



Evaluation of Drainage Outfalls INTERIM REPORT

December 2020

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Chapter 1289, Item 430 M, of the 2020 Acts of Assembly Evaluation of Drainage Outfalls December 2020

Introduction

Chapter 1289, Item 430M, of the 2020 Virginia Acts of Assembly, directs the Secretary of Transportation and the Secretary of Natural Resources to evaluate the scope of certain drainage outfalls across the Commonwealth, and recommend cost-effective solutions and means by which to fund maintenance of such outfalls. Specifically, Chapter 1289, Item 430M, provides that:

It is the intent of the General Assembly that the Secretary of Transportation and the Secretary of Natural Resources, in consultation with the Chairs of the House Appropriations, Senate Finance and Appropriations, House Transportation, Senate Transportation, House Agriculture, Chesapeake and Natural Resources, and Senate Agriculture, Conservation and Natural Resources Committees, and counties containing subject outfalls, shall evaluate the scope of drainage outfalls across the Commonwealth originating from Virginia Department of Transportation (VDOT) maintained roads with no assigned maintaining entity, and recommend cost-effective solutions and means by which to fund maintenance of such outfalls.

Consistent with the legislation, an interim report is hereby submitted to the aforementioned committee chairs. A final report shall be submitted by September 30, 2021.

Background & Scope

Since the end of the 2020 Session of the General Assembly, VDOT has convened a multi-disciplinary team for the development of a work plan. As an initial task, the work plan required an analysis of those specified outfalls that constitute occurrences of “. . . *drainage outfalls across the Commonwealth originating from [VDOT-maintained] roads with no assigned maintaining entity*” from other, non-subject outfalls. Consequently, the following section clarifies the scope of Chapter 1289, Item 430M (“the Study”) as requested by the General Assembly.

Drainage outfalls beyond Commonwealth-owned property. Generally, any outfall originating from a VDOT-maintained road that is within VDOT’s right-of-way is maintained by VDOT and would not fall within the scope of the Study. Furthermore, any outfall originating from a VDOT-maintained road that is within a drainage easement held by VDOT is maintained by VDOT and would be outside the scope of the Study. In both instances, VDOT operates as the assigned maintaining entity. *Thus, the outfalls identified by the Study for evaluation generally occur outside of Commonwealth-owned property or access easements.*

Drainage outfalls conveying excess, off-site stormwater. VDOT’s conveyance system is designed for and manages stormwater that originates from VDOT-maintained roadways. In some instances, excess stormwater originates off-site and enters VDOT-maintained roadways from private property, only to leave the system down gradient and discharge at yet another point outside of VDOT’s ownership. *Thus, the scope of the Study would seem to include an evaluation of those outfalls where design capacity has been overwhelmed due to excess stormwater that both originates and discharges beyond the Commonwealth-owned property or easements.*

Drainage outfalls originally dedicated to localities. As discussed above, VDOT maintains those outfalls owned by the Commonwealth. Pursuant to common law, no property interest in land can be transferred to the Commonwealth by implication, whether plat or otherwise. Consequently, the outfalls to be evaluated by the Study most often occur on property owned by a locality or private party.

Due to historical developments, sometimes the ownership of the outfall, as between the locality and a private party, may not be well understood. For example, outfalls created and owned by a private developer are often dedicated to the locality when the plat is recorded—even if the locality is not expressly named. More specifically, interests dedicated “for public use” are accepted by the locality pursuant to § 15.2-2265, which provides:

The recordation of an approved plat shall operate to transfer, in fee simple, to the respective localities in which the land lies the portion of the premises platted as is on the plat set apart for streets, alleys or other public use and to transfer to the locality any easement indicated on the plat to create a public right of passage over the land. The recordation of such plat shall operate to transfer to the locality, or to such association or public authority as the locality may provide, such easements shown on the plat for the conveyance of stormwater, domestic water and sewage, including the installation and maintenance of any facilities utilized for such purposes, as the locality may require. . . . When the authorized officials of a locality within which land is located, approve in accordance with the subdivision ordinances of the locality a plat or replat of land therein, then upon the recording of the plat or replat in the circuit court clerk's office, all rights-of-way, easements or other interest of the locality in the land included on the plat or replat, except as shown thereon, shall be terminated and extinguished, except that an interest acquired by the locality by condemnation, by purchase for valuable consideration and evidenced by a separate instrument of record, or streets, alleys or easements for public passage subject to the provisions of § 15.2-2271 or 15.2-2272 shall not be affected thereby.

