feet in size; however, the governing body of the ~~county, city, town or district~~ *program authority* may reduce this exception to a smaller area of disturbed land or qualify the conditions under which this exception shall apply;

~~12~~ *11* . Installation of fence and sign posts or telephone and electric poles and other kinds of posts or poles;

~~13~~ *12* . Shore erosion control projects on tidal waters when the projects are approved by local wetlands boards, the Marine Resources Commission or the United States Army Corps of Engineers; *and*

~~14~~ *13* . 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 plan-approving authority.

"Local erosion and sediment control program" or "local control program" means an outline of the various methods employed by a ~~district or locality~~ *program authority* 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 or owners of the freehold of the premises or lesser estate therein, a mortgagee or vendee in possession, assignee of rents, receiver, 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 the Commonwealth, any interstate body, or any other legal entity.

"Plan-approving authority" means the Board, the ~~district or a county, city, or town~~ *program authority* , or a department of a ~~county, city, or town~~ *program authority* , responsible for determining the adequacy of a conservation plan submitted for land-disturbing activities on a unit or units of lands and for approving plans.

"Program authority" means a district, county, city, or town which has adopted a soil erosion and sediment control program which has been approved by the Board.

"State erosion and sediment control program" or "state program" means the program administered by the Board pursuant to this article, 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 jurisdiction.

~~"Subdivision," unless otherwise defined in a local ordinance adopted pursuant to § 15.1-465, means the division of a parcel of land into three or more lots or parcels of less than five acres each for the purpose of transfer of ownership or building development, or, if a new street is involved in such division, any division of a parcel of land. The term includes resubdivision and, when appropriate to the context, shall relate to the process of subdividing or to the land subdivided.~~

"Town" means an incorporated town.

§ 10.1-561. State erosion and sediment control program.—A. The Board shall *develop a program and* promulgate regulations for the effective control of soil erosion, sediment deposition and nonagricultural runoff which must be met in any control program to prevent the unreasonable degradation of properties, stream channels, waters and other natural resources in accordance with the Administrative Process Act (§ 9-6.14:1 et seq.).

The regulations shall:

1. Be based upon relevant physical and developmental information concerning the watersheds and drainage basins of the Commonwealth, including, but not limited to, data relating to land use, soils, hydrology, geology, size of land area being disturbed, proximate water bodies and their characteristics, transportation, and public facilities and services;

2. Include such survey of lands and waters as may be deemed appropriate by the Board or required by any applicable law to identify areas, including multijurisdictional and watershed areas, with critical erosion and sediment problems; and

3. Contain conservation standards for various types of soils and land uses, which shall include criteria, techniques, and methods for the control of erosion and sediment resulting from land-disturbing activities.

B. The Board shall provide technical assistance and advice to, and conduct and supervise educational programs for, districts and localities which have adopted local control programs.

~~B~~ *C* . The program and regulations shall be available for public inspection at the Department.

D. The Board shall promulgate regulations establishing minimum standards of effectiveness of erosion and sediment control programs, and criteria and procedures for reviewing and evaluating the effectiveness of erosion and sediment control programs. In developing minimum standards for program effectiveness, the Board shall consider

information and standards on which the regulations promulgated pursuant to subsection A of this section are based.

~~C~~ *E* . The Board shall periodically conduct a comprehensive review and evaluation to ensure ~~the acceptability of~~ *that* all erosion and sediment control programs operating under the jurisdiction of this article *meet minimum standards of effectiveness in controlling soil erosion, sediment deposition and nonagricultural runoff. The Board shall develop a schedule for conducting periodic reviews and evaluations of the effectiveness of erosion and sediment control programs .*

~~D~~ *F* . The Board shall issue certificates of competence concerning the content, application and intent of specified subject areas of this chapter and accompanying regulations , *including program administration, plan preparation and review, and project inspection,* to personnel of ~~local governments~~ *program authorities and to any other persons* who have completed training programs or in other ways demonstrated adequate knowledge. *The Department shall administer education and training programs for specified subject areas of this chapter and accompanying regulations, and is authorized to charge persons attending such programs reasonable fees to cover the costs of administering the programs.*

§ 10.1-561.1. Certification of local program personnel.—A. The minimum standards of local program effectiveness established by the Board pursuant to subsection D of § 10.1-561 shall provide that within one year following the adoption of amendments to the local program adding the provisions of this section, (i) a conservation plan shall not be approved unless it is prepared by a certified plan preparer; (ii) a conservation plan shall not be approved until it is reviewed by a certified plan reviewer; (iii) inspections of land-disturbing activities are conducted by a certified inspector; and (iv) a local program shall contain a certified program administrator, a certified plan reviewer, and a certified project inspector, who may be the same person.

B. Any person who holds a certificate of compliance from the Board in the areas of plan preparation and review, project administration, or program administration which was attained prior to the adoption of the mandatory certification provisions of subsection A of this section shall be deemed to satisfy the requirements of that area of certification.

§ 10.1-562. Local erosion and sediment control programs.—A. Each district in the Commonwealth ~~, except as provided in subsection C of this section, shall have a soil erosion and sediment control program consistent with the state program and regulations for erosion and sediment control~~ *shall adopt and administer an erosion and sediment control program for any area within the district for which a county, city, or town does not have an approved erosion and sediment control program* .

To carry out its program the district shall adopt regulations consistent with the state program. The regulations may be revised from time to time as necessary. Before adopting or revising regulations, the district shall give due notice and conduct a public hearing on the proposed or revised regulations except that a public hearing shall not be required when the district is amending its program to conform to revisions in the state program. However, a public hearing shall be held if a district proposes or revises regulations that are more stringent than the state program. The program and regulations shall be available for public inspection at the principal office of the district.

B. In areas where there is no district, a county, city, or town shall adopt and administer ~~the~~ *an* erosion and sediment control program ~~and exercise the responsibilities of a district with respect thereto, as provided in this article~~ .

C. Any county, city, or town ~~that has adopted its own~~ *within a district may adopt and administer an* erosion and sediment control program ~~which has been approved by the Board shall be treated under this article as a county, city, or town which lies in an area where there is no district, whether or not such district in fact exists~~ .

Any town, lying within a county which has adopted its own erosion and sediment control program, ~~must either~~ *may* adopt its own program or become subject to the county program. If a town lies within the boundaries of more than one county, the town shall be considered for the purposes of this article to be wholly within the county in which the

larger portion of the town lies. Any county, city, or town with an erosion and sediment control program may designate its department of public works or a similar local government department as the plan-approving authority or may designate the district as the plan-approving authority for all or some of the conservation plans.

D. ~~If a district or county or city not in a district, fails to submit a program to the Board, the Board shall, after such hearings or consultations as it deems appropriate with the various local interests involved, develop and adopt an appropriate program to be carried out by such district, county or city.~~ *Any erosion and sediment control program adopted by a district, county, city, or town shall be approved by the Board if it is consistent with the state program and regulations for erosion and sediment control.*

E. If a review conducted by the Board of a local control program indicates that the program authority has not administered, enforced or conducted its program in a manner that satisfies the minimum standards of effectiveness established pursuant to subsection D of § 10.1-561, the Board shall notify the program authority in writing, which notice shall identify corrective action required to attain the minimum standard of effectiveness and shall include an offer to provide technical assistance to implement the corrective action. If the program authority has not implemented the corrective action identified by the Board within thirty days following receipt of the notice, or such additional period as is necessary to complete the implementation of the corrective action, then the Board shall revoke its approval of the program. Prior to revoking its approval of any local control program, the Board shall conduct a formal hearing pursuant to § 9-6.14:12 of the Administrative Process Act. Judicial review of any order of the Board revoking its approval of a local control program shall be made in accordance with Article 4 (§ 9-6.14:15 et seq.) of the Administrative Process Act.

