

**Chapter 23**  
**CHESAPEAKE BAY PRESERVATION\***

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**Sec. 23-1. Short title.**

This chapter shall be known and may be cited as "The Chesapeake Bay Preservation Ordinance" (ordinance). (Ord. No. 183, 8-6-90)

**Sec. 23-2. Statement of intent.**

The Chesapeake Bay Preservation Act (Act), chapter 21 of the Code of Virginia, recognizes that healthy state and local economies are integrally related to each other and the environmental health of the Chesapeake Bay. The purpose of this chapter is to control and regulate runoff at the source to protect against and minimize pollution and deposition of sediment in wetlands, streams and lakes in James City County which are tributaries of the Chesapeake Bay. This chapter is intended to assist in protection of the Chesapeake Bay and its tributaries from nonpoint source pollution from land uses or appurtenances within the Chesapeake Bay drainage area. Regulations in this chapter are necessary for:

- (1) Protection of existing high quality state waters and 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;
- (2) Safeguarding the clean waters of the commonwealth from pollution;

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\***Cross references**-Erosion and sediment control, Ch. 8; health and sanitation, Ch. 11; public parks and recreation facilities, Ch. 16; sewers and sewage, Ch. 17; subdivisions, Ch. 19; wetlands, Ch. 22; zoning, Ch. 24.

- (3) Prevention of any increase in pollution;
- (4) Reduction of existing pollution; and
- (5) Promotion of water resource conservation in order to provide for the health, safety and welfare of present and future citizens of the commonwealth.

This chapter establishes criteria used by James City County in granting, denying or modifying requests to subdivide or develop land in Chesapeake Bay Preservation Areas. (Ord. No. 183, 8-6-90)

### **Sec. 23-3. Definitions.**

For the purpose of this chapter, the following words and phrases shall have the meanings ascribed below:

*Agricultural lands.* Those lands used for tilling soil, planting and harvesting crops or plant growth of any kind in the open, pasture, horticulture, dairying, floriculture, or raising poultry and/or livestock. Buildings and structures are not included in this definition.

*Best management practice (BMP).* A practice, or combination of practices, that is determined by a state, local or regional agency 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.

*Board.* The Chesapeake Bay Board, which is comprised of the members of the James City County Wetlands Board.

*Buffer area.* An area of natural or established vegetation managed to protect other components of resource protection areas and county and state waters from significant degradation due to land disturbances or uses.

*Caliper.* The diameter of a tree trunk measured six inches above the ground for nursery stock.

*Chesapeake Bay Preservation Area (CBPA).* All land in James City County designated by the board of supervisors pursuant to part III of the Chesapeake Bay Regulations and the Code of Virginia, section 10.1-2107 of the Act. Chesapeake Bay Preservation Area (CBPA) shall consist of resource protection areas (RPAs) and resource management areas (RMAs).

*Development.* The construction or substantial alteration of residential, commercial, industrial, institutional, recreational, transportation, or utility facilities or structures.

*Dripline.* A vertical projection to the ground surface from the furthest lateral extent of a tree's leaf canopy.

*Floodplain.* All lands that would be inundated by floodwater as a result of a storm event of a 100-year return interval as designated by Chapter 24, Section 24-586, et seq., of the County Code.

*Highly erodible soils.* 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 by the Universal Soil Loss Equation 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 T is the soil loss tolerance.

*Highly permeable soils.* 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 Soil Survey Handbook* of November 1996, in the "Field Office Technical Guide" of the U.S. Department of Agriculture Natural Resources Conservation Service.

*Hydric soils.* Soils that are saturated, flooded or ponded long enough during the growing season to support wetland vegetation.

*Impervious cover.* 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, parking areas, and any concrete, asphalt or compacted aggregate surface. Pervious pavement surfaces will not be considered as totally impervious but will be given partial credit based on the open area and runoff characteristics of the paver structure and the proposed installation.

*Land disturbing activity.* As defined in the Erosion and Sediment Control Ordinance, section 8-2 of the county code.

*Manager.* The manager of development management or his designee.

*Nonpoint source pollution (NSP).* Includes, but is not limited to, the following stormwater-borne pollutants resulting from land use activities:

- (1) Sediment;
- (2) Nutrients, such as phosphorus and nitrogen;
- (3) Bacteria; such as fecal coliforms
- (4) Viruses;
- (5) Oxygen depletion;
- (6) Hydrocarbons, such as fuels and lubricants;
- (7) Toxic metals, such as lead, zinc, copper;
- (8) Toxic chemicals;
- (9) Chlorides, chlorinated water; and
- (10) Increases in water temperature above normal, ambient levels.

*Nontidal wetlands.* Those wetlands, other than tidal wetlands, that are inundated or saturated by surface or groundwater 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 section 404 of the Federal Clean Water Act, in 33 CFR 328.3b.

*Noxious weeds.* Weeds that are difficult to control effectively, such as Johnson Grass, Kudzu and multiflora rose. A complete list is contained in the Department of Conservation and Recreation, Division of Natural Heritage publication entitled *Invasive Plant Species of Virginia*.

*Plan of development.* Site plans, subdivision plans or other plans submitted pursuant to section 23-10 to ensure compliance with this chapter.

*Public road.* A publicly owned road designed and constructed in accordance with water quality protection criteria at least as stringent as requirements applicable to the Virginia Department of Transportation, including regulations promulgated pursuant to (i) the Erosion and Sediment Control Law (section 10.1-560 et seq. of the Code of Virginia) and (ii) the Virginia Stormwater Management Act (section 10.1-603.1 et seq. of the Code of Virginia). This definition includes those roads where the Virginia Department of Transportation exercises direct supervision over the design or construction activities, or both.

*Redevelopment.* The process of developing land that is or has been previously developed.

*Resource management area (RMA).* That component of the CBPA that is not classified as the resource protection area. Lands of particular sensitivity within RMAs include, but are not limited to, nontidal wetlands not in RPAs, floodplains, highly erodible soils, highly permeable soils, hydric soils.

*Resource protection area (RPA).* That component of a CBPA comprised of land 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 to the quality of state waters. RPAs shall include:

1. Tidal wetlands;
2. Nontidal wetlands connected by surface flow and contiguous to tidal wetlands or water bodies with perennial flow;
3. Tidal shores;
4. A buffer area not less than 100 feet in width located adjacent to and landward of the components listed in subdivisions 1 through 3 above, and along both sides of any water body with perennial flow.

*Runoff.* That portion of precipitation that is discharged across the land surface through conveyances to one or more waterways.

*Sightline.* A line extending from a fixed point to a viewed object or area through an opening or passageway.

*Silvicultural activities.* Forest management activities, 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 are 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 are located on property defined as real estate devoted to forest use under § 58.1-3230 of the Code of Virginia.

*Substantial alteration.* Expansion or modification of a building or development which would result in a disturbance of land exceeding an area of 2,500 square feet in the RMA only.

*Tidal shore or shore.* Land contiguous to a tidal body of water between the mean low water level and the mean high water level.

*Tidal wetlands.* Vegetated and nonvegetated wetlands, as defined in section 28.2-1300 of the Code of Virginia.

*Water Body with Perennial flow.* A body of water that flows in a natural or man-made channel year-round during a year of normal precipitation. This includes, but is not limited to, streams, estuaries, and tidal embayments, and may include drainage ditches or channels constructed in wetlands or from former natural drainageways, which convey perennial flow. Lakes and ponds through which a perennial stream flows are part of the perennial stream. Generally, the water table is located above the streambed for most of the year and groundwater is the primary source for stream flow. The methodology to determine perennial flow shall be in accordance with section 23-10 (2)(d) of this chapter.

*Water-dependent facility.* A development of land that cannot exist outside of the RPA and must be located on the shoreline because of the intrinsic nature of its operation. These facilities include, but are not limited to:

- (1) Ports;
- (2) The intake and outfall structures of power plants, water treatment plants, sewage treatment plants and storm sewers;
- (3) Marinas and other boat docking structures;
- (4) Beaches and other public water-oriented recreation areas; and
- (5) Fisheries or other marine resources facilities.

*Wetlands.* Tidal and nontidal wetlands.  
(Ord. No. 183, 8-6-90; Ord. No. 183A-1, 11-12-96; Ord. No. 183A-3, 11-25-03)

#### **Sec. 23-4. Designation of Chesapeake Bay Preservation Area (CBPA).**

The board of supervisors hereby designates all of James City County, Virginia, as a CBPA. The CBPA is further delineated on the CBPA map as resource protection areas (RPAs) and resource management areas (RMAs). The CBPA map shows general locations of RPAs and RMAs and should be consulted by persons contemplating development. Site specific determinations of RPAs shall occur through the Plan of Development review process or through the review of a Water Quality Impact Assessment developed pursuant to section 23-11 of this chapter. (Ord. No. 183, 8-6-90; Ord. No. 183A-3, 11-25-03)

#### **Sec. 23-5. Permitted uses.**

Permitted uses, special permit uses, accessory uses and special requirements shall be as established by the zoning district for that lot, parcel or acreage as specified in chapter 24 of this Code, unless specifically modified by the requirements set forth herein. All land-disturbing activities shall be prohibited on slopes of 25 percent or greater unless determined by the manager to be consistent with the intent of this chapter. (Ord. No. 183, 8-6-90; Ord. No. 183A-1, 11-12-96; Ord. No. 183A-3, 11-25-03)

**Sec. 23-6. Lot size.**

Lot size shall be subject to the requirements of the zoning ordinance; provided, that any lot shall have sufficient area outside the RPA to accommodate an intended use, in accordance with performance standards in section 23-9, when this use is not otherwise allowed in the RPA. (Ord. No. 183, 8-6-90)

**Cross reference**-Zoning, Ch. 24.

**Sec. 23-7. Development criteria for resource protection areas.**

In addition to the general performance criteria set forth in section 23-9, the criteria in this section are applicable in Resource Protection Areas.

(a) Development in RPAs may be allowed only when permitted by the manager and if it (i) is water dependent; (ii) constitutes redevelopment; (iii) is a new use subject to the provisions of subsection (c)(2) of this section; (iv) is a road or driveway crossing satisfying the conditions set forth in subdivision (3) of this section; or (v) is a flood control or stormwater management facility satisfying the conditions set forth in subdivision (4) of this section.

- (1) A new or expanded water dependent facility may be allowed provided that the following criteria are met:
  - a. It does not conflict with either the comprehensive plan or any applicable approved watershed management plan;
  - b. It complies with the performance criteria set forth in section 23-9 of this chapter;
  - c. Any nonwater - dependent component is located outside of the RPA; and
  - d. Access to the water-dependent facility will be provided with the minimum disturbance necessary. Where practicable, a single point of access will be provided.
- (2) Redevelopment on isolated redevelopment sites shall be permitted only if there is no increase in the amount of impervious cover and no further encroachment within the RPA and it shall conform to sections 23-9(b)(4) and (5), and the stormwater management requirements outlined under section 23-9(b)(8) of this chapter.
- (3) Roads and driveways not exempt under section 23-13 and which, therefore, must comply with the provisions of this chapter, may be constructed in or across RPAs if each of the following conditions are met:
  - a. The manager makes a finding that there are no reasonable alternatives to aligning the road or drive in or across the RPA, and;
  - b. The alignment and design of the road or driveway are optimized, consistent with other applicable requirements, to minimize encroachment in the RPA and minimize adverse effects on water quality, and;

- c. The design and construction of the road or driveway satisfy all applicable criteria of this chapter including the submission of a water quality impact assessment, and;
  - d. The manager reviews the plan for the road or driveway proposed in or across the RPA in coordination with the plan of development requirements as required under section 23-10.
- (4) Flood control and stormwater management facilities that drain or treat water from multiple development projects or from a significant portion of a watershed may be allowed in RPAs provided that:
- a. The manager has conclusively established that location within the RPA is the optimum location, meaning that it is the best place to locate the facility from an engineering/functionality consideration regardless of the presence of an RPA;
  - b. The size of the facility is the minimum necessary to provide necessary flood control, stream channel protection, stormwater treatment or all three;
  - c. The facility must be consistent with a stormwater management program that has been approved by the Chesapeake Bay Local Assistance Board as a Phase 1 modification to the county's program;
  - d. All applicable permits for construction in state or federal waters must be obtained from the appropriate state and federal agencies;
  - e. Approval must be received from the county prior to construction; and,
  - f. Routine maintenance must be performed on the facility to assure that it continues to function as designed.

(b) A water quality impact assessment as outlined in section 23-11 of this chapter shall be required for any proposed land disturbance, development or redevelopment within RPAs and for any other development within RMAs when required by the manager because of the unique characteristics of the site, intensity of development, or potential impacts on water quality or RPAs in accordance with the provisions of section 23-11 of this chapter.

(c) Buffer area requirements. To minimize the adverse effects of human activities on the other components of RPAs, state waters and aquatic life, a 100-foot buffer area of vegetation that is effective in retarding runoff, preventing erosion and filtering nonpoint source pollution from runoff shall be retained if present and established during development where it does not exist. The buffer shall have three layers of vegetation comprised of native trees, shrubs, and ground covers. Where the buffer is being established, a buffer modification plan will be prepared that may incorporate existing vegetation. A list of acceptable native plants is available from the manager. A buffer area not less than 100 feet in width shall be located adjacent to and landward of other RPA components and along both sides of any water body with perennial flow. The full buffer area shall be designated as the landward component of the RPA. The 100-foot buffer area shall be deemed to achieve a 75 percent reduction of sediments and a 40 percent reduction of nutrients. All subdivision plats submitted for approval after August 6, 1990, shall clearly identify the boundaries of any RPA within the property. Such plat shall contain a statement that all existing vegetation within the RPA shall remain in its undisturbed natural state, except for vegetation weakened by age, storm, fire or other natural cause. Developers shall install signs identifying the landward limit of the RPA. Signs shall be obtained, installed and maintained in accordance with guidelines established by the manager.

- (1) Permitted buffer modifications. In order to maintain the functional value of the buffer area, existing vegetation may be removed upon approval by the manager of a buffer modification plan only to provide for reasonable sight lines, access paths, general wood lot management, and BMPs including those that prevent upland erosion and concentrated flows of stormwater, as follows:
  - a. Trees may be pruned or removed as necessary to provide for sight lines 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;
  - b. Access paths shall be constructed and surfaced so as to effectively control erosion;
  - c. Dead, diseased, or dying trees or shrubbery, or noxious weeds may be removed based upon the approval of the manager, who may require a recommendation by a professional forester or arborist; and
  - d. 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 and restore the function of the buffer in accordance with the best available technical advice and applicable permit conditions or requirements.
- (2) Permitted buffer encroachments.
  - a. When application of the buffer would result in the loss of a buildable area on a lot or parcel recorded prior to August 6, 1990, encroachments into the buffer may be allowed through an administrative process in accordance with the following criteria:
    1. Encroachments into the buffer 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; and
    3. The encroachment may not extend into the seaward 50 feet of the buffer area.
  - b. When application of the buffer would result in the loss of a buildable area on a lot or parcel recorded between August 6, 1990, and January 1, 2004, encroachments into the buffer may be allowed through an administrative process in accordance with the following criteria:
    1. The lot or parcel was created as a result of a legal process conducted in conformity with the county's subdivision regulations;
    2. Conditions or mitigation measures imposed through a previously approved exception shall be met;
    3. If the use of a best management practice (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 subdivision (c)(2)a. of this section shall be met.
- (3) On agricultural lands, the agricultural buffer area shall be managed to prevent concentrated flows of surface water from breaching the buffer area and appropriate measures may be taken to prevent noxious weeds from invading the buffer area. Agricultural activities may encroach into the buffer area as follows:

- a. Agricultural activities may encroach into the landward 50 feet of the 100-foot wide buffer area when at least one agricultural BMP which, in the opinion of the local 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 BMP achieves water quality protection, pollutant removal and water resource conservation at least the equivalent of the 100-foot buffer area. If nutrient management is identified as the predominant water quality issue, a nutrient management plan, including soil tests, must be developed and implemented consistent with the Virginia Nutrient Training and Certification Regulations (4 VAC 5-15 et seq.) administered by the Virginia Department of Conservation and Recreation.
  - b. Agricultural activities may encroach within the landward 75 feet of the 100-foot wide buffer area when agricultural BMPs which 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 "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 and implemented consistent with the Virginia Nutrient Management Training and Certification Regulations (4 VAC 5-515 et seq.) administered by the Virginia Department of Conservation and Recreation. In conjunction with the remaining buffer area, this collection of BMPs shall be presumed to achieve water quality protection at least the equivalent of that provided by the 100-foot wide buffer area.
  - c. The buffer area is not required to be designated for agricultural drainage ditches if at least one BMP which, in the opinion of the local 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.
- (4) When agricultural or silvicultural uses within the buffer area cease, and the lands are proposed to be converted to other uses, the full 100-foot wide buffer area shall be reestablished. In reestablishing the buffer, management measures shall be undertaken to provide woody vegetation that assures the buffer functions are maintained or established
- (Ord. No. 183, 8-6-90; Ord. No. 183A-1, 11-12-96; Ord. No. 183A-3, 11-25-03)

**Sec. 23-8. Determining resource protection area boundaries.**

The CBPA map shall be used as a guide to the general location of RPAs. In addition, reference materials that may be used as general guidance for estimating locations of Resource Protection Areas include federal and county topographic maps, wetland maps, and aerial photography. Site-specific boundaries of the RPA shall be determined by the applicant through the performance of an environmental inventory required as part of the plan of development review process or a water quality impact assessment. Site-specific boundaries determined by the applicant shall be reviewed and approved by the manager. (Ord. No. 183, 8-6-90; Ord. No. 183A-1, 11-12-96; Ord. No. 183A-3, 11-25-03)

**Sec. 23-9. Performance standards.**

(a) *Purpose and intent.* The performance standards establish the means to minimize erosion and sedimentation potential, reduce land application of nutrients and toxics, and maximize rainwater infiltration. Natural ground cover, especially woody vegetation, is most efficient in holding soil in place and preventing site erosion. Indigenous vegetation, with its adaptability to local conditions without the use of harmful fertilizers or pesticides, filters and infiltrates stormwater runoff. Keeping impervious cover to a minimum enhances rainwater infiltration and effectively reduces increases of stormwater runoff.

The purpose and intent of these requirements is also to implement the following objectives: prevent a net increase in nonpoint source pollution from new development and development on previously developed land where the runoff was treated by a water quality protection best management practice; achieve a ten percent reduction in nonpoint source pollution from development on previously developed land where the runoff was not treated by one or more water quality best management practices; and achieve a 40 percent reduction in nonpoint source pollution from agricultural and silvicultural uses.

(b) *General performance standards:*

- (1) Land disturbance shall be limited to the area necessary to provide for the proposed use or development.
  - a. In accordance with an approved plan of development, the limits of clearing and/or grading shall be clearly defined. These limits shall be clearly shown on submitted plans and physically marked on the development site in accordance with subsection (2)b. below.
  - b. Impervious cover shall not exceed 60 percent of the site unless it can be demonstrated that the project will have the same impact on water quality as the project would have if it were 60 percent impervious. Demonstration of equivalent water quality will be through compliance with guidelines developed by the manager. For projects with an approved stormwater master plan, compliance with this impervious cover provision can be demonstrated on a project basis rather than an individual site basis. However, in no case shall impervious cover exceed the limits established in section 24-99(c)(4) of the zoning ordinance.
  - c. Ingress and egress during construction shall be limited to one access point, unless otherwise approved by the manager.
- (2) Existing vegetation shall be preserved to the maximum extent practicable, consistent with the use or development permitted by an approved plan of development.
  - a. Existing trees over 12 inches in diameter at breast height shall be preserved except in impervious areas and as necessary to accommodate site grading. Upon approval by the manager, diseased trees or trees weakened by age, storm, fire or other injury may be removed; provided, that when such removal results in a 20 percent or greater reduction in existing tree canopy, a sufficient number of trees with a 1-½ inch caliper shall be planted to restore the full canopy.
  - b. Prior to clearing or grading, suitable protective barriers, such as safety fencing, shall be erected outside of the dripline of any tree or stand of trees to be preserved unless otherwise approved on the clearing plan. Protective barriers shall remain so erected throughout all phases of construction. The storage of equipment, materials, debris or fill shall not be allowed within the area protected by the barrier.

- (3) Land development shall minimize impervious cover to promote infiltration of stormwater into the ground consistent with the proposed use or development permitted.
- (4) All development and redevelopment exceeding 2,500 square feet of land disturbance shall be subject to a plan of development review process conducted in accordance with section 23-10 of this chapter.
- (5) Any land-disturbing activity exceeding 2,500 square feet, including construction of all single-family houses, and septic tanks and drainfields shall comply with the requirements of chapter 8 of this Code.
- (6) All on-site sewage disposal systems not requiring a NPDES permit shall be pumped out at least once every five years. However, in lieu of requiring proof of septic tank pump-out every five years, owners of on-site sewage disposal systems can submit documentation every five years, certified by a sewage handler permitted by the Virginia Department of Health, that the septic system has been inspected, is functioning properly, and the tank does not need to have the effluent pumped out of it.
- (7) A reserve sewage disposal site, with a capacity at least equal to that of the primary sewage disposal site, shall be provided. This requirement shall not apply to any lot or parcel recorded prior to August 6, 1990, if such lot or parcel is not sufficient in capacity to accommodate a reserve sewage disposal site, as determined by the local health department. Building or construction of any impervious surface shall be prohibited on the area of all sewage disposal sites or on an on-site sewage treatment system which operates under a permit issued by the State Water Control Board until the structure is served by public sewer.
- (8) For any development or redevelopment, stormwater runoff shall be controlled by the use of BMPs that are consistent with the water quality protection provisions (4 VAC 3-20-71 et seq.) of the Virginia Stormwater Management Regulations (4 VAC 3-20). This consistency shall be demonstrated by compliance with the criteria and BMP facilities contained in the latest version of the James City County Guidelines for Design and Construction of Stormwater Management BMPs. In addition, increases in the quantity of stormwater runoff resulting from development or redevelopment shall be addressed by the requirements of chapter 8 of the County Code.
  - a. If compliance for a development is based in whole or part on the use of existing downstream onsite or offsite structural BMPs, evidence shall be provided that facilities are currently in good working order and performing at the design levels of service. The manager may require a review of both the original design and maintenance plans to verify this provision. A new maintenance agreement may be required to ensure compliance with this chapter;
- (9) Prior to initiating grading or other on-site activities on any portion of a lot or parcel, all wetlands permits required by federal, state and county laws and regulations shall be obtained and evidence of such submitted to the manager. For those projects where no wetlands are proposed to be impacted or where the impacts do not require written authorization, documentation shall be submitted to the manager by a qualified wetlands professional attesting that the wetlands permitting process has been completed and no further documentation is necessary from the regulatory agencies.
- (10) All lands upon which agricultural activities are being conducted shall undergo a soil and water quality conservation assessment. Such assessment shall evaluate 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 accomplished consistent with this chapter. Plans of development or water quality impact assessments are not required for activities on agricultural lands except for land disturbing activities not related to food and/or fiber production.

(Ord. No. 183, 8-6-90; Ord. No. 183A-1, 11-12-96; Ord. No. 183A-3, 11-25-03; Ord. No. 183A-4, 12-11-07; Ord. No. 183A-5, 1-8-08)

### **Sec. 23-10. Plan of development.**

Any development or redevelopment exceeding 2,500 square feet of land disturbance in the CBPA shall be accomplished through a plan of development process prior to any clearing or grading of the site or the issuance of any building permit to assure compliance with all applicable requirements of this chapter and any applicable approved watershed management plans. Administration of the plan of development process shall be in accordance with chapter 24 of this Code for site plans and chapter 19 of this Code for subdivision plans. The following plans or studies shall be submitted, unless otherwise provided for:

- (1) *Site and subdivision plans.* Site plans in accordance with the provisions of chapter 24 of this Code or subdivision plans in accordance with chapter 19 of this Code. In the event that chapter 24 does not require the preparation of a site plan for a development activity that exceeds 2,500 square feet of land disturbance, a plan will still be required for the purposes of this chapter that complies with items 2, 3, and 5 of this subsection.
- (2) *Environmental inventory.* An environmental inventory shall be submitted in conjunction with preliminary site plan or preliminary subdivision plan approval applications. Except for the perennial stream determination required in item d. of this subsection, this requirement may be waived by the manager when the proposed use or development would result in less than 5,000 square feet of disturbed area. For existing single-family lots in a RPA, showing items required by subsection a. on the plat plan normally required as part of the building permit application shall satisfy the requirements for an environmental inventory. An environmental inventory is not required for existing single-family lots in the RMA.
  - a. The environmental inventory shall be drawn to scale clearly delineating the following components:
    1. Tidal wetlands;
    2. Tidal shores;
    3. Nontidal wetlands connected by surface flow and contiguous to tidal wetlands or water bodies with perennial flow (i.e., RPA wetlands);
    4. A 100-foot buffer area located adjacent to and landward of the components listed in items 1. through 3. above, and along both sides of any water body with perennial flow;
    5. Nontidal wