

**CHAPTER 118.**

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## ARTICLE 1.

### General Provisions and Definitions.

#### Section 118-1-1. Title.

This Chapter shall hereafter be known, cited, and referred to as the "Chesapeake Bay Preservation Ordinance" of Fairfax County.

#### Section 118-1-2. Authority.

This ordinance is enacted pursuant to the authority and mandates of the Chesapeake Bay Preservation Act, Sections 10.1-2100, et seq., of the *Code of Virginia*.

#### Section 118-1-3. Enactment.

This Chapter shall be effective at 12:01 A.M. on July 1, 1993.

#### Section 118-1-4. Findings.

(a) The Chesapeake Bay is one of the most productive estuaries in the world, providing substantial economic and social benefits to the people of the Commonwealth of Virginia. Healthy state and local economies are integrally related to and dependent upon the health of the Chesapeake Bay, therefore the general welfare of the people of Fairfax County and the Commonwealth depends on the health of the Bay.

(b) The Chesapeake Bay waters have been degraded significantly by many sources of pollution, including nonpoint source pollution from land uses and development. While nonpoint source pollution from an individual property may not be substantial, cumulative negative impacts of pollution from developed and developing properties, as well as from agricultural lands, have been significant. Existing high quality waters are worthy of protection from degradation to guard against further pollution, and the quality of other state waters should be improved. Certain lands that are proximate to shorelines and streams have intrinsic water quality value due to the ecological and biological processes they perform or are sensitive to impacts which may result in significant degradation of the quality of state waters and the Chesapeake Bay. Other lands have severe development constraints from erosion and soil limitations. With proper management, they offer significant ecological benefits by providing water quality maintenance and pollution control, as well as flood and erosion control. These lands, designated by the Board of Supervisors of Fairfax County as Chesapeake Bay Preservation Areas ("CBPAs"), need to be protected and managed to prevent destruction and damage in order to protect the quality of water in the Bay and other state waters, and consequently the quality of life in Fairfax County and the Commonwealth of Virginia.

(c) The entirety of Fairfax County drains into the Potomac River and ultimately the Chesapeake Bay. Any use or development within the County can, therefore, impact the water quality of the Bay.

(d) While certain lands have intrinsic water quality value due to the ecological and biological processes they perform or are sensitive to impacts which may result in significant degradation of the quality of state waters, it is recognized that some activities, including the provision of infrastructure, may need to be located in these areas. It is also recognized that certain exceptions to requirements regarding these lands may be appropriate.

(e) The mandates of the Act constitute a material change in circumstances substantially affecting the public health, safety and welfare and necessitating an appropriate legislative response by the Board of Supervisors.

#### **Section 118-1-5. Purpose and Intent.**

The purpose and intent of this Chapter is to encourage and promote: (1) the protection of existing high quality state waters; (2) the restoration of all other state waters to a condition or quality that will permit all reasonable public uses and will support the propagation and growth of all aquatic life, including game fish, which might reasonably be expected to inhabit them; (3) the safeguarding of the clean waters of the Commonwealth from pollution; (4) the prevention of any increase in pollution; (5) the reduction of existing pollution; and (6) water resource conservation in order to provide for the health, safety and welfare of the present and future citizens of Fairfax County and the Commonwealth of Virginia.

#### **Section 118-1-6. Definitions.**

For the purposes of this Chapter:

(a) "Agricultural land" means:

(1) Any area of land of five (5) acres or more upon which crops are produced or raised, except trees that are produced for timber;

(2) Any tract of land used as a nursery on which plants are raised or kept for transplanting, for use as stock for budding or grafting, or for sale, regardless of the area of the tract; and

(3) Any tract of land on which kennels, horses, poultry, or livestock are maintained regardless of the area of the tract.

(b) "Applicant" means a person who has submitted a plan of development to the Department of Public Works and Environmental Services or an exception request to the Director.

(c) "Average land cover conditions" means the average percent of impervious area within the County, as set forth in the Fairfax County Public Facilities Manual.

(d) "Best Management Practice" or "BMP" means a practice, or combination of practices, that is determined by the Director to be the most effective, practicable means of preventing or reducing the amount of pollution generated by nonpoint sources to a level compatible with water quality goals.

(e) "Buffer area" means an area of natural or established vegetation managed to protect other components of a Resource Protection Area and state waters from significant degradation due to land disturbances.

(f) "Chesapeake Bay Preservation Area" or "CBPA" means any land designated by the County pursuant to Part III of the Chesapeake Bay Preservation Area Designation and Management Regulations and Section 10.1-2107 of the *Code of Virginia*. A Chesapeake Bay Preservation Area shall consist of a Resource Protection Area and a Resource Management Area.

(g) "Development" means the construction, rehabilitation, rebuilding or substantial alteration of residential, commercial, industrial, institutional, recreational, transportation, or utility uses, facilities or structures which results in a net increase in impervious area within an RPA and/or a net increase in impervious area within an RMA of greater than 20%, relative to conditions prior to development.

(h) "Director" means the Director of the Department of Public Works and Environmental Services.

(i) "Highly erodible soils" means soils (excluding vegetation) with an erodibility index (EI) from sheet and rill erosion equal to or greater than eight. The erodibility index for any soil is defined as the product of the formula  $RKLS/T$ , where K is the soil susceptibility to water erosion in the surface layer; R is the rainfall and runoff; LS is the combined effects of slope length and steepness; and  $\bar{T}$  is the soil loss tolerance.

(j) "Highly permeable soils" means soils with a given potential to transmit water through the soil profile. Highly permeable soils are identified as any soil having a permeability equal to or greater than six inches of water movement per hour in any part of the soil profile to a depth of 72 inches (permeability groups "rapid" and "very rapid") as found in the "National Soils Survey Handbook" of November, 1996, in the "Field Office Technical Guide" of the U.S. Department of Agriculture Natural Resources Conservation Service.

(k) "Impervious area" or "impervious surface" means a surface composed of any material that significantly impedes or prevents natural infiltration of water into the soil. Impervious surfaces include, but are not limited to, roofs, buildings, streets, and concrete, asphalt, or compacted gravel surfaces. "Impervious area" or "impervious surface" does not include the water surface area of a swimming pool.

(l) "Intensely Developed Area" or "IDA" means an area of existing development and infill sites where development is concentrated and little of the natural environment remains as of the date of adoption of this Chapter and which is so designated on the map of Chesapeake Bay Preservation Areas adopted by the Board of Supervisors pursuant to Section 118-1-9. An IDA must satisfy at least one of the following conditions as of July 1, 1993: development has severely altered the natural state of the area such that it has more than fifty percent (50%) impervious surface; public sewer and water systems, or a constructed stormwater drainage system, or both, have been constructed and serve the area as of the date of adoption of this Chapter; or housing density is equal to or greater than four dwelling units per acre.

(m) "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, permanent flooding associated with the impoundment of water, and filling of land.

(n) "Lot" means a parcel of land that is designated at the time of application for a special permit, a special exception, a site plan, a building permit, residential/non-residential use permit, or other plan of development, as a tract of land which is to be used, developed or built upon as a unit under single ownership. A parcel of land shall be deemed to be a lot in accordance with this definition, regardless of whether or not the boundaries thereof coincide with the boundaries of lots or parcels as shown on any map of record or other plans of development.

(o) "Major floodplain" means those land areas in and adjacent to streams and watercourses subject to continuous or periodic inundation from flood events with a one (1) percent chance of occurrence in any given year (i.e., the 100-year flood frequency event) and having a drainage area equal to or greater than three hundred and sixty (360) acres.

(p) "Nonpoint source pollution" means pollution consisting of constituents such as sediment, nutrients, and organic and toxic substances from diffuse sources, such as runoff from agriculture and urban land development and uses.

(q) "Nontidal wetlands" means those wetlands other than tidal wetlands that are inundated or

saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions, as defined by the U.S. Environmental Protection Agency pursuant to Sec. 404 of the Federal Clean Water Act, in 33 CFR 328.3b, dated November 13, 1986, or as subsequently amended.

(r) "Noxious weeds" means Johnson grass, kudzu, poison ivy, ragweed, poison oak, poison sumac, purple loosestrife, and multiflora rose and any other species hereinafter designated by the State as a noxious weed.

(s) "Passive recreation" means recreational activities that are commonly unorganized and non-competitive, including, but not limited to, picnicking, bird watching, kite flying, bicycling, and walking. Site amenities for such activities include, but are not limited to, picnic tables, photo stands, open play areas where substantial clearing is not required, rest rooms, tot lots, boardwalks, paved paths, pathways, benches, and pedestrian bridges and appurtenant structures.

(t) "Plans of development" means plans, including but not limited to, development plans, conceptual development plans, final development plans, generalized development plans, special exception plats, special permit plats, variance plats, PRC plans, minor site plans, site plans, preliminary subdivision plats, final subdivision plats, subdivision waivers and exceptions, conservation plans, construction plans, rough grading plans, grading plans, and plans associated with wetlands permits.