F. If the Board revokes its approval of a local control program of a county, city, or town, and the locality is in a district, the district shall adopt and administer an erosion and sediment control program for the locality.

G. If the Board (i) revokes its approval of a local control program of a district, or of a county, city, or town not in a district, or (ii) finds that a local program consistent with the state program and regulations has not been adopted by a district or a county, city, or town which is required to adopt and administer a local program, the Board shall, after such hearings or consultations as it deems appropriate with the various local interests involved, develop, adopt, and administer an appropriate program to be carried out within such district, county, city, or town, as applicable, by the Board.

H. If the Board has revoked its approval of any local control program, the program authority may request that the Board approve a replacement program, and the Board shall approve the replacement program if it finds that (i) the program authority is capable of administering the program in accordance with the minimum standards of effectiveness, and (ii) the replacement program otherwise meets the requirements of the state program and regulations. The Board shall conduct a formal hearing pursuant to § 9-6.14:12 of the Administrative Process Act on any request for approval of a replacement program.

~~E.~~ *I.* Any ~~district, county, city or town~~ *program authority* which administers an erosion and sediment control program may charge applicants a reasonable fee to defray the cost of program administration, including costs associated with the issuance of grading or land-disturbing permits, plan review, and periodic inspection for compliance with erosion and sediment control plans if charges for such costs are not made under any other law, ordinance, or program. The fee shall not exceed an amount commensurate with the services rendered, taking into consideration the time, skill and administrators' expense involved ~~, or $1,000, whichever is less~~ .

~~F.~~ *J.* The governing body of any county, city or town which (i) is in a district which has adopted a local control program, (ii) has adopted its own local control program, (iii) is subject to a local control program adopted by the Board, or (iv) administers a local control program, may adopt an ordinance establishing a uniform schedule of civil penalties for violations of any regulation or order of the Board, any provision of its program, any

condition of a permit, or any provision of this article. Any schedule of civil penalties shall be uniform for each type of specified violation ~~, and the~~ . *The* civil penalty for any one violation shall not exceed $100 *, except that the civil penalty for commencement of land-disturbing activities without an approved plan as provided in § 10.1-563 shall not exceed $1,000* . Each day during which the violation is found to have existed shall constitute a separate offense. ~~However, in no event shall specified violations arising from the same operative set of facts be charged more frequently than once in any ten-day period, and in~~ *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* . Designation of a particular violation for a civil penalty shall be in lieu of criminal sanctions and shall preclude the prosecution of such violation as a misdemeanor under subsection A of § 10.1-569.

§ 10.1-563. Regulated land-disturbing activities; submission and approval of control plan.—A. Except as provided in § 10.1-564, no person may engage in any land-disturbing activity until he has submitted to the district or locality an erosion and sediment control plan for the land-disturbing activity *which has been prepared by a certified plan preparer,* and the plan has been reviewed and approved by the plan-approving authority. Where land-disturbing activities involve lands under the jurisdiction of more than one local control program an erosion and sediment control plan may, at the option of the applicant, be submitted to the Board for review and approval rather than to each jurisdiction concerned. *Where the land-disturbing activity results from the construction of a single-family residence, an agreement in lieu of a plan may be substituted for an erosion and sediment control plan if executed by the plan-approving authority.*

B. The plan-approving authority shall review conservation plans submitted to it and grant written approval within forty-five days of the receipt of the plan if it determines that the plan meets the requirements of the Board's regulations and if the person responsible for carrying out the plan certifies that he will properly perform the conservation measures included in the plan and will conform to the provisions of this article.

When a plan is determined to be inadequate, written notice of disapproval stating the specific reasons for disapproval shall be communicated to the applicant within forty-five days. The notice shall specify the modifications, terms and conditions that will permit approval of the plan. If no action is taken by the plan-approving authority within the time specified above, the plan shall be deemed approved and the person authorized to proceed with the proposed activity.

C. 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.

D. Electric and telephone utility companies and railroad companies shall file general erosion and sediment control specifications annually with the Board for review and written comments. The specifications shall apply to:

1. Construction, installation or maintenance of electric and telephone utility lines; and

2. Construction of the tracks, rights-of-way, bridges, communication facilities and other related structures and facilities of the railroad company.

The Board shall have sixty days in which to comment. Individual approval of separate projects within subdivisions 1 and 2 of this subsection is not necessary when approved specifications are followed. Projects not included in subdivisions 1 and 2 of this subsection

shall comply with the requirements of the appropriate local erosion and sediment control program. The Board shall have the authority to enforce approved specifications.

E. In order to prevent further erosion a local program may require approval of a conservation plan for any land identified in the local program as an erosion impact area.

F. For the purposes of subsections A and B of this section, when land-disturbing activity will be required of a contractor performing construction work pursuant to a construction contract, the preparation, submission and approval of an erosion and sediment control plan shall be the responsibility of the owner.

§ 10.1-564. State agency projects.— *A.* Any state agency that undertakes a project involving a land-disturbing activity shall file specifications annually or a conservation plan for each project with the Department for review and written comments. The Department shall have sixty days in which to comment and its comments shall be binding on the state agency or the private business hired by the state agency. Individual approval of separate projects is not necessary when approved specifications are followed.

As on-site changes occur, the state agency shall submit changes in the conservation plan to the Department.

The state agency responsible for the land-disturbing activity shall ensure compliance with the approved plan or specifications.

B. The Department shall not approve specifications or a conservation plan submitted by a federal or state agency for a project involving a land-disturbing activity in any district, county, city, or town which has adopted more stringent soil erosion and sediment control regulations than those necessary to ensure compliance with the Board's regulations unless the specifications or conservation plan comply with the regulations of the district or locality, provided the program authority has submitted a copy of the regulations to the Department.

§ 10.1-566. Monitoring, reports and inspections.—A. The plan-approving authority or, if a permit is issued in connection with land-disturbing activities which involve the issuance of a grading, building, or other permit, the permit-issuing authority (i) shall provide for periodic inspections of the land-disturbing activity and (ii) may require monitoring and reports from the person responsible for carrying out the plan, to ensure compliance with the approved plan and to determine whether the measures required in the plan are effective in controlling erosion and sediment. ~~The owner, occupier or operator shall be given notice of the inspection and an opportunity to accompany the inspectors.~~ If the permit-issuing authority or plan-approving authority determines that there is a failure to comply with the plan, notice shall be served upon the permittee or person responsible for carrying out the plan by registered or certified mail to the address specified in the permit application or in the plan certification, or by delivery at the site of the land-disturbing activities to the agent or employee supervising such activities. Where the plan-approving authority serves notice, a copy of the notice shall also be sent to the issuer of the permit. The notice shall specify the measures needed to comply with the plan and shall specify the time within which such measures shall be completed. Upon failure to comply within the time specified, the permit may be revoked and the permittee or person responsible for carrying out the plan shall be deemed to be in violation of this article and shall be subject to the penalties provided by § 10.1-569.

B. Notwithstanding the above provisions of this section the following may be applied:

1. Where a county, city, or town administers the local control program and the permit-issuing authority and the plan-approving authority are not within the same local government department, the locality may designate one department to inspect, monitor, report and ensure compliance. In the event a district has been designated as the plan-approving authority for all or some of the conservation plans, the enforcement of the program shall be with the local government department; however, the district may inspect, monitor and make reports for the local government department.

2. Where a district adopts the local control program and permit-issuing authorities have been established by a locality, the district by joint resolution with the appropriate locality

may exercise the responsibilities of the permit-issuing authorities with respect to monitoring, reports, inspections and enforcement.

3. Where a permit-issuing authority has been established, and such authority is not vested in an employee or officer of local government but in the commissioner of revenue or some other person, the locality shall exercise the responsibilities of the permit-issuing authority with respect to monitoring, reports, inspections and enforcement unless such responsibilities are transferred as provided for in this section.

C. Upon receipt of a sworn complaint of a ~~substantial~~ violation of this section, § 10.1-563 or § 10.1-564 from the ~~designated enforcement officer~~ *representative of the program authority or the Board responsible for ensuring program compliance* , the chief administrative officer , *or his designee,* of ~~(i)~~ *the program authority or* the Board ~~; or (ii) the county, city or town operating its own erosion and sediment control program, or (iii) a district which is responsible for monitoring and inspecting for compliance~~ may, in conjunction with or subsequent to a notice to comply as specified in subsection A above, issue an order requiring that all or part of the land-disturbing activities permitted on the site be stopped until the specified corrective measures have been taken *or, if land-disturbing activities have commenced without an approved plan as provided in § 10.1-563, requiring that all of the land-disturbing activities be stopped until an approved plan or any required permits are obtained* . 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 as specified in subsection A above. Otherwise, such an 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 circuit court of the jurisdiction wherein the violation was alleged to have occurred~~ . *If the alleged violator has not completed the specified corrective measures or obtained an approved plan or any required permits, as appropriate, within seven days from the date of service of the order, the chief administrative officer or his designee may issue an order to the owner requiring that all construction and other work on the site, other than corrective measures, be stopped until the specified corrective measures have been taken or an approved plan and any required permits have been obtained, as appropriate. Such an order shall be served upon the owner by registered or certified mail to the address specified in the permit application or the land records of the locality in which the site is located. The owner may appeal the issuance of an order to the circuit court of the jurisdiction wherein the violation was alleged to have occurred. Any person violating or failing, neglecting or refusing to obey an order issued by the chief administrative officer or his designee may be compelled in a proceeding instituted in the circuit court of the jurisdiction wherein the violation was alleged to have occurred to obey same and to comply therewith by injunction, mandamus or other appropriate remedy.* Upon completion *and approval* of corrective action *or obtaining an approved plan or any required permits* , the order shall immediately be lifted. Nothing in this section shall prevent the chief administrative officer *or his designee* from taking any other action specified in § 10.1-569.

§ 10.1-569. Penalties, injunctions and other legal actions.—A. Violators of §§ 10.1-563, 10.1-564 or § 10.1-566 shall be guilty of a *Class 1* misdemeanor ~~and subject to a fine not exceeding $1,000 or thirty days imprisonment for each violation, or both~~ .

B. If a locality has adopted an ordinance establishing a uniform schedule of civil penalties as permitted by subsection F of § 10.1-562, any person who violates any regulation or order of the Board, any condition of a permit, any provision of its program, or any provision of this article shall, upon a finding of an appropriate general district court, be assessed a civil penalty in accordance with the schedule. A civil action for such violation

may be brought by the locality wherein the land lies. In any trial for a scheduled violation, it shall be the burden of the locality to show the liability of the violator by a preponderance of the evidence. An admission or finding of liability shall not be a criminal conviction for any purpose. 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.

C. The appropriate permit-issuing authority, ~~or a district or locality operating its own program~~ *the program authority, an aggrieved owner of property sustaining or threatened with economic damage as the result of a violation of a local program* , or the Board may apply to the circuit court in any jurisdiction wherein the land lies to enjoin a violation or a threatened violation under § 10.1-563, § 10.1-564 or § 10.1-566 without the necessity of showing that an adequate remedy at law does not exist.

D. In addition to any criminal or civil penalties provided under this chapter, any person who violates any provision of this chapter may be liable to the ~~locality~~ *the program authority, an aggrieved owner of property sustaining economic damage as the result of a violation of a local program* , or the Board, as appropriate, in a civil action for damages.

E. 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.

F. With the consent of any person who has violated or failed, neglected or refused to obey any regulation or order of the Board, or any condition of a permit or any provision of this article, 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 E of this section. Such civil charges shall be instead of any appropriate civil penalty which could be imposed under subsection B or E.

G. Upon request of a ~~district or locality operating its own~~ program *authority* , or the permit-issuing authority, the attorney for the Commonwealth shall take legal action to enforce the provisions of this article. Upon request of the Board, the Attorney General shall take appropriate legal action on behalf of the Board to enforce the provisions of this article.

H. 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.

§ 10.1-569.1. Remedies of Director; land-disturbing activities not completed; penalty.—A. An aggrieved owner of property sustaining economic damage as the result of a violation of a local program occurring while land-disturbing activities are being conducted may give written notice of the alleged violation to the official of the program authority responsible for ensuring program compliance and to the Director.

B. If the program authority does not respond to the alleged violation in a manner which causes the violation to cease and abates the damage to the aggrieved owner's property within thirty days following receipt of the notice, the aggrieved owner may advise the Director and request that the Director take action to stop the violation and abate the damage to his property.

C. Upon receipt of the notice of the alleged violation of the local program, the Director shall conduct an informal investigation of the aggrieved owner's complaint. If the Director finds that the program authority has not responded to the alleged violation as required by the local program, the Director shall notify the program authority upon the expiration of

the thirty-day period that the Director may exercise appropriate remedies if the program authority does not respond to the alleged violation and, if appropriate, stop the alleged violation and abate the damage to the aggrieved owner's property. If the program authority has not instituted action to stop the violation and abate the damage to the aggrieved owner's property within ten days following receipt of the notice, and if the Director finds that land-disturbing activities are being conducted in violation of the local program and that the violation is causing damage to the property of an aggrieved owner, then the Director may issue an order requiring the permittee or person conducting the land-disturbing activities in violation of the local program to cease all land-disturbing activities until specified corrective measures have been completed, and to comply with the provisions of the local program. Such orders are to be issued only after an informal hearing conducted by the Director with reasonable notice to the affected person of the time, place and purpose thereof, and shall become effective upon service on the person by certified mail, return receipt requested, sent to his address specified in the land records of the locality, or by personal delivery by an agent of the Director.

D. If the Director finds that the program authority has not responded to a violation as required by the local program and that the violation is causing or is in imminent danger of causing harmful erosion of lands or sediment deposition in waters within the watersheds of the Commonwealth, the Director may issue an emergency order directing the person to cease all land-disturbing activities until specified corrective measures have been completed, and to comply with the provisions of the local program. The Director shall within ten days after issuance of the emergency order hold an informal hearing, after reasonable notice of the time and place thereof to the person, to affirm, modify, amend or cancel the emergency order.

E. If the Director finds that a person who has been issued an order to cease all land-disturbing activities or an emergency order is not complying with the terms thereof, he may institute a proceeding in the appropriate circuit court for an injunction, mandamus or other appropriate remedy compelling the person to comply with such order.

F. Any person violating or failing, neglecting or refusing to obey any injunction, mandamus or other remedy obtained pursuant to subsection E shall be subject, in the discretion of the court, to a civil penalty not to exceed $2,000 for each violation. Any civil penalties assessed by a court shall be paid into the state treasury.

§ 10.1-569.2. Remedies of Board; land-disturbing activities have ceased; penalty.—A. An aggrieved owner of property sustaining economic damage as the result of a violation of a local program, which violation occurs or continues to exist after land-disturbing activities have ceased for a period of thirty days or more, may give written notice of the alleged violation to the official of the program authority responsible for ensuring program compliance and to the Board.

B. If the program authority does not respond to the alleged violation in a manner which causes the violation to cease and abates the damage to the aggrieved owner's property within thirty days following receipt of the notice, the aggrieved owner may advise the Board and request that the Board take action to stop the violation and abate the damage to his property.

C. Upon receipt of the notice of the alleged violation of the local program, the Board shall direct the Director to conduct an informal investigation of the aggrieved owner's complaint. If the Director finds that the program authority has not responded to the alleged violation as required by the local program, the Board shall notify the program authority upon the expiration of the thirty day period that the Board may exercise appropriate remedies if the program authority does not respond to the alleged violation and, if appropriate, stop the alleged violation and abate the damage to the aggrieved owner's property. If the program authority has not instituted action to stop the violation and abate the damage to the aggrieved owner's property within ten days following receipt of the notice, and if the Board finds that land-disturbing activities conducted in violation

owner, then the Board may issue an order requiring any person occupying the site to cease all construction and other work on the site until specified corrective measures have been completed, and to comply with the provisions of the local program. Such orders are to be issued only after a formal hearing conducted by the Board, with reasonable notice to the person of the time, place and purpose thereof, and shall become effective upon service on the person by certified mail, return receipt requested, sent to his address specified in the land records of the locality, or by personal delivery by an agent of the Board.

D. If the Board finds that the program authority has not responded to a violation as required by the local program and that the violation is causing or is in imminent danger of causing harmful erosion of lands or sediment deposition in waters within the watersheds of the Commonwealth, the Board may issue an emergency order directing the person to cease all construction and other work on the site until specified corrective measures have been completed, and to comply with the provisions of the local program. The Board shall within ten days after issuance of the emergency order hold a formal hearing, after reasonable notice of the time and place thereof to the person, to affirm, modify, amend or cancel the emergency order.

E. If the Board finds that a person who has been issued an order to cease all construction and other work on the site or emergency order is not complying with the terms thereof, it may institute a proceeding in the appropriate circuit court for an injunction, mandamus or other appropriate remedy compelling the person to comply with such order.

F. Any owner violating or failing, neglecting, or refusing to obey any injunction, mandamus or other remedy obtained pursuant to subsection E shall be subject, in the discretion of the court, to a civil penalty not to exceed $2,000 for each violation. Any civil penalties assessed by a court shall be paid into the state treasury.

Official Use By Clerks

Passed By The House of Delegates		**Passed By The Senate**	
without amendment	☐	without amendment	☐
with amendment	☐	with amendment	☐
substitute	☐	substitute	☐
substitute w/amdt	☐	substitute w/amdt	☐

Date: _____ Date: _____

_____ _____

Clerk of the House of Delegates Clerk of the Senate

Summary of Changes Made to HB 1574 During 1993 Session

House Bill 1574 was introduced by Delegate Murphy on January 21, 1993. The other six members of the joint subcommittee signed on as co-patrons. The bill was amended as it was considered by the House Committee on Conservation and Natural Resources and the Senate Committee on Agriculture, Conservation and Natural Resources.

The recommendations of the joint subcommittee set forth in Section V of the final report are listed below, together with a statement of whether they were adopted as introduced or were amended during the legislative process. A copy of the version of HB 1574 that passed both houses is attached as Exhibit A.

1. Subsection D of § 10.1-561 (minimum statewide standards of effectiveness for erosion and sediment control programs to be established): Adopted.

2. Subsection E of § 10.1-561 (Board to review and evaluate the effectiveness of erosion and sediment control programs): Adopted.

3. Subsection E of § 10.1-562 (Board revocation of approval of deficient local programs): Adopted.

4. Subsection F of § 10.1-562 (Districts to adopt programs for decertified localities): Adopted.

5. Subsection G of § 10.1-562 (state adoption of erosion and sediment control program where district does not operate and adequate program): Adopted.

6. Subsection B of § 10.1-561 (state educational and technical assistance to localities): Adopted.

7. Subsection B of § 10.1-564 (approval of plans for state agency projects where local requirements are more stringent than state standards): This section was re-written extensively. A state agency must comply with more-stringent local program requirements only if (i) the agency has not submitted annual specifications to the Department, and (ii) the land-disturbing authority does not involve multiple jurisdictions with separate local programs.

8. (No change recommended)

9. Subsection F of § 10.1-561 (expansion of the Board's voluntary certification program for local government personnel): Adopted with no material change.

10. § 10.1-561 (Mandatory certification of local program personnel): The requirement that conservation plans be prepared by a "certified plan preparer" was not adopted.

11. § 10.1-560 (Definitions of certified plan reviewer, program administrator and project inspector): Adopted with no material changes, except that "certified plan reviewer" now includes any licensed professional engineer architect, landscape architect, or surveyor.

12. Subsection A of § 10.1-563 (conservation plans to be prepared by certified preparers): This requirement was not adopted. Definition of "certified plan preparer" was deleted.

13. (No change recommended)

14. § 10.1-569.1 (state intervention to take enforcement actions where locality fails to act): This section was rewritten to track the existing provisions in the State Water Control Law regarding the issuance of special orders by the Board. The substance of the section was adopted. An aggrieved owner damaged as the result of a violation of a plan, or the failure to obtain an approved plan, may notify the Director; if the program authority has not responded within 30 days, the owner may ask the Director to intervene; and the Board may issue an order requiring the violator to stop all land-disturbing activities until corrective measures are completed.

15. § 10.1-569.2 (Board authorized to issue stop-work order covering all construction work on the site where a violation occurs after land-disturbing activities are completed): This section was deleted. There is no provision for the issuance of stop-work orders which require the cessation of any work other than land-disturbing activities.

16. Subsection A of § 10.1-566 (Notice to owners, etc. of project inspections): The proposal to delete the requirement that owners be given notice of inspections was not adopted; the provision deleting the requirement that the owner, etc. be given an opportunity to accompany the inspectors was adopted.

17. Subsection C of § 10.1-566 (Deleting the requirement that a violation be "substantial" before a stop work order can be issued): Adopted.

18. Subsection C of § 10.1-566 (Clarifying who is authorized to make sworn complaints of a violation): Adopted.

19. Subsection C of § 10.1-566 (Authorizing the designee of the chief administrative officer of the program authority to issue stop work order): Adopted.

20. Subsection C of § 10.1-566 (Authorizing the issuance of stop-work orders where activities are undertaken without an approved plan, as well as where a plan is violated): Adopted.

21. Subsection C of § 10.1-566 (Allowing stop-work orders covering all construction activities on the site of a violation to be issued if corrective work is not completed within 7 days after the issuance of a stop-work order covering only land-disturbing activities): This provision has been substantially re-written. Broad stop-work orders covering all construction activities on a site may be issued only where the violation is the failure to obtain an approved plan or any required permits, which is not corrected within 7 days after the issuance of the initial, limited stop-work order.

22. Subsection J of § 10.1-562 (Increasing the cap on the civil penalty that may be charged for starting land-disturbing activities without an approved plan from $100 to $1,000 for a single occurrence, and from $3,000 to $10,000 for a series of violations): Adopted with no material changes. However, the amount of any civil penalty that may be assessed is fixed, and localities no longer have discretion in setting the civil penalty for particular violations.

23. Subsection I of § 10.1-562 (Eliminating the restriction on charging violators with a civil penalty no more often than once every ten days): Adopted.

24. Subsection I of § 10.1-562 (Eliminating the $1,000 limit on application fees that locality may charge for plan review and approval): This section was rewritten to require that the program authority hold a public hearing prior to enacting an ordinance establishing a schedule of fees for program administration. The $1,000 limit is deleted.

25. (No change recommended to the agricultural exemption.)

26. (No change recommended to the forestry exemption.)

27. § 10.1-560 (Exemption for single-family homes not built in conjunction with subdivision development removed): Adopted.

28. § 10.1-560 (Exemption for disturbed land areas of less than 10,000 square feet reduced to 5,000 square feet): This proposed amendment was not adopted.

29. Subsection C of § 10.1-569 (Allowing aggrieved landowners to obtain injunctive relief): This proposed amendment was not adopted.

30. Subsection D of § 10.1-569 (Allowing aggrieved landowners to sue violators for damaged): This proposed amendment was not adopted.

31. Subsection A of § 10.1-563 (Allowing builder of a single-family residence to enter into an agreement with the plan authority in lieu of submitting a conservation plan): Adopted.

Exhibit A

1993 SESSION

LD8679376

HOUSE BILL NO. 1574

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Senate Committee on Agriculture, Conservation and Natural Resources on February 22, 1993)

(Patron Prior to Substitute—Delegate Murphy)

An Act to amend and reenact §§ 10.1-560 through 10.1-564, 10.1-566, and 10.1-569 of the Code of Virginia and to amend the Code of Virginia by adding sections numbered 10.1-561.1 and 10.1-569.1, relating to erosion and sediment control; penalties.

Be it enacted by the General Assembly of Virginia:

1. That §§ 10.1-560 through 10.1-564, 10.1-566, and 10.1-569 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding sections numbered 10.1-561.1 and 10.1-569.1 as follows:

§ 10.1-560. Definitions.—As used in this article, unless the context requires 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.

"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.

"Certified inspector" means an employee or agent of a program authority who (i) holds a certificate of competence from the Board in the area of project inspection or (ii) 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 (i) holds a certificate of competence from the Board in the area of plan review, (ii) is enrolled in the Board's training program for plan review and successfully completes such program within one year after enrollment, or (iii) is licensed as a professional engineer, architect, certified landscape architect or land surveyor pursuant to Article 1 (§ 54.1-400 et seq.) of Chapter 4 of Title 54.1.

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

"Conservation plan," "erosion and sediment control plan," or "plan" means a document containing material for the conservation of soil and water resources of a unit or 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 assure that the entire unit or units of land will be so treated to achieve the conservation objectives.

"District" or "soil and water conservation district" means a political subdivision of this Commonwealth organized in accordance with the provisions of Article 3 (§ 10.1-506 et seq.) of this chapter.

"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 ~~one acre~~ *10,000 square feet* or less used for residential purposes or to shorelines where the erosion results from wave action or other coastal processes.

"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, clearing, grading, excavating, transporting and

filling of land, except that the term shall not include:

1. Minor land-disturbing activities such as home gardens and individual home landscaping, repairs and maintenance work;

2. Individual service connections;

3. Installation, maintenance, or repair of any underground public utility lines when such activity occurs on an existing hard surfaced road, street or sidewalk provided the land-disturbing activity is confined to the area of the road, street or sidewalk which is hard surfaced;

4. 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;

5. Surface or deep mining;

6. Exploration or drilling for oil and gas including the well site, roads, feeder lines and off-site disposal areas;

7. 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;

8. Repair or rebuilding of the tracks, right-of-way, bridges, communication facilities and other related structures and facilities of a railroad company;

9. 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 provisions of the Dam Safety Act, Article 2 (§ 10.1-604 et seq.) of Chapter 6 of this title, ditches, strip cropping, lister furrowing, contour cultivating, contour furrowing, land drainage and land irrigation;

~~10. Preparation for single-family residences separately built, unless in conjunction with multiple construction in subdivision development; however, the governing body of any county which has adopted the urban county executive form of government, any city adjacent to such county, and any county contiguous to such county with the county executive form of government or any town within the contiguous county, and any city completely surrounded by such county, and portions of the Counties of Bedford, Franklin, and Pittsylvania which lie in the Smith Mountain Lake drainage area may regulate land-disturbing activities related to single-family residences separately built whether or not they are developed in conjunction with multiple construction in subdivision development;~~

~~11~~ *10* . Disturbed land areas of less than 10,000 square feet in size; however, the governing body of the ~~county, city, town or district~~ *program authority* may reduce this exception to a smaller area of disturbed land or qualify the conditions under which this exception shall apply;

~~12~~ *11* . Installation of fence and sign posts or telephone and electric poles and other kinds of posts or poles;

~~13~~ *12* . Shore erosion control projects on tidal waters when the projects are approved by local wetlands boards, the Marine Resources Commission or the United States Army Corps of Engineers; *and*

~~14~~ *13* . 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 plan-approving authority.

"Local erosion and sediment control program" or "local control program" means an outline of the various methods employed by a ~~district or locality~~ *program authority* 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 or owners of the freehold of the premises or lesser estate

therein, a mortgagee or vendee in possession, assignee of rents, receiver, 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 the Commonwealth, any interstate body, or any other legal entity.

"Plan-approving authority" means the Board, the ~~district or a county, city, or town~~ *program authority* , or a department of a ~~county, city, or town~~ *program authority* , responsible for determining the adequacy of a conservation plan submitted for land-disturbing activities on a unit or units of lands and for approving plans.

"Program authority" means a district, county, city, or town which has adopted a soil erosion and sediment control program which has been approved by the Board.

"State erosion and sediment control program" or "state program" means the program administered by the Board pursuant to this article, 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 jurisdiction.

~~"Subdivision," unless otherwise defined in a local ordinance adopted pursuant to § 15.1-465, means the division of a parcel of land into three or more lots or parcels of less than five acres each for the purpose of transfer of ownership or building development, or, if a new street is involved in such division, any division of a parcel of land. The term includes resubdivision and, when appropriate to the context, shall relate to the process of subdividing or to the land subdivided.~~

"Town" means an incorporated town.

§ 10.1-561. State erosion and sediment control program.—A. The Board shall *develop a program and* promulgate regulations for the effective control of soil erosion, sediment deposition and nonagricultural runoff which must be met in any control program to prevent the unreasonable degradation of properties, stream channels, waters and other natural resources in accordance with the Administrative Process Act (§ 9-6.14:1 et seq.).

The regulations shall:

1. Be based upon relevant physical and developmental information concerning the watersheds and drainage basins of the Commonwealth, including, but not limited to, data relating to land use, soils, hydrology, geology, size of land area being disturbed, proximate water bodies and their characteristics, transportation, and public facilities and services;

2. Include such survey of lands and waters as may be deemed appropriate by the Board or required by any applicable law to identify areas, including multijurisdictional and watershed areas, with critical erosion and sediment problems; and

3. Contain conservation standards for various types of soils and land uses, which shall include criteria, techniques, and methods for the control of erosion and sediment resulting from land-disturbing activities.

B. The Board shall provide technical assistance and advice to, and conduct and supervise educational programs for, districts and localities which have adopted local control programs.

~~B~~ *C* . The program and regulations shall be available for public inspection at the Department.

D. The Board shall promulgate regulations establishing minimum standards of effectiveness of erosion and sediment control programs, and criteria and procedures for reviewing and evaluating the effectiveness of erosion and sediment control programs. In developing minimum standards for program effectiveness, the Board shall consider information and standards on which the regulations promulgated pursuant to subsection A of this section are based.

~~E~~ *E* . The Board shall periodically conduct a comprehensive review and evaluation to ensure ~~the acceptability of~~ *that* all erosion and sediment control programs operating under the jurisdiction of this article *meet minimum standards of effectiveness in controlling soil erosion, sediment deposition and nonagricultural runoff. The Board shall develop a schedule for conducting periodic reviews and evaluations of the effectiveness of erosion and sediment control programs* .

~~D~~ *F* . The Board shall issue certificates of competence concerning the content, application and intent of specified subject areas of this chapter and accompanying regulations , *including program administration, plan review, and project inspection,* to personnel of ~~local governments~~ *program authorities and to any other persons* who have completed training programs or in other ways demonstrated adequate knowledge. *The Department shall administer education and training programs for specified subject areas of this chapter and accompanying regulations, and is authorized to charge persons attending such programs reasonable fees to cover the costs of administering the programs.*

§ 10.1-561.1. Certification of local program personnel.—A. The minimum standards of local program effectiveness established by the Board pursuant to subsection D of § 10.1-561 shall provide that within one year following the adoption of amendments to the local program adding the provisions of this section, (i) a conservation plan shall not be approved until it is reviewed by a certified plan reviewer; (ii) inspections of land-disturbing activities are conducted by a certified inspector; and (iii) a local program shall contain a certified program administrator, a certified plan reviewer, and a certified project inspector, who may be the same person.

B. Any person who holds a certificate of competence from the Board in the areas of plan review, project administration, or program administration which was attained prior to the adoption of the mandatory certification provisions of subsection A of this section shall be deemed to satisfy the requirements of that area of certification.

§ 10.1-562. Local erosion and sediment control programs.—A. Each district in the Commonwealth ~~, except as provided in subsection C of this section, shall have a soil erosion and sediment control program consistent with the state program and regulations for erosion and sediment control~~ *shall adopt and administer an erosion and sediment control program for any area within the district for which a county, city, or town does not have an approved erosion and sediment control program* .

To carry out its program the district shall adopt regulations consistent with the state program. The regulations may be revised from time to time as necessary. Before adopting or revising regulations, the district shall give due notice and conduct a public hearing on the proposed or revised regulations except that a public hearing shall not be required when the district is amending its program to conform to revisions in the state program. However, a public hearing shall be held if a district proposes or revises regulations that are more stringent than the state program. The program and regulations shall be available for public inspection at the principal office of the district.

B. In areas where there is no district, a county, city, or town shall adopt and administer ~~the~~ *an* erosion and sediment control program ~~and exercise the responsibilities of a district with respect thereto, as provided in this article~~ .

C. Any county, city, or town ~~that has adopted its own~~ *within a district may adopt and administer an* erosion and sediment control program ~~which has been approved by the Board shall be treated under this article as a county, city, or town which lies in an area where there is no district, whether or not such district in fact exists~~ .

Any town, lying within a county which has adopted its own erosion and sediment control program, ~~must either~~ *may* adopt its own program or become subject to the county program. If a town lies within the boundaries of more than one county, the town shall be considered for the purposes of this article to be wholly within the county in which the larger portion of the town lies. Any county, city, or town with an erosion and sediment control program may designate its department of public works or a similar local government department as the plan-approving authority or may designate the district as the

plan-approving authority for all or some of the conservation plans.

D. ~~If a district or county or city not in a district, fails to submit a program to the Board, the Board shall, after such hearings or consultations as it deems appropriate with the various local interests involved, develop and adopt an appropriate program to be carried out by such district, county or city.~~ *Any erosion and sediment control program adopted by a district, county, city, or town shall be approved by the Board if it is consistent with the state program and regulations for erosion and sediment control.*

E. If a review conducted by the Board of a local control program indicates that the program authority has not administered, enforced or conducted its program in a manner that satisfies the minimum standards of effectiveness established pursuant to subsection D of § 10.1-561, the Board shall notify the program authority in writing, which notice shall identify corrective action required to attain the minimum standard of effectiveness and shall include an offer to provide technical assistance to implement the corrective action. If the program authority has not implemented the corrective action identified by the Board within thirty days following receipt of the notice, or such additional period as is necessary to complete the implementation of the corrective action, then the Board shall revoke its approval of the program. Prior to revoking its approval of any local control program, the Board shall conduct a formal hearing pursuant to § 9-6.14:12 of the Administrative Process Act. Judicial review of any order of the Board revoking its approval of a local control program shall be made in accordance with Article 4 (§ 9-6.14:15 et seq.) of the Administrative Process Act.

F. If the Board revokes its approval of a local control program of a county, city, or town, and the locality is in a district, the district shall adopt and administer an erosion and sediment control program for the locality.

G. If the Board (i) revokes its approval of a local control program of a district, or of a county, city, or town not in a district, or (ii) finds that a local program consistent with the state program and regulations has not been adopted by a district or a county, city, or town which is required to adopt and administer a local program, the Board shall, after such hearings or consultations as it deems appropriate with the various local interests involved, develop, adopt, and administer an appropriate program to be carried out within such district, county, city, or town, as applicable, by the Board.

H. If the Board has revoked its approval of any local control program, the program authority may request that the Board approve a replacement program, and the Board shall approve the replacement program if it finds that (i) the program authority is capable of administering the program in accordance with the minimum standards of effectiveness and (ii) the replacement program otherwise meets the requirements of the state program and regulations. The Board shall conduct a formal hearing pursuant to § 9-6.14:12 of the Administrative Process Act on any request for approval of a replacement program.

~~E.~~ *I.* Any ~~district, county, city or town~~ *program authority* which administers an erosion and sediment control program may charge applicants a reasonable fee to defray the cost of program administration ~~, including costs associated with the issuance of grading or land-disturbing permits, plan review, and periodic inspection for compliance with erosion and sediment control plans if charges for such costs are not made under any other law, ordinance, or program~~ . *A program authority shall hold a public hearing prior to enacting an ordinance establishing a schedule of fees.* The fee shall not exceed an amount commensurate with the services rendered, taking into consideration the time, skill and administrators' expense involved ~~, or $1,000, whichever is less~~ .

~~F.~~ *J.* The governing body of any county, city or town which (i) is in a district which has adopted a local control program, (ii) has adopted its own local control program, (iii) is subject to a local control program adopted by the Board, or (iv) administers a local control program, may adopt an ordinance ~~establishing a uniform schedule of civil penalties for~~ *providing that* violations of any regulation or order of the Board, any provision of its program, any condition of a permit, or any provision of this article *shall be subject to a civil penalty* . ~~Any schedule of civil penalties shall be uniform for each type of specified~~

~~violation, and the~~ *The* civil penalty for any one violation shall ~~not exceed~~ *be* $100 *, except that the civil penalty for commencement of land-disturbing activities without an approved plan as provided in § 10.1-563 shall* ~~not exceed~~ *be $1,000* . Each day during which the violation is found to have existed shall constitute a separate offense. ~~However, in no event shall specified violations arising from the same operative set of facts be charged more frequently than once in any ten-day period, and in~~ *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* . ~~Designation of a particular violation for~~ *Adoption of such an ordinance providing that violations are subject to* a civil penalty shall be in lieu of criminal sanctions and shall preclude the prosecution of such violation as a misdemeanor under subsection A of § 10.1-569.

§ 10.1-563. Regulated land-disturbing activities; submission and approval of control plan.—A. Except as provided in § 10.1-564, no person may engage in any land-disturbing activity until he has submitted to the district or locality an erosion and sediment control plan for the land-disturbing activity and the plan has been reviewed and approved by the plan-approving authority. Where land-disturbing activities involve lands under the jurisdiction of more than one local control program an erosion and sediment control plan may, at the option of the applicant, be submitted to the Board for review and approval rather than to each jurisdiction concerned. *Where the land-disturbing activity results from the construction of a single-family residence, an agreement in lieu of a plan may be substituted for an erosion and sediment control plan if executed by the plan-approving authority.*

B. The plan-approving authority shall review conservation plans submitted to it and grant written approval within forty-five days of the receipt of the plan if it determines that the plan meets the requirements of the Board's regulations and if the person responsible for carrying out the plan certifies that he will properly perform the conservation measures included in the plan and will conform to the provisions of this article.

When a plan is determined to be inadequate, written notice of disapproval stating the specific reasons for disapproval shall be communicated to the applicant within forty-five days. The notice shall specify the modifications, terms and conditions that will permit approval of the plan. If no action is taken by the plan-approving authority within the time specified above, the plan shall be deemed approved and the person authorized to proceed with the proposed activity.

C. 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.

D. Electric and telephone utility companies and railroad companies shall file general erosion and sediment control specifications annually with the Board for review and written comments. The specifications shall apply to:

1. Construction, installation or maintenance of electric and telephone utility lines; and

2. Construction of the tracks, rights-of-way, bridges, communication facilities and other related structures and facilities of the railroad company.

The Board shall have sixty days in which to comment. Individual approval of separate projects within subdivisions 1 and 2 of this subsection is not necessary when approved specifications are followed. Projects not included in subdivisions 1 and 2 of this subsection shall comply with the requirements of the appropriate local erosion and sediment control

program. The Board shall have the authority to enforce approved specifications.

E. In order to prevent further erosion a local program may require approval of a conservation plan for any land identified in the local program as an erosion impact area.

F. For the purposes of subsections A and B of this section, when land-disturbing activity will be required of a contractor performing construction work pursuant to a construction contract, the preparation, submission and approval of an erosion and sediment control plan shall be the responsibility of the owner.

§ 10.1-564. State agency projects.— ~~Any state agency that undertakes a project involving a land-disturbing activity shall file specifications annually or a conservation plan for each project with the Department for review and written comments. The Department shall have sixty days in which to comment and its comments shall be binding on the state agency or the private business hired by the state agency. Individual approval of separate projects is not necessary when approved specifications are followed.~~

~~As on-site changes occur, the state agency shall submit changes in the conservation plan to the Department.~~

~~The state agency responsible for the land-disturbing activity shall ensure compliance with the approved plan or specifications.~~

A. A state agency shall not undertake a project involving a land-disturbing activity unless (i) the state agency has submitted annual specifications for its conduct of land-disturbing activities which have been reviewed and approved by the Department as being consistent with the state program or (ii) the state agency has submitted a conservation plan for the project which has been reviewed and approved by the Department.

B. The Department shall not approve a conservation plan submitted by a federal or state agency for a project involving a land-disturbing activity (i) in any locality which has not adopted a local program with more stringent regulations than those of the state program or (ii) in multiple jurisdictions with separate local programs, unless the conservation plan is consistent with the requirements of the state program.

C. The Department shall not approve a conservation plan submitted by a federal or state agency for a project involving a land-distributing activity in one locality with a local program with more stringent regulations than those of the state program unless the conservation plan is consistent with the requirements of the local program. If a locality has not submitted a copy of its local program regulations to the Department, the provisions of subsection B of this section shall apply.

D. The Department shall have sixty days in which to comment on any specifications or conservation plan submitted to it for review, and its comments shall be binding on the state agency and any private business hired by the state agency.

E. As on-site changes occur, the state agency shall submit changes in a conservation plan to the Department.

F. The state agency responsible for the land-disturbing activity shall ensure compliance with the approved plan or specifications.

§ 10.1-566. Monitoring, reports and inspections.—A. The plan-approving authority or, if a permit is issued in connection with land-disturbing activities which involve the issuance of a grading, building, or other permit, the permit-issuing authority (i) shall provide for periodic inspections of the land-disturbing activity and (ii) may require monitoring and reports from the person responsible for carrying out the plan, to ensure compliance with the approved plan and to determine whether the measures required in the plan are effective in controlling erosion and sediment. The owner, ~~occupier or operator~~ *permittee, or person responsible for carrying out the plan* shall be given notice of the inspection ~~and an opportunity to accompany the inspectors~~ . If the permit-issuing authority or plan-approving authority determines that there is a failure to comply with the plan, notice shall be served upon the permittee or person responsible for carrying out the plan by registered or certified mail to the address specified in the permit application or in the plan certification, or by delivery at the site of the land-disturbing activities to the agent or employee

supervising such activities. Where the plan-approving authority serves notice, a copy of the notice shall also be sent to the issuer of the permit. The notice shall specify the measures needed to comply with the plan and shall specify the time within which such measures shall be completed. Upon failure to comply within the time specified, the permit may be revoked and the permittee or person responsible for carrying out the plan shall be deemed to be in violation of this article and shall be subject to the penalties provided by § 10.1-569.

B. Notwithstanding the above provisions of this section the following may be applied:

1. Where a county, city, or town administers the local control program and the permit-issuing authority and the plan-approving authority are not within the same local government department, the locality may designate one department to inspect, monitor, report and ensure compliance. In the event a district has been designated as the plan-approving authority for all or some of the conservation plans, the enforcement of the program shall be with the local government department; however, the district may inspect, monitor and make reports for the local government department.

2. Where a district adopts the local control program and permit-issuing authorities have been established by a locality, the district by joint resolution with the appropriate locality may exercise the responsibilities of the permit-issuing authorities with respect to monitoring, reports, inspections and enforcement.

3. Where a permit-issuing authority has been established, and such authority is not vested in an employee or officer of local government but in the commissioner of revenue or some other person, the locality shall exercise the responsibilities of the permit-issuing authority with respect to monitoring, reports, inspections and enforcement unless such responsibilities are transferred as provided for in this section.

C. Upon receipt of a sworn complaint of a ~~substantial~~ violation of this section, § 10.1-563 or § 10.1-564 from the ~~designated enforcement officer~~ *representative of the program authority or the Board responsible for ensuring program compliance* , the chief administrative officer , *or his designee,* of ~~(i)~~ *the program authority or* the Board ~~, or (ii) the county, city or town operating its own erosion and sediment control program, or (iii) a district which is responsible for monitoring and inspecting for compliance~~ may, in conjunction with or subsequent to a notice to comply as specified in subsection A above, issue an order requiring that all or part of the land-disturbing activities permitted on the site be stopped until the specified corrective measures have been taken *or, if land-disturbing activities have commenced without an approved plan as provided in § 10.1-563, requiring that all of the land-disturbing activities be stopped until an approved plan or any required permits are obtained* . 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 as specified in subsection A above. Otherwise, such an 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 circuit court of the jurisdiction wherein the violation was alleged to have occurred. *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 chief administrative officer or his designee 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. Such an order shall be served upon the owner by registered or certified mail to the address specified in the permit application or the land records of the locality in which the site is located. The owner may appeal the issuance of an order to the circuit court of the jurisdiction wherein the violation was alleged to have occurred. Any person violating or failing, neglecting or*

refusing to obey an order issued by the chief administrative officer or his designee may be compelled in a proceeding instituted in the circuit court of the jurisdiction wherein the violation was alleged to have occurred to obey same and to comply therewith by injunction, mandamus or other appropriate remedy. Upon completion *and approval* of corrective action *or obtaining an approved plan or any required permits* , the order shall immediately be lifted. Nothing in this section shall prevent the chief administrative officer *or his designee* from taking any other action specified in § 10.1-569.

§ 10.1-569. Penalties, injunctions and other legal actions.—A. Violators of §§ 10.1-563, 10.1-564 or § 10.1-566 shall be guilty of a *Class 1* misdemeanor ~~and subject to a fine not exceeding $1,000 or thirty days imprisonment for each violation, or both~~ .

B. If a locality has adopted an ordinance establishing a uniform schedule of civil penalties as permitted by subsection ~~F~~ *J* of § 10.1-562, any person who violates any regulation or order of the Board, any condition of a permit, any provision of its program, or any provision of this article shall, upon a finding of an appropriate general district court, be assessed a civil penalty in accordance with the schedule. A civil action for such violation may be brought by the locality wherein the land lies. In any trial for a scheduled violation, it shall be the burden of the locality to show the liability of the violator by a preponderance of the evidence. An admission or finding of liability shall not be a criminal conviction for any purpose. 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.

C. The appropriate permit-issuing authority, ~~or a district or locality operating its own program~~ *the program authority* , or the Board may apply to the circuit court in any jurisdiction wherein the land lies to enjoin a violation or a threatened violation under § 10.1-563, § 10.1-564 or § 10.1-566 without the necessity of showing that an adequate remedy at law does not exist.

D. In addition to any criminal or civil penalties provided under this chapter, any person who violates any provision of this chapter may be liable to the ~~locality~~ *program authority* , or the Board, as appropriate, in a civil action for damages.

E. 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.

F. With the consent of any person who has violated or failed, neglected or refused to obey any regulation or order of the Board, or any condition of a permit or any provision of this article, 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 E of this section. Such civil charges shall be instead of any appropriate civil penalty which could be imposed under subsection B or E.

G. Upon request of a ~~district or locality operating its own~~ program *authority* , or the permit-issuing authority, the attorney for the Commonwealth shall take legal action to enforce the provisions of this article. Upon request of the Board, the Attorney General shall take appropriate legal action on behalf of the Board to enforce the provisions of this article.

H. 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.

§ 10.1-569.1. Stop work orders by Board; civil penalties.—A. An aggrieved owner of

property sustaining pecuniary damage resulting from a violation of an approved plan or required permit, or from the conduct of land-disturbing activities commenced without an approved plan or required permit, may give written notice of the alleged violation to the program authority and to the Director.

B. Upon receipt of the notice from the aggrieved owner and notification to the program authority, the Director shall conduct an investigation of the aggrieved owner's complaint.

C. If the program authority has not responded to the alleged violation in a manner which causes the violation to cease and abates the damage to the aggrieved owner's property within thirty days following receipt of the notice from the aggrieved owner, the aggrieved owner may request that the Director require the violator to stop the violation and abate the damage to his property.

D. If (i) the Director's investigation of the complaint indicates that the program authority has not responded to the alleged violation as required by the local program, (ii) the program authority has not responded to the alleged violation within thirty days from the date of the notice given pursuant to subsection A of this section, and (iii) the Director is requested by the aggrieved owner to require the violator to cease the violation, then the Director shall give written notice to the program authority that the Director will request the Board to issue an order pursuant to subsection E of this section.

E. If the program authority has not instituted action to stop the violation and abate the damage to the aggrieved owner's property within ten days following receipt of the notice from the Director, the Board is authorized to issue an order requiring the owner, permittee, person responsible for carrying out an approved plan, or person conducting the land-disturbing activities without an approved plan or required permit to cease all land-disturbing activities until the violation of the plan ~~or permit~~ has ceased, or an approved plan and required permits are obtained, as appropriate, and specified corrective measures have been completed.

F. Such orders are to be issued only after a hearing with reasonable notice to the affected person of the time, place and purpose thereof, and they shall become effective upon service on the person by certified mail, return receipt requested, sent to his address specified in the land records of the locality, or by personal delivery by an agent of the Director. However, if the Board finds that any such violation is grossly affecting or presents an imminent and substantial danger of causing harmful erosion of lands or sediment deposition in waters within the watersheds of the Commonwealth, it may issue, without advance notice or hearing, an emergency order directing such person to cease all land-disturbing activities on the site immediately and shall provide an opportunity for a hearing, after reasonable notice as to the time and place thereof, to such person, to affirm, modify, amend or cancel such emergency order.

G. If a person who has been issued an order or emergency order is not complying with the terms thereof, the Board may institute a proceeding in the appropriate circuit court for an injunction, mandamus, or other appropriate remedy compelling the person to comply with such order.

H. Any person violating or failing, neglecting or refusing to obey any injunction, mandamus or other remedy obtained pursuant to subsection G of this section shall be subject, in the discretion of the court, to a civil penalty not to exceed $2,000 for each violation. Any civil penalties assessed by a court shall be paid into the state treasury.