Upon recordation, the locality would then be the assigned maintenance entity. If the private developer did not transfer ownership or access rights to the locality, however identified, the property owner would continue to have the responsibility of being the assigned maintenance entity for the outfall. *Thus, this Study is likely to identify those outfalls constructed by private developers*

and typically dedicated to the locality through the deed recordation process as being within the scope of evaluation.

Drainage outfalls not transferred to, or accepted by, VDOT. Confusion as to maintenance responsibility may also arise if a road was constructed by an entity other than VDOT but ultimately intended for acceptance into the state system. This would include roads constructed by localities or developers that are subject to the standards required for subdivision and secondary street acceptance. These developments often include drainage easements, not on VDOT right of way, that remain the responsibility of others, such as localities, developers, or subdivisions, depending on local requirements and practices. In such cases, responsibility for maintaining said drainage easements would continue to be with the owner of the easements, such as the locality, the developer or a homeowner's association. *Accordingly, the Study is likely to identify those outfalls constructed by another entity but not subsequently transferred to VDOT as being within the scope of evaluation, if not adequately maintained.*

Drainage outfalls arising from "Byrd Act" highways. Further historical confusion arises via the transfer of county roads to the Commonwealth pursuant to the 1932 Omnibus Act, commonly referred to as the "Byrd Act." The Byrd Act created the secondary system when it transferred the "control, supervision, management and jurisdiction" of county roads from localities to VDOT. While it also transferred the power to exercise eminent domain, the Act did not expand any rights of property ownership. Prior to 1932, many public roads were established by prescriptive easement rather than fee simple. Consequently, boundary lines and ownership, especially in rural areas, may remain unclear. *It is expected that such outfalls would be subject to the Study, as VDOT may not possess adequate access rights to maintain outfalls beyond its right-of-way.*

Work Plan

Given that many of the foregoing examples delineating the scope of the Study arise from outfalls outside of property owned by the Commonwealth, efforts to evaluate the scope and magnitude of drainage outfalls with no assigned maintaining entity should, to the greatest extent feasible, include a locality-level reconnaissance to determine how and why the drainage easement is failing to be maintained. Unfortunately, due to the potential breadth of the problem, a comprehensive "on the ground" survey of individual outfalls occurring across the Commonwealth would not be feasible within a year and would not be the most efficient method for identifying the systemic causes of the problem.

In accordance with the Study's direction, the following approach to the Study is offered and intended to be conducted after and in further consultation with the Chairs of the House Appropriations, Senate Finance and Appropriations, House Transportation, Senate Transportation, House Agriculture, Chesapeake and Natural Resources, and Senate Agriculture, Conservation and Natural Resources Committees, and counties containing subject outfalls.

Evaluation of inadequate drainage outfalls. VDOT's Maintenance Division will review the effectiveness of current drainage policies and procedures utilized by the Department including best management practices for ditching, for the purpose of identifying and proposing means of minimizing any negative impacts arising from outfalls that might be inadequately maintained or contributing to stormwater overflows. VDOT will review policies and procedures in other states for purposes of assessing the status of best management practices elsewhere.

Local developments and concerns regarding drainage outfalls. VDOT's Office of Land Use will summarize its understanding of how each locality addresses drainage easements for projects not constructed by VDOT to gain an understanding of the numbers of drainage easements being placed under private responsibility. A survey of drainage outfall developments and concerns will be conducted directly with participating localities.

Legal authority concerning the maintenance of drainage outfalls. A review of controlling statutes, local ordinances, and jurisprudence should be performed to assess responsible parties and regulatory authority, including any enforcement authority by which localities require maintenance for drainage outfalls under private easement.

Adequacy of current funding levels for drainage outfalls. In conjunction with the survey of participating localities, the Study should also investigate/evaluate current investment and funding approaches to the maintenance of drainage outfalls. Such an evaluation might also investigate funding levels between localities with and those without significant numbers of orphaned outfalls.

This interim report is due by December 31, 2020, and a final report is due by September 30, 2021¹.

Next Steps

Based on the findings from the above analysis that would be provided in the final report, the Secretary of Transportation and the Secretary of Natural Resources, with the support of staff, would then be in a position to recommend cost-effective solutions and means by which to fund maintenance of such outfalls to the Chairs of the House Appropriations, Senate Finance and Appropriations, House Transportation, Senate Transportation, House Agriculture, Chesapeake and Natural Resources, and Senate Agriculture, Conservation and Natural Resources Committees.

¹ It is noted that a study of this magnitude and complexity may require additional time and hence, an extension of the due date for the final report to the first day of the 2022 General Assembly Session may be appropriate.