(u) "Public roads" means roads that satisfy construction, siting and water quality standards applicable to roads constructed by the Virginia Department of Transportation or other publicly owned roads that meet such standards.

(v) "Redevelopment" means the substantial alteration, rehabilitation, or rebuilding of a property for residential, commercial, industrial, or other purposes where there is no net increase in impervious area by the proposed redevelopment within an RPA and no more than a net increase in impervious area within an RMA of 20% relative to conditions prior to redevelopment, or any construction, rehabilitation, rebuilding, or substantial alteration of residential, commercial, industrial, institutional, recreational, transportation, or utility uses, facilities or structures within an IDA.

(w) "Resource Management Area" or "RMA" means that component of the Chesapeake Bay Preservation Area comprised of lands that, if improperly used or developed, have a potential for causing significant water quality degradation or for diminishing the functional value of the Resource Protection Area.

(x) "Resource Protection Area" or "RPA" means that component of the Chesapeake Bay Preservation Area comprised of lands adjacent to water bodies with perennial flow that have an intrinsic water quality value due to the ecological and biological processes they perform or are sensitive to impacts which may result in significant degradation of the quality of state waters. In their natural condition, these lands provide for the removal, reduction, or assimilation of sediments, nutrients, and potentially harmful or toxic substances from runoff entering the Bay and its tributaries, and minimize the adverse effects of human activities on state waters and aquatic resources.

(y) "Silvicultural activity" means any forest management activity, including but not limited to the harvesting of timber, the construction of roads and trails for forest management purposes, and the preparation of property for reforestation that is conducted in accordance with the silvicultural best management practices developed and enforced by the State Forester pursuant to

§ 10.1-1105 of the *Code of Virginia* and is located on property defined as real estate devoted to forest use under § 58.1-3230 of the *Code of Virginia*.

(z) "Substantial alteration" means expansion or modification of a structure or development that would result in disturbance of any land within a Resource Protection Area or land exceeding an area of 2,500 square feet within a Resource Management Area.

(aa) "Tidal shores" or "shore" means land contiguous to a tidal body of water between the mean low water level and the mean high water level.

(bb) "Tidal wetlands" means vegetated and nonvegetated wetlands as defined in Chapter 116, Wetlands Zoning Ordinance, of the Fairfax County Code.

(cc) "Use" means any purpose for which a structure or a tract of land may be designed, arranged, intended, maintained, or occupied; also, any activity, occupation, business or operation carried on, or intended to be carried on, in or on a structure or on a tract of land.

(dd) "Water body with perennial flow" means a body of water flowing in a natural or man-made channel year-round, except during periods of drought. The term "water body with perennial flow" includes perennial streams, estuaries, and tidal embayments. A perennial stream means any stream that is both perennial and so depicted on the map of Chesapeake Bay Preservation Areas adopted by the Board of Supervisors pursuant to Section 118-1-9(a). Streams identified as perennial on the adopted map are based on field studies conducted by the Department of Public Works and Environmental Services. Lakes and ponds that form the source of a perennial stream, or through which the perennial stream flows, are a part of the perennial stream. The width of a perennial stream may be measured from top-of-bank to top-of-bank or at the Ordinary High Water Mark (OHWM) as defined by 33 CFR Part 328.3(e). The aerial extent of a pond or lake is measured at the OHWM. Generally, the water table is located above the streambed for most of the year and groundwater is the primary source for stream flow. In the absence of pollution or other manmade disturbances, a perennial stream is capable of supporting aquatic life.

(ee) "Watercourse" means a stream with incised channel (bed and banks) over which waters are conveyed.

(ff) "Water-dependent development" or "Water-dependent facility" means the development of land or a facility that cannot exist outside of a Resource Protection Area and must be located within a Resource Protection Area, either in whole or in part, by reason of the intrinsic nature of its operation. These facilities include, but are not limited to (i) ports; (ii) the intake and outfall structures of power plants, water treatment plants, sewage treatment plants, and storm sewers; (iii) marinas and other boat docking structures; (iv) beaches and other public water-oriented recreation areas; (v) fisheries or other marine resources facilities; and (vi) stream bank stabilization measures.

(gg) "Wetlands" means tidal and nontidal wetlands.

### **Section 118-1-7. Areas of Applicability.**

This Chapter and all regulations adopted hereunder shall apply to all land located within the unincorporated areas of Fairfax County.

(a) The County is divided into Resource Protection Areas ("RPAs") and Resource Management Areas ("RMAs") that are subject to the criteria and requirements of this Chapter. Portions of

RPAs and RMAs may be designated by the Board at a future date as Intensely Developed Areas ("IDAs"). RPAs are protected from most development because, left intact, they function to improve and protect water quality. RMAs, which include all areas outside of RPAs, are regulated to protect RPAs and water resources from degradation resulting from development and land disturbing activity. IDAs are redevelopment areas within which the performance criteria for redevelopment within Article 3 shall apply.

(b) RPAs shall include any land characterized by one or more of the following features:

- (1) A tidal wetland;
- (2) A tidal shore;
- (3) A water body with perennial flow;
- (4) A nontidal wetland connected by surface flow and contiguous to a tidal wetland or water body with perennial flow;
- (5) A buffer area as follows:
  - (i) Any land within a major floodplain;
  - (ii) Any land within 100 feet of a feature listed in Sections 118-1-7(b)(1)-(4).

The full buffer area shall be designated as the landward component of the RPA notwithstanding the presence of permitted uses, encroachments, and permitted vegetation clearing in compliance with Article 3. Designation of the components listed in Sections 118-1-7(b)(1)-(4) shall not be subject to modification unless based on reliable, site-specific information as provided for in Section 118-1-9.

(c) RMAs shall include any area not designated as an RPA.

(d) Intensely Developed Areas (IDAs) shall include any area so depicted on the map of Chesapeake Bay Preservation Areas adopted by the Board of Supervisors pursuant to Section 118-1-9.

#### **Section 118-1-8. Administration.**

The Director shall be responsible for the administration of this Chapter, except for Section 118-3-2(h) which shall be administered by the Director of Health Services.

#### **Section 118-1-9. Chesapeake Bay Preservation Area Boundaries.**

(a) There shall be a map of Chesapeake Bay Preservation Areas adopted by the Board of Supervisors.

(b) A reliable, site-specific evaluation shall be conducted to determine whether water bodies on or adjacent to development sites have perennial flow and RPA boundaries shall be adjusted, as deemed necessary by the Director, on the site, based on this evaluation of the site. The site-specific evaluations shall be conducted in accordance with this Chapter and the Public Facilities Manual.

(c) It is the burden of the applicant to show the appropriate RPA and RMA boundaries, applying the criteria in Section 118-1-7, on all plans of development submitted for review to the Director. Where RPA and RMA boundaries on the adopted map differ from boundaries as determined from the text of this Chapter, the text shall govern. Such boundary locations shown on plans of development can be approved, modified or disapproved by the Director. The Director may require the submission of an RPA boundary delineation study from the applicant to determine if the location of the RPA boundary shown on the plan of development is in accordance with the text of this Chapter.

(d) Any landowner or agent of the landowner may submit a site-specific determination of the location of RPA boundaries certified by a professional engineer, land surveyor, landscape architect, soil scientist, or wetland delineator certified or licensed to practice in the Commonwealth of Virginia for review and approval by the Director. For land in agricultural use, such site-specific determination of the location of RPA boundaries may be made by an agricultural water quality specialist designated by the Northern Virginia Soil and Water Conservation District. Such site-specific determinations of RPA boundaries shall be performed in accordance with the requirements of this Chapter and the Public Facilities Manual.

(e) The adopted map of Chesapeake Bay Preservation Areas shall display the locations and boundaries of IDAs designated by the Board of Supervisors.

#### **Section 118-1-10. Severability.**

If any of the Articles, Sections, Paragraphs, sentences, clauses, or phrases of this Chapter shall be declared unconstitutional or invalid by a valid judgment or decree of a court of competent jurisdiction, such unconstitutionality or invalidity shall not affect the validity of the Chapter in its entirety or any of the remaining Articles, Sections, Paragraphs, sentences, clauses, and phrases.

#### **Section 118-1-11. Conflicts**

Whenever any provision of this Chapter imposes a greater requirement or a higher standard than is required in any State or Federal statute or other County ordinance or regulation, the provision of this Chapter shall govern. Whenever any provision of any State or Federal statute or other County ordinance or regulation imposes a greater requirement or a higher standard than is required by this Chapter, the provision of such State or Federal statute or other County ordinance or regulation shall govern.

#### **Section 118-1-12. Vested Rights**

The provisions of this chapter shall not affect vested rights of any landowner under existing law<sup>1</sup>.

### **ARTICLE 2.**

#### **Allowed Uses, Development and Redevelopment.**

##### **Section 118-2-1. Allowed Uses, Development and Redevelopment in Resource Protection Areas.**

The following uses, development and redevelopment may be allowed within an RPA if otherwise permitted by the Zoning Ordinance and other law:

(a) Water-dependent development, subject to compliance with the performance criteria of Article 3 of this Chapter;

(b) Redevelopment, including all development within IDAs, subject to compliance with the

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<sup>1</sup> See, for example, “Board Policy for Treatment of Approved and Pending Plans of Development” adopted by the Board of Supervisors on July 7, 2003, and Article 5 of this Chapter.

performance criteria of Article 3 of this Chapter; and

(c) Uses, development or redevelopment exempted under Article 5 of this Chapter or for which an exception allowing such use or development or redevelopment in an RPA is approved pursuant to Article 5 or Article 6 of this Chapter.

(d) Roads and driveways not exempted under Article 5 of this Chapter provided that:

(1) There are no reasonable alternatives to aligning the road or driveway in or across the Resource Protection Area;

(2) The alignment and design of the road or driveway are optimized, consistent with other applicable requirements, to minimize encroachment into the Resource Protection Area and adverse impacts on water quality; and

(3) The design and construction of the road or driveway satisfy all applicable criteria of this Chapter, including the approval of a Water Quality Impact Assessment.

(e) Flood control and stormwater management facilities that drain or treat water from multiple development projects or from a significant portion of a watershed, provided that:

(1) The Director has conclusively established that location of the facility within the Resource Protection Area is the optimum location;

(2) The size of the facility is the minimum necessary to provide necessary flood control or stormwater treatment, or both;

(3) The facility must be consistent with Fairfax County's stormwater management program as approved by the Chesapeake Bay Local Assistance Board;

(4) All applicable permits for construction in state or federal waters must be obtained from the appropriate state and federal agencies, such as the U.S. Army Corps of Engineers, the Virginia Department of Environmental Quality, and the Virginia Marine Resources Commission; and

(5) Approval must be received from the Director prior to construction.

Routine maintenance is allowed to be performed on such facilities to assure that they continue to function as designed. It is not the intent of this subsection to allow a best management practice that collects and treats runoff from only an individual lot or some portion of the lot to be located within a Resource Protection Area.

### **Section 118-2-2. Allowed Uses, Development and Redevelopment in Resource Management Areas.**

Uses, development and redevelopment, otherwise permitted by the Zoning Ordinance and other law, shall be allowed in RMAs provided that the use, development or redevelopment is in compliance with the performance criteria set forth in this Chapter.

### **Section 118-2-3. Use Regulations.**

All uses conducted in Chesapeake Bay Preservation Areas shall comply with the provisions of Section 6-1702 of the Public Facilities Manual.

### **Section 118-2-4. Exceptions.**

Exceptions to these requirements may be allowed as set forth in Article 5 and Article 6 of this Chapter.

### **ARTICLE 3.**

#### **Land Use and Development Performance Criteria.**

##### **Section 118-3-1. Purpose and Intent.**

The purpose of this Article is to achieve the goals of the Chesapeake Bay Preservation Act and Section 118-1-5 through the establishment of criteria to implement the following objectives: prevent a net increase in nonpoint source pollution from new development based on average land cover conditions, achieve a 10% reduction in nonpoint source pollution from redevelopment, and achieve a 40% reduction in nonpoint source pollution from agricultural and silvicultural uses.

##### **Section 118-3-2. General Performance Criteria for Resource Management Areas and Resource Protection Areas.**

Unless waived or modified by other provisions of this Chapter, it shall be demonstrated to the satisfaction of the Director that any use, development, or redevelopment of land in Chesapeake Bay Preservation Areas meets the following performance criteria:

- (a) No more land shall be disturbed than is necessary to provide for the proposed use, development, or redevelopment.
- (b) Indigenous vegetation shall be preserved to the maximum extent practicable consistent with the use, development, or redevelopment proposed.
- (c) Where the best management practices utilized require regular or periodic maintenance in order to continue their functions, such maintenance shall be ensured through a maintenance agreement with the owner or through some other mechanism or agreement that achieves an equivalent objective.
- (d) Impervious cover shall be minimized consistent with the use, development, or redevelopment proposed.
- (e) Any land disturbing activity that exceeds an area of 2,500 square feet shall comply with the requirements of Chapter 104 of the Fairfax County Code. The construction of single family dwellings, septic tanks and drainfields shall not be exempt from this requirement.
- (f) For any development or redevelopment, stormwater runoff shall be controlled by the use of best management practices (BMPs) as follows:
  - (1) For development, the projected total phosphorus runoff pollution load for the proposed development shall be reduced by no less than forty (40) percent compared to phosphorus loads projected for the development without BMPs. This requirement shall not apply to any development that does not require a site plan pursuant to Article 17 of the Zoning Ordinance, that does not require subdivision approval pursuant to Chapter 101 of the Fairfax County Code, and that does not result in an impervious area of 18% or greater on the lot or parcel on which the development will occur.
  - (2) For development and redevelopment within the Water Supply Protection Overlay District, the phosphorus removal requirements for the overlay district shall apply if such requirements impose a higher standard than the requirements of this Chapter.
  - (3) For redevelopment of any property not currently served by one or more BMPs, the total

phosphorus runoff pollution load from the property shall be reduced by at least ten (10) percent from the phosphorus runoff pollution load prior to redevelopment.

(4) For redevelopment of any property that is currently and adequately served by one or more BMPs, the projected phosphorus runoff pollution load after redevelopment shall not exceed the existing phosphorus runoff pollution load.

(5) Best management practices (BMPs) shall be reviewed, modified, waived and/or approved by the Director in accordance with Article 6 of the Public Facilities Manual. Waivers or modifications shall be subject to the following criteria:

(i) The requested waiver or modification to the criteria is the minimum necessary to afford relief;

(ii) Granting the waiver or modification will not confer upon the applicant any special privileges that are denied by this part to other property owners who are subject to its provisions and who are similarly situated;

(iii) The waiver or modification is in harmony with the purpose and intent of this part and is not of substantial detriment to water quality;

(iv) The waiver or modification request is not based upon conditions or circumstances that are self-created or self-imposed;

(v) Reasonable and appropriate conditions are imposed, as warranted, that will prevent the allowed activity from causing a degradation of water quality; and

(vi) Other findings, as appropriate and required herein, are met.

(6) The following options shall be considered to comply with paragraph (f) of this Section:

(i) Incorporation on the site of BMPs that achieve the required control as set forth in paragraphs (1) through (5) above. For the purposes of this subsection, the "site" may include multiple projects or properties that are adjacent to one another or lie within the same drainage area where a single BMP or a system of BMPs will be utilized by those projects in common to satisfy water quality protection requirements;

(ii) Compliance with a locally adopted regional stormwater management program, which may include a Virginia Pollution Discharge Elimination System (VPDES) permit issued by the Department of Environmental Quality to a local government for its municipally owned separate storm sewer system discharges, that is reviewed and found by the Chesapeake Bay Local Assistance Board to achieve water quality protection equivalent to that required by this subsection; or

(iii) Compliance with a site-specific VPDES permit issued by the Department of Environmental Quality, provided that the local government specifically determines that the permit requires measures that collectively achieve water quality protection equivalent to that required by this subsection.

(7) The requirements of paragraph (f) of this Section may be waived or modified for a property if the Director determines that the provision of BMPs is not practical or desirable due to constraints imposed by the dimensions or location of the property. Waivers or modifications shall be subject to the following criteria:

(i) The requested waiver or modification to the criteria is the minimum necessary to afford relief;

(ii) Granting the waiver or modification will not confer upon the applicant any special privileges that are denied by this part to other property owners who are subject to its provisions and who are similarly situated;

(iii) The waiver or modification is in harmony with the purpose and intent of this part and is not of substantial detriment to water quality;

(iv) The waiver or modification request is not based upon conditions or circumstances that are self-created or self-imposed;

(v) Reasonable and appropriate conditions are imposed, as warranted, that will prevent the allowed activity from causing a degradation of water quality; and

(vi) Other findings, as appropriate and required herein, are met.

(8) Any maintenance, alteration, use or improvement to an existing structure or use that does not degrade the quality of surface water discharge, as determined by the Director, may be exempted from the requirements of paragraph (f).

(g) The Director shall require certification on all plans of development that all wetlands permits required by law will be obtained prior to commencement of land disturbing activities in any area subject to the plan of development review. No land disturbing activity on the land subject to the plan of development shall commence until all such permits have been obtained by the applicant and evidence of such permits has been provided to the Director.

(h) All on-site sewage disposal systems requiring a Virginia Pollutant Discharge Elimination System (VPDES) permit shall be subject to the restrictions imposed by the State Water Control Board or the Virginia Department of Health. All on-site sewage disposal systems not requiring a VPDES permit shall be administered by the Director of the Department of Health and shall comply with the following provisions:

(1) Each disposal system shall be pumped out at least once every five years.

(2) For new development or redevelopment, each disposal system shall be provided with a reserve sewage disposal site with a capacity at least equal to that of the primary sewage disposal site.

(i) Compliance with Chapter 68 of the Fairfax County Code shall be deemed to constitute compliance with this requirement. This requirement shall not apply to any parcel of land for which a site plan or preliminary subdivision plat was filed on or before May 21, 1973, and approved by November 20, 1976 if the Director of the Department of Health determines the parcel to have insufficient capacity to accommodate a reserve sewage disposal site except as may be required in the Commonwealth of Virginia Sewage Handling and Disposal Regulations.

(ii) Building shall be prohibited on the area of all such sewage disposal sites, including the reserve sewage disposal site, until the structure is connected to a public sewer or an on-site sewage treatment system which operates under a permit issued by the State Water Control Board.

(i) Land upon which agricultural activities are being conducted, including but not limited to crop production, pasture, and dairy and feedlot operations, or lands otherwise defined as agricultural land by the local government, shall have a soil and water quality conservation assessment conducted that evaluates the effectiveness of existing practices pertaining to soil erosion and sediment control, nutrient management, and management of pesticides, and where necessary, results in a plan that outlines additional practices needed to ensure that water quality protection is being accomplished consistent with the Chesapeake Bay Preservation Act and this chapter.

(1) Recommendations for additional conservation practices need address only those conservation issues applicable to the tract or field being assessed. Any soil and water quality conservation practices that are recommended as a result of such an assessment and are

subsequently implemented with financial assistance from federal or state cost-share programs must be designed, consistent with cost-share practice standards effective in January 1999 in the “Field Office Technical Guide” of the U.S. Department of Agriculture Natural Resources Conservation Service or the June 2000 edition of the “Virginia Agricultural BMP Manual” of the Virginia Department of Conservation and Recreation, respectively. Unless otherwise specified in this section, general standards pertaining to the various agricultural conservation practices being assessed shall be as follows:

(i) For erosion and sediment control recommendations, the goal shall be, where feasible, to prevent erosion from exceeding the soil loss tolerance level, referred to as “T,” as defined in the “National Soil Survey Handbook” of November 1996 in the “Field Office Technical Guide” of the U.S. Department of Agriculture Natural Resources Conservation Service. However, in no case shall erosion exceed the soil loss consistent with an Alternative Conservation System, referred to as an “ACS”, as defined in the “Field Office Technical Guide” of the U.S. Department of Agriculture Natural Resources Conservation Service.

(ii) For nutrient management, whenever nutrient management plans are developed, the operator or landowner must provide soil test information, consistent with the Virginia Nutrient Management Training and Certification Regulations (4 VAC 5-15).

(iii) For pest chemical control, referrals shall be made to the local cooperative extension agent or an Integrated Pest Management Specialist of the Virginia Cooperative Extension Service. Recommendations shall include copies of applicable information from the “Virginia Pest Management Guide” or other Extension materials related to pest control.

(2) A higher priority shall be placed on conducting assessments of agricultural fields and tracts adjacent to Resource Protection Areas. However, if the landowner or operator of such a tract also has Resource Management Area fields or tracts in his operation, the assessment for that landowner or operator may be conducted for all fields or tracts in the operation. When such an expanded assessment is completed, priority must return to Resource Protection Area fields and tracts.

(3) The findings and recommendations of such assessments and any resulting soil and water quality conservation plans will be submitted to the Northern Virginia Soil and Water Conservation District Board, which will be the plan-approving authority.

### **Section 118-3-3. Additional Performance Criteria for Resource Protection Areas.**

The criteria in this Section shall apply specifically within RPAs and supplement the general performance criteria in Section 118-3-2.

(a) A Water Quality Impact Assessment shall be required for any proposed development or redevelopment within an RPA that is not exempt pursuant to Article 5 of this Chapter or for which an exception waiving this criteria is not approved pursuant to Article 6 of this Chapter.

(b) *Allowable Development*: Development is allowed within RPAs if it is water-dependent. New or expanded water-dependent activities shall comply with the following:

(1) Such activities shall not conflict with the Comprehensive Plan;

(2) Such activities shall comply with the performance criteria set forth in this Article;

(3) Any non-water dependent component shall be located outside of the RPA; and

(4) Access shall be provided with the minimum disturbance necessary, and where practicable, a single point of access shall be provided.

(c) Redevelopment, outside of IDAs, is allowed within RPAs only if there is no increase in the amount of impervious area within the RPA and no further encroachment within the RPA and shall conform to the criteria set forth in this Chapter.

(d) *Buffer area requirements:* To minimize the adverse effects of human activities on the other components of the RPA, state waters, and aquatic life, a buffer area that is effective in retarding runoff, preventing erosion, and filtering nonpoint source pollution from runoff shall be retained, if present, and established where it does not exist. Notwithstanding permitted uses, encroachments, and vegetation clearing, authorized by this Chapter, the buffer area is not reduced in width. Where land uses such as agriculture or silviculture within the area of the buffer cease and the lands are proposed to be converted to other uses, the full buffer shall be reestablished in accordance with Section 118-3-3(f).

In order to maintain the functional value of the buffer area, indigenous vegetation may be removed, subject to approval by the Director, from a buffer area only to provide for reasonable sight lines, access paths, general woodlot management, habitat management and other uses authorized by this Chapter, subject to the following:

(1) Trees may be pruned or removed as necessary to provide for sight lines and vistas, provided that where removed, they shall be replaced with other vegetation that is equally effective in retarding runoff, preventing erosion, and filtering nonpoint source pollution from runoff. Trees may be pruned or removed from the RPA buffer in an area no greater than 5,000 square feet or 25% of the buffer area, whichever is less, for all sight lines and vistas combined. The bounds of this area shall be determined in a manner acceptable to the Director and be based on identified vantage points and the portion of the shoreline to be viewed. Trees may not be removed where reasonable sight lines or vistas can be created by pruning trees alone. Pruning shall be performed in accordance with the Public Facilities Manual. No more than 25% of the trees 6 inches or greater in diameter at breast height (4.5 feet) may be removed from the areas designated for sight lines and vistas. Trees may not be pruned or removed within any RPA component listed in Section 118-1-7(b)(1) through (4). A written request for a determination by the Director that the proposed removal of vegetation from the RPA buffer is in accordance with the requirements of this Chapter is required. Such request shall include a plan showing the following: (i) the vantage points for the sight lines and vistas, (ii) the portion of the shoreline to be viewed, (iii) the area in which trees are to be pruned or removed, (iv) the location of all trees six (6) inches or greater in diameter at breast height (4.5 feet) or as required by the Director, and (v) the location of the trees to be removed or pruned. The request shall also indicate the type of replacement vegetation proposed. Trees may not be pruned or removed from the RPA buffer until a written determination is obtained from the Director that the proposed activity is in accordance with the requirements of this Chapter.

(2) Any path shall be constructed and surfaced so as to effectively control erosion.

Paths serving individual residential lots shall be no more than four (4) feet in width except as necessary for handicapped access.

(3) Noxious weeds and dead, diseased, or dying trees or shrubbery may be removed provided that where removed, they shall be replaced with other vegetation that is equally effective in retarding runoff, preventing erosion, and filtering nonpoint source pollution from runoff. Vegetation may not be removed from any RPA component listed in Section 118-1-7(b)(1) through (4).

(4) For shoreline erosion control projects, trees and woody vegetation may be removed, necessary control techniques employed, and appropriate vegetation established to protect or stabilize the shoreline in accordance with the best available technical advice and applicable permit conditions or requirements. For shoreline erosion control projects which propose the use of sea walls, rip-rap, groins or other structural means of stabilization, it shall be demonstrated to the satisfaction of the Director that vegetative techniques cannot be effectively utilized.

(e) On agricultural lands, the buffer area shall be managed to prevent concentrated flows of surface water from breaching the buffer area and appropriate measures, as recommended by the Northern Virginia Soil and Water Conservation District, may be taken to prevent noxious weeds from invading the buffer area. Agricultural activities may encroach into the buffer area as follows:

(1) Agricultural activities may encroach into the landward 50 feet of the 100-foot wide buffer area when at least one agricultural best management practice which, in the opinion of the Northern Virginia Soil and Water Conservation District Board, addresses the more predominant water quality issue on the adjacent land (erosion control or nutrient management) is being implemented on the adjacent land, provided that the combination of the undisturbed buffer area and the best management practice achieves water quality protection, pollutant removal, and water resource conservation at least the equivalent of the 100-foot wide buffer area. If nutrient management is identified as the predominant water quality issue, a nutrient management plan, including soil tests, must be developed consistent with the Virginia Nutrient Management Training and Certification Regulations (4 VAC 5-15) administered by the Virginia Department of Conservation and Recreation.

(2) Agricultural activities may encroach within the landward 75 feet of the 100-foot wide buffer area when agricultural best management practices which, in the opinion of the Northern Virginia Soil and Water Conservation District Board, address erosion control, nutrient management, and pest chemical control, are being implemented on the adjacent land. The erosion control practices must prevent erosion from exceeding the soil loss tolerance level, referred to as "T," as defined in the "National Soil Survey Handbook" of November 1996 in the "Field Office Technical Guide" of the U.S. Department of Agriculture Natural Resource Conservation Service. A nutrient management plan, including soil tests, must be developed, consistent with the Virginia Nutrient Management Training and Certification Regulations (4 VAC 5-15) administered by the Virginia Department of Conservation and Recreation. In conjunction with the remaining buffer area, this collection of best management practices shall be presumed to achieve water quality protection at least the equivalent of that provided by the 100-foot wide buffer area.

(3) The buffer area is not required to be designated adjacent to agricultural drainage ditches if at least one best management practice which, in the opinion of the Northern Virginia Soil and Water Conservation District Board, addresses the more predominant water quality issue on the adjacent land – either erosion control or nutrient management – is being implemented on the adjacent land.

(4) If specific problems are identified pertaining to agricultural activities that are causing pollution of the nearby water body with perennial flow or violate performance standards pertaining to the vegetated buffer area, the Director, in cooperation with the Northern Virginia Soil and Water Conservation District, shall recommend a compliance schedule to the landowner and require the problems to be corrected consistent with that schedule. This schedule shall expedite environmental protection while taking into account the seasons and other temporal considerations so that the probability for successfully implementing the corrective measures is greatest.

(5) In cases where the landowner or his agent or operator has refused assistance from the Northern Virginia Soil and Water Conservation District in complying with or documenting compliance with the agricultural requirements of this chapter, the district shall report the noncompliance to the Director. The Director shall require the landowner to correct the problems within a specified period of time not to exceed 18 months from their initial notification of the deficiencies to the landowner. The Director, in cooperation with the district, shall recommend a compliance schedule to the landowner. This schedule shall expedite environmental protection while taking into account the seasons and other temporal considerations so that the probability for successfully implementing the corrective measures is greatest.

(f) Buffer area establishment: Where buffer areas are to be established, they shall consist of a mixture of overstory trees, understory trees, shrubs and groundcovers. The density of overstory trees shall be a minimum of 100 trees per acre. The density of understory trees shall be a minimum of 200 trees per acre. The density of shrubs shall be a minimum of 1089 plants per acre. If seedlings are used instead of container plants, the density of trees shall be doubled. Large caliper trees shall not be planted on slopes steeper than 2:1. Plant materials shall be randomly placed to achieve a relatively even spacing throughout the buffer. The Director may approve the use of a seed mixture as a supplement to or in lieu of individual plants for shrubs and groundcovers. Plants shall be native to the degree practical and adaptable to site conditions. Wetland plantings (including herbaceous plantings) and/or wetland seed mix shall be used where site conditions warrant. Plant materials and planting techniques shall be as specified in the Public Facilities Manual.

## **ARTICLE 4.**

### **Water Quality Impact Assessments.**

#### **Section 118-4-1. Purpose and Intent.**

The purpose of the Water Quality Impact Assessment (WQIA) is to ensure protection of Resource Protection Areas consistent with the goals, objectives, and requirements of this Chapter through (1) the identification of the impacts of proposed development or redevelopment on water quality on lands within RPAs; (2) the assurance that, where development or redevelopment does take place within RPAs, it will be located on those portions of a site and in a manner that will be least disruptive to the natural functions of RPAs; and (3) the requirement of mitigation measures

which will address water quality protection.

**Section 118-4-2. Applicability.**

A Water Quality Impact Assessment shall be required for any development or redevelopment within an RPA unless exempt under Article 5 or unless waived by the Director in accordance with the provisions of Section 118-6-5. A Water Quality Impact Assessment shall also be required for development or redevelopment within an RMA if the Director determines that such an assessment is necessary because of the unique characteristics of the site or because the intensity of the proposed development may cause significant impacts on the adjacent RPA.

**Section 118-4-3. Water Quality Impact Assessment Components.**

The Water Quality Impact Assessment shall:

- (a) Display the boundaries of the RPA;
- (b) Display and describe the location and nature of the proposed encroachment into and/or impacts to the RPA, including any clearing, grading, impervious surfaces, structures, utilities, and sewage disposal systems;
- (c) Provide justification for the proposed encroachment into and/or impacts to the RPA;
- (d) Describe the extent and nature of any proposed disturbance or disruption of wetlands;
- (e) Display and discuss the type and location of proposed best management practices to mitigate the proposed RPA encroachment and/or adverse impacts;
- (f) Demonstrate the extent to which the proposed activity will comply with all applicable performance criteria of this Chapter; and
- (g) Provide any other information deemed by the Director to be necessary to evaluate potential water quality impacts of the proposed activity.

**Section 118-4-4. Submission and Review Requirements for Water Quality Impact Assessments.**

A minimum of four (4) copies of the Water Quality Impact Assessment shall be submitted to the Director for review in conjunction with the submission of a plan of development. The Director may, at his discretion, require additional copies of the Water Quality Impact Assessment to be submitted. Where the Water Quality Impact Assessment is submitted pursuant to an exception request under Article 5 or Article 6, the Water Quality Impact Assessment and the exception request may be submitted as a combined document.

**ARTICLE 5.**

**Nonconformities, Waivers, Exceptions, and Exemptions.**

**Section 118-5-1. Nonconforming Uses and Noncomplying Structures.**

(a) Any structure or non-agricultural use that was established in accordance with all applicable provisions of the County Code in effect at the time of establishment, and was in existence on November 18, 2003, or a structure or non-agricultural use established pursuant to a waiver of or exception to the provisions of this Chapter that does not comply with the provisions of this

Chapter may continue and be maintained, but may not be enlarged or expanded, unless such enlargement or expansion is approved pursuant to Article 5 or Article 6 of this Chapter and otherwise complies with applicable provisions of the County Code.

(b) Nothing in this Chapter shall affect the reconstruction of structures destroyed or damaged by any casualty, if such reconstruction is otherwise permitted by law and so long as the structure is reconstructed in the same location and creates no more impervious area than existed with the prior structure. Upon application for a Building Permit to replace such structures, the provisions of this Chapter shall be waived.

### **Section 118-5-2. Public Utilities, Railroads, Public Roads, and Facilities Exemptions.**

The following activities shall be exempt from the provisions of this Chapter to the extent that they are allowed by the Zoning Ordinance and are not prohibited by any other ordinance or law:

(a) The construction, installation, operation and maintenance of electric, natural gas, fiber-optic and telephone transmission lines, railroads, and public roads and their appurtenant structures in accordance with the Erosion and Sediment Control Law (Section 10.1-560 et seq. of the *Code of Virginia*) and with Chapter 104 of the Fairfax County Code and with the Stormwater Management Act (Section 10.1-603.1 et seq. of the *Code of Virginia*).

(b) The construction, installation, and maintenance of water lines, storm or sanitary sewer lines including pumping stations, natural gas lines, underground telecommunications and cable television lines and appurtenant structures owned, permitted, or both by Fairfax County or a regional service authority and subject to the following, as determined by the Director:

(1) To the degree possible, the location of such utilities and facilities shall be outside RPAs;

(2) No more land shall be disturbed than is necessary to provide for the proposed utility installation;

(3) All such construction, installation, and maintenance of such utilities and facilities shall be in compliance with all applicable state and federal permits and designed and conducted in a manner that protects water quality; and

(4) Any land disturbance exceeding an area of 2,500 square feet shall comply with Chapter 104 of the Fairfax County Code.

### **Section 118-5-3. Additional Exemptions.**

The following activities shall also be exempt from the provisions of this Chapter to the extent that they are allowed by the Zoning Ordinance and are not prohibited by any other ordinance or law:

(a) *Within Resource Protection Areas:* Water wells, site amenities for passive recreation, historic preservation activities, and archaeological activities, provided that:

(1) Any land disturbance exceeding an area of twenty-five hundred (2,500) square feet shall comply with Chapter 104 of the Fairfax County Code;

(2) Any required state or federal permits shall have been issued;

(3) Except for boardwalks, pathways, paved paths, the location of such activities shall be outside RPAs to the degree possible;

(4) No more land shall be disturbed than is necessary to provide for the desired activity.

Boardwalks, pathways, and paved paths serving individual residential properties shall be no more than four (4) feet in width except as necessary for handicapped access;

(5) All such activities shall be in compliance with all applicable state and federal permits, and shall be conducted in a manner that protects water quality; and

(6) A written request for an exemption shall be filed with and approved by the Director. Such request should be filed along with any plans of development submitted for review.

(b) *Within Resource Management Areas:* Any land-disturbing activity of twenty-five hundred (2,500) square feet or less in size.

(c) *Silvicultural activities,* provided that such operations adhere to water quality protection procedures prescribed by the Virginia Department of Forestry in the January 1997 edition of *Forestry Best Management Practices for Water Quality in Virginia* as determined by the Virginia Department of Forestry.

#### **Section 118-5-4. Waivers for Loss of Buildable Area in a Resource Protection Area.**

(a) When the application of the RPA buffer area would result in the effective loss of a reasonable buildable area on a lot or parcel recorded prior to October 1, 1989, in accordance with all applicable provisions of the County Code in effect at the time of recordation, encroachments into the buffer area may be approved by the Director in accordance with the following criteria:

(1) Encroachments into the buffer area shall be the minimum necessary to achieve a reasonable buildable area for a principal structure and necessary utilities;

(2) Where practicable, a vegetated area that will maximize water quality protection, mitigate the effects of the buffer encroachment, and is equal to the area of encroachment into the buffer area shall be established elsewhere on the lot or parcel;

(3) The encroachment may not extend into the seaward 50 feet of the buffer area;

(4) The proposed development shall not exceed 10,000 square feet of land disturbance in the RPA buffer, exclusive of land disturbance necessary for the installation of a soil absorption field associated with an individual sewage disposal facility and land disturbance necessary to provide access to the lot or parcel and principal structure pursuant to Section 118-2-1(d);

(5) The proposed development shall not create more than 5,000 square feet of impervious surface within the RPA buffer, exclusive of impervious surface necessary to provide access to the lot or parcel and principal structure pursuant to Section 118-2-1(d);

(6) The lot or parcel must meet the minimum lot size specified for the zoning district in which located or meet the requirements of Section 2-405 of Chapter 112, the Zoning Ordinance, and any other applicable ordinances and laws;

(7) The requirements of Section 118-3-2 shall be satisfied or waived pursuant to Section 118-3-2(f)(7); and

(8) The requirements of Section 118-3-3 shall be satisfied except as specifically provided for in this section to permit an encroachment into the RPA buffer area.

(b) When the application of the RPA buffer area would result in the effective loss of a reasonable buildable area on a lot or parcel recorded between October 1, 1989, and November 18, 2003, in accordance with all applicable provisions of the County Code in effect at the time of recordation, encroachments into the buffer area may be approved by the Director in accordance

with the following criteria:

- (1) The lot or parcel was created as a result of a legal process in conformance with the Subdivision Ordinance;
- (2) Conditions or mitigation measures imposed through a previously approved exception shall be met;
- (3) If the use of a BMP was previously required, the BMP shall be evaluated to determine if it continues to function effectively and, if necessary, the BMP shall be reestablished or repaired and maintained as required; and
- (4) The criteria in Section 118-5-4(a)(1) through (8) shall be met.

**Section 118-5-5. Exceptions for Minor Additions.**

(a) The Director may waive any or all of the performance criteria and requirements of this Chapter for the construction of additions to principal structures that were established as of July 1, 1993, in accordance with all applicable provisions of the County Code in effect at the time of establishment, which do not result in the creation of 1,000 square feet or more of additional impervious area within an RPA, or the creation of additional impervious area within an RPA that exceeds two (2) percent of the lot area up to a maximum limit of 2,500 square feet, whichever amount is greater. The maximum additional impervious area shall be applied to each lot recorded prior to July 1, 1993, in accordance with all applicable provisions of the County Code in effect at the time of recordation, and shall be a cumulative measure based on the amount of impervious area added to the particular lot after July 1, 1993, including any impervious area allowed under Section 118-6-8. Additions to impervious area shall be allowed to such lots until the maximum additional impervious area allowed is reached on the particular lot. The cumulative limit on the maximum additional impervious area measure shall continue indefinitely, regardless of ownership of the property.

(b) The Director may waive any or all of the performance criteria and requirements of this Chapter for the construction of additions to principal structures established between July 1, 1993, and November 18, 2003, in accordance with all applicable provisions of the County Code in effect at the time of establishment, on lots that did not require RPAs to be designated on them under the provisions of this Chapter in effect at the time the principal structures were established and which do not result in the creation of 1,000 square feet or more of additional impervious area within an RPA, or the creation of additional impervious area within an RPA that exceeds two (2) percent of the lot area up to a maximum limit of 2,500 square feet, whichever amount is greater. The maximum additional impervious area shall be applied to each lot recorded as of November 18, 2003, in accordance with all applicable provisions of the County Code in effect at the time of recordation, and shall be a cumulative measure based on the amount of impervious area added to the particular lot after November 18, 2003, including any impervious area allowed under Section 118-6-8. Additions to impervious area shall be allowed to such lots until the maximum additional impervious area allowed is reached on the particular lot. The cumulative limit on the maximum additional impervious area measure shall continue indefinitely, regardless of ownership of the property.

(c) The Director may approve, deny, or approve with conditions individual exception requests upon a finding that:

- (1) The requested exception to the criteria is the minimum necessary to afford relief;
- (2) Granting the exception will not confer upon the applicant any special

privileges that are denied by this part to other property owners who are subject to its provisions and who are similarly situated;

(3) The exception is in harmony with the purpose and intent of this part and is not of substantial detriment to water quality;

(4) The exception request is not based upon conditions or circumstances that are self-created or self-imposed;

(5) Reasonable and appropriate conditions are imposed, as warranted, that will prevent the allowed activity from causing a degradation of water quality;

(6) There will be no net increase in nonpoint source pollutant load. The construction of a deck on an existing principal structure will be deemed to have met this finding provided that the deck is constructed over an existing maintained area, rainfall is allowed to pass through the deck, and no additional impervious area is created; and

(7) Any development or land disturbance exceeding an area of 2,500 square feet complies with all erosion and sediment control requirements of this Chapter and Chapter 104 of the County Code.

## **ARTICLE 6.**

### **Exceptions.**

#### **Section 118-6-1. Granting of Exceptions.**

Exceptions to the criteria and requirements of this Chapter to permit encroachment into the RPA that do not qualify for administrative review under Article 5 may be granted by the Exception Review Committee or by the Board of Supervisors in conjunction with a rezoning or special exception approval as set forth in this Article with appropriate conditions necessary to preserve the purposes and intent of this Chapter. No exception shall be granted under this Article except after notice and a public hearing and upon the findings as required herein. All exception requests shall be in writing and submitted to the Director. All exception requests shall be submitted in accordance with the requirements of Section 118-6-5 unless modified by the Director and will not be accepted until all the submission requirements have been met. Except as noted below, the Director shall, within 90 days of receipt of a complete application for an exception pursuant to this Article, unless an extended period is mutually agreed to by the applicant and the Director, forward such exception request to the Exception Review Committee for a public hearing along with a recommendation for approval, denial, or approval with conditions. All exception requests for property that is also the subject of a rezoning or special exception application shall be scheduled concurrently for public hearing with the rezoning or special exception application within twelve (12) months of the date of acceptance, unless an extended period is agreed to by the applicant, and shall be forwarded by the Director to the Board of Supervisors for public hearing along with a recommendation of approval, denial or approval with conditions. If an application is denied or dismissed by the Exception Review Committee or Board of Supervisors, no new application concerning any or all of the same property for the same general use as applied for originally shall be heard by said Exception Review Committee or Board for a period of less than twelve (12) months from the date of action by the Exception Review Committee or Board on the original application unless otherwise waived by the Exception Review Committee or Board. If an application is withdrawn prior to commencement of the public hearing, there shall be no limit on a rehearing. If an application is withdrawn after commencement of the public hearing, no new application concerning any or all of the same property for the same general use as applied for originally shall be heard by said Exception Review Committee or Board of Supervisors for a period of less than twelve (12) months from the date of action by the Exception Review Committee or Board on the original application unless otherwise waived by the Exception Review Committee or Board. The time

limits set forth in Section 15.2-2259 of the *Code of Virginia* shall be tolled during the pendency of an exception request. Approval of an exception shall constitute approval for the normal and routine maintenance of the facilities which are developed.

### **Section 118-6-2. Conduct of Public Hearings.**

All public hearings required by this Article shall be conducted in accordance with the following provisions:

(a) No public hearing shall be held unless the required notice for same has been satisfied in accordance with the provisions of Section 118-6-3.

(b) All hearings shall be open to the public. Any person may appear and testify at such hearing, either in person or by an authorized agent or attorney.

(c) The Exception Review Committee shall by general rule prescribe procedures for the conduct of hearings to be heard by the Exception Review Committee.

(d) The Chairman of the Exception Review Committee, upon a vote of the majority of the members, may continue or defer a hearing. If a hearing has been opened and public testimony has been received and there is cause for continuation of a hearing, no formal notice as required by Section 118-6-3 shall be required if the hearing is continued to a date certain. If a hearing is concluded, but action is deferred until a future date, no formal notice as set forth in Section 118-6-3 shall be required prior to action being taken. If a hearing has not been opened, and there is cause for deferral of the hearing, written notice to adjacent property owners as required by Section 118-6-3 shall be remailed, except such notice shall be mailed not less than five (5) days in advance of the public hearing.

### **Section 118-6-3. Required Notice for Public Hearings.**

No public hearing shall be held unless documented evidence can be presented that the notice requirements herein have been satisfied. The subject of the public hearing need not be advertised in full, but may be advertised by reference. Every such advertisement shall contain a descriptive summary of the proposed action and shall contain a reference to the place or places within the County where copies of the subject of the public hearing may be examined.

(a) Publication: Public notice of any hearing to be held by the Exception Review Committee shall be published once a week for two (2) successive weeks in a local newspaper having general circulation in the County. Such notice shall be published not less than five (5) days nor more than twenty-one (21) days before the date of the hearing, and there shall be a minimum of six (6) days between the first and second publication. The notice shall specify the date, time and place of the hearing and the nature of the matter before the Exception Review Committee. The public notice shall be the responsibility of the Exception Review Committee.

(b) Written Notice to Applicant: For an application for an exception to be heard by the Exception Review Committee, the Exception Review Committee shall send written notice of the public hearing to the applicant. Such written notice shall be sent by either first class or certified mail postmarked a minimum of twenty (20) days before the day of the hearing.

(c) Written Notice to Adjacent Property Owners: For applications to be heard by the Exception Review Committee, the applicant shall send written notice to all owners of property abutting and immediately across the street from and within 500 feet of the subject property and one (1) homeowner association or civic association within the immediate area as approved by the Department of Public Works and Environmental Services. Such notice shall include notice to

owners of properties abutting and immediately across the street and within 500 feet of the subject property which lie in an adjoining county or city. If such notice does not result in the notification of five (5) different property owners, then additional notices shall be sent to other property owners in the immediate vicinity so that notices are sent to different owners of not less than five (5) properties. Notice shall be sent to the last known address of the owner(s) as shown in the current Real Estate Tax Assessment files. Notice to homeowner associations or civic associations shall be sent to the registered office address kept on file with the State Corporation Commission. The applicant shall send a copy of the notification letter to the Board Member in whose district the subject property is located on the same date the abutting property owners are notified. All written notice shall be sent by certified mail, return receipt requested, and postmarked not less than fifteen (15) days prior to the hearing as evidenced by the postmark date on the white receipts for the certified mailings. Written notice shall include the tax map reference number, the street address of the parcel, the date, time and place of the hearing, and the nature of the matter before the Exception Review Committee. A party's actual notice of, or participation in, the proceedings for which the written notice is required shall waive the right of that party to challenge the validity of the proceeding due to failure of the party to receive the written notice required.

(d) If an exception is heard concurrently with a public hearing on proposed rezoning or special exception applications, notification of the proposed exception shall be conducted concurrently with the rezoning and special exception notification and shall meet the requirements of Article 18 of the Zoning Ordinance in lieu of paragraph (c) above.

#### **Section 118-6-4. Withdrawal of Application.**

An application may be withdrawn at any time by the applicant or his agent by giving notice in writing to the Director. An application also may be withdrawn administratively by the Director if it is determined that the application was accepted in error.

#### **Section 118-6-5. Submission Requirements for Exception Requests.**

Submission Requirements for Exception Requests:

- (a) Four (4) copies of an application form provided by the Director and completed and signed by the applicant.
- (b) Four (4) copies of a Water Quality Impact Assessment.
- (c) Ten (10) copies of a plat which meets the submission requirements of Zoning Ordinance Section 9-011, paragraph 2.
- (d) Photographs of the property showing existing structures, terrain and vegetation.
- (e) Four (4) copies of a map identifying classification of soil types, at a scale of one inch equals five hundred feet (1" = 500'), covering an area at least 500 feet beyond the perimeter of the proposed development.
- (f) A statement of justification which addresses how the proposed development complies with the factors set forth in Sections 118-6-6(a) through (f).

The Director, upon written request with justification, may modify or waive the above submission requirements, if it is determined by the Director that the requirement is clearly not necessary for the review of the application. The Director may require the submission of such additional information as he deems necessary to review the application. The requirement for submission of a Water Quality Impact Assessment may only be waived subject to the findings in Section 118-6-6.

#### **Section 118-6-6. Required Findings.**

Exceptions to the criteria and requirements of this Chapter may be granted only on a finding that:

- (a) The requested exception to the criteria is the minimum necessary to afford relief;
- (b) Granting the exception will not confer upon the applicant any special privileges that are denied by this part to other property owners who are subject to its provisions and who are similarly situated;
- (c) The exception is in harmony with the purpose and intent of this Chapter and is not of substantial detriment to water quality;
- (d) The exception request is not based upon conditions or circumstances that are self-created or self-imposed;
- (e) Reasonable and appropriate conditions are imposed, as warranted, that will prevent the allowed activity from causing a degradation of water quality; and
- (f) Other findings, as appropriate and required herein, are met.

**Section 118-6-7. Exceptions for Loss of Buildable Area in a Resource Protection Area.**

Where the application of the RPA criteria will result in the effective loss of a reasonable buildable area on a lot or parcel recorded prior to November 18, 2003, in accordance with all applicable provisions of the County Code in effect at the time of recordation and the proposed development does not satisfy the criteria for an administrative waiver by the Director under Section 118-5-4, exceptions may be approved in accordance with the following criteria:

- (a) The proposed development does not exceed 10,000 square feet of land disturbance, exclusive of land disturbance necessary for the installation of a soil absorption field associated with an individual sewage disposal facility and land disturbance necessary to provide access to the lot or parcel and principal structure pursuant to Section 118-2-1(d);
- (b) The proposed development does not create more than 5,000 square feet of impervious surface within an RPA, exclusive of impervious surface necessary to provide access to the lot or parcel and principal structure pursuant to Section 118-2-1(d);
- (c) The lot or parcel must meet the minimum lot size specified for the zoning district in which located or meet the requirements of Section 2-405 of Chapter 112, the Zoning Ordinance, and any other applicable ordinances and laws;
- (d) Where practicable, a vegetated area that will maximize water quality protection, mitigate the effects of the buffer encroachment, and is equal to the area of encroachment into the buffer area shall be established elsewhere on the lot or parcel;
- (e) The requirements of Section 118-3-2 shall be satisfied or waived pursuant to Section 118-3-2(f)(7); and
- (f) The requirements of Section 118-3-3 shall be satisfied except as specifically provided for in this section to permit an encroachment into the RPA buffer area.

**Section 118-6-8. Exceptions for Accessory Structures.**

(a) Exceptions to waive any or all of the performance criteria and requirements of this Chapter for the construction of accessory structures and uses to principal structures that were established as of July 1, 1993, in accordance with all applicable provisions of the County Code in effect at the time of establishment, may be approved subject to the following conditions:

- (1) The accessory structure or use shall not result in the creation of 1,000 square feet or more of additional impervious area within an RPA, or the creation of additional impervious area within an RPA that exceeds two (2) percent of the lot area up to a maximum limit of 2,500

square feet, whichever amount is greater. The maximum additional impervious area shall be applied to each lot recorded prior to July 1, 1993, in accordance with all applicable provisions of the County Code in effect at the time of recordation, and shall be a cumulative measure based on the amount of impervious area added to the particular lot after July 1, 1993, for all uses on the lot requiring an exception or waiver. Additions to impervious area shall be allowed to such lots until the maximum additional impervious area allowed is reached on the particular lot. The cumulative limit on the maximum additional impervious area measure shall continue indefinitely, regardless of ownership of the property; and

(2) Where practicable, a vegetated area that will maximize water quality protection, mitigate the effects of the buffer encroachment, and is equal to the area of encroachment into the buffer area shall be established elsewhere on the lot or parcel.

(b) Exceptions to waive any or all of the performance criteria and requirements of this Chapter for the construction of accessory structures and uses to principal structures established between July 1, 1993, and November 18, 2003, in accordance with all applicable provisions of the County Code in effect at the time of establishment, on lots that did not require RPAs to be designated on them under the provisions of this Chapter in effect at the time the principal structures were established, may be approved subject to the following conditions:

(1) The accessory structure or use shall not result in the creation of 1,000 square feet or more of additional impervious area within an RPA, or the creation of additional impervious area within an RPA that exceeds two (2) percent of the lot area up to a maximum limit of 2,500 square feet, whichever amount is greater. The maximum additional impervious area shall be applied to each lot recorded prior to November 18, 2003, in accordance with all applicable provisions of the County Code in effect at the time of recordation, and shall be a cumulative measure based on the amount of impervious area added to the particular lot after November 18, 2003, for all uses on the lot requiring an exception or waiver. Additions to impervious area shall be allowed to such lots until the maximum additional impervious area allowed is reached on the particular lot. The cumulative limit on the maximum additional impervious area measure shall continue indefinitely, regardless of ownership of the property; and

(2) Where practicable, a vegetated area that will maximize water quality protection, mitigate the effects of the buffer encroachment, and is equal to the area of encroachment into the buffer area shall be established elsewhere on the lot or parcel.

#### **Section 118-6-9. General Resource Protection Area Encroachment Request.**

Exceptions to the criteria and requirements of this Chapter to permit encroachment into the RPA that do not qualify for review under Section 118-6-7, Section 118-6-8, or Section 118-6-9 may be granted subject to the additional finding that the water quality benefits resulting from the proposed facility or improvement exceed the associated water quality detriments. Where practicable, a vegetated area that will maximize water quality protection, mitigate the effects of the buffer encroachment, and is equal to the area of encroachment into the buffer area shall be established elsewhere on the lot or parcel.

### **ARTICLE 7.**

#### **Exception Review Committee.**

##### **Section 118-7-1. Purpose.**

The purpose of the Exception Review Committee shall be to administer the provisions of

Article 6 of this Chapter in such a manner that the intent of the Chapter is maintained.

**Section 118-7-2. Authority and Establishment.**

The Exception Review Committee is established in accordance with the requirements of this Chapter and 9 VAC 10-20-140. The official title of this body shall be the "Exception Review Committee".

**Section 118-7-3. Membership.**

(a) The Exception Review Committee shall be composed of seven (7) members with demonstrated knowledge of and interest in environmental issues and shall be appointed by the Board of Supervisors for a term of four (4) years.

(b) Members shall exempt themselves from voting on any action in which their financial interests or those of their immediate family or employer are directly involved.

**Section 118-7-4. Officers.**

The officers of the Exception Review Committee shall consist of a Chairman, Vice-Chairman, and Secretary.

The Chairman, Vice-Chairman, and Secretary shall be elected by majority vote of the Exception Review Committee at the first Committee meeting each calendar year.

**Section 118-7-5. Meetings.**

(a) The Exception Review Committee shall meet at a time and place to be designated by resolution of the Exception Review Committee.

(b) Four (4) members of the Exception Review Committee shall constitute a quorum but a lesser number may meet and adjourn.

(c) Special meetings may be called by the Chairman provided at least five (5) days notice of such meeting is given each member in writing.

(d) All public hearings conducted by the Exception Review Committee shall be in accordance with the provisions of Section 118-6-2. All hearings shall be open to the public, and any person affected may appear and testify at such hearing, either in person or by an authorized agent or attorney.

**Section 118-7-6. Records.**

(a) The Exception Review Committee shall keep written records and minutes of all its proceedings, showing evidence presented, findings of fact by the Exception Review Committee, and the vote of each member upon each question, or if absent or failing to vote, such fact.

(b) Every decision of the Exception Review Committee shall be recorded in accordance with standard forms prescribed by the Exception Review Committee, and shall fully set forth the circumstances of the application and the findings on which the decision is based. Every decision of the Exception Review Committee shall be made by resolution adopted by a majority of all of the members present, except as otherwise specifically provided in this Chapter.

**Section 118-7-7. Duties.**

The purpose of the Exception Review Committee shall be to administer the provisions of Article 6 of this Chapter, hold public hearings as required herein, and approve/disapprove exception requests in such a manner that the intent of the Chapter is maintained.

## **ARTICLE 8.**

### **Appeals.**

(a) An applicant aggrieved by any decision of the Director of the Department of Public Works and Environmental Services or the Director of the Department of Health in the administration of this Chapter may, within fifteen (15) days of such decision, appeal the decision to the Board of Supervisors.

(b) An applicant or any other party aggrieved by any decision of the Exception Review Committee in the administration of this Chapter may, within thirty (30) days of such decision, appeal the decision to the Board of Supervisors.

(c) Such appeal shall be filed with the Clerk to the Board of Supervisors and shall state with specificity the provisions of this Chapter which the applicant alleges to have been violated by the decision and the reasons therefore. A copy of the appeal shall also be delivered to the Director of the Department of Public Works and Environmental Services within such thirty (30) day period.

(b) The time limits set forth in Section 15.2-2259 of Va. Code Ann. shall be tolled during the pendency of an application filed pursuant to Paragraph (a) above.

## **ARTICLE 9.**

### **Violations and Penalties.**

#### **Section 118-9-1. General Provisions.**

(a) Any building erected or improvements constructed contrary to any of the provisions of this Chapter and any land disturbing activity regardless of area contrary to any of the provisions of this Chapter and any removal of vegetation in Chesapeake Bay Preservation Areas contrary to any of the provisions of this Chapter shall be and the same is hereby declared to be unlawful.

(b) Any person, whether owner, lessee, principal, agent, employee or otherwise, who violates any of the provisions of this Chapter, or permits any such violation, or fails to comply with any of the requirements hereof, or who erects any building or uses any building or land in violation of the provisions of this Chapter shall be subject to the enforcement provisions of this Article.

(c) Upon becoming aware of any violation of any provisions of this Chapter, the Director shall serve a notice of violation on the property owner, the person committing or permitting the same either in person or by registered or certified mail to the property or the owner's address. Such notice shall specify the provisions of the Chapter which have been violated, the measures needed to remedy the violation, and a reasonable time in which to remedy the violations. Failure to take steps to comply with such notice within the time provided for therein shall constitute a separate violation of this Chapter.

(d) Restoration of Chesapeake Bay Preservation Areas shall be performed as necessary to meet the intent of this Chapter, the requirements herein, and the requirements of the Public Facilities

Manual. In addition to the plantings required by Section 118-3-3(f) and the Public Facilities Manual, the Director may require that trees illegally removed from Chesapeake Bay Preservation Areas be replaced by other trees of the same or comparable species of equal value and/or be replaced 2 for 1 with 2 inch caliper trees. The value of the replacement trees shall not exceed the value of those illegally removed as determined by the formula in the latest revision of the "Guide for Plant Appraisal" prepared by the Council of Tree and Landscape Appraisers and published by the International Society of Arboriculture.

(e) The Director may require the submission of a Water Quality Impact Assessment (WQIA) in accordance with the provisions of Article 4 as a condition for remedying a violation. In addition to the components of the WQIA listed in Section 118-4-3, the WQIA shall include a restoration plan acceptable to the Director for any removal of vegetation from Chesapeake Bay Preservation Areas which does not comply with the provisions of this Chapter.

(f) The Director, on behalf of the Board of Supervisors, may apply to the Fairfax County Circuit Court for injunctive relief to enjoin a violation or a threatened violation of any provision of this Chapter.

### **Section 118-9-2. Criminal Violations and Penalties.**

(a) Violators of this Chapter shall be guilty of a Class 1 misdemeanor.

(b) Each day any violation of this Chapter shall continue shall constitute a separate offense.

(c) In addition to any criminal penalties provided under this Article, any person who violates any provision of this Chapter may be liable to the County in a civil action for damages, or for injunctive relief.

### **Section 118-9-3. Civil Penalties.**

(a) Any person who violates any provision of this Chapter or who violates or fails, neglects, or refuses to obey any local governmental body's or official's final notice, order, rule, regulation, or variance or permit condition authorized under this Chapter shall, upon such finding by an appropriate circuit court, be assessed a civil penalty not to exceed \$5,000 for each day of violation. Such civil penalties may, at the discretion of the court assessing them, be directed to be paid into the treasury of the county for the purpose of abating environmental damage to or restoring Chesapeake Bay Preservation Areas therein, in such a manner as the court may direct by order, except that where the violator is the county itself or its agent, the court shall direct the penalty to be paid into the state treasury.

(b) With the consent of any person who (1) violates any provision of any local ordinance related to the protection of water quality in Chesapeake Bay Preservation Areas or (2) violates or fails, neglects, or refuses to obey any local governmental body's or official's notice, order, rule, regulation, or variance or permit condition authorized under such ordinance, the local government may provide for the issuance of an order against such person for the one-time payment of civil charges for each violation in specific sums, not to exceed \$10,000 for each violation. Such civil charges shall be paid into the treasury of the county for the purpose of abating environmental damage to or restoring Chesapeake Bay Preservation Areas therein, except that where the violator is the county itself or its agent, the civil charges shall be paid into the state treasury. Civil charges shall be in lieu of any appropriate civil penalty that could be imposed under subsection a above. Civil charges may be in addition to the cost of any

restoration required or ordered by the local government body or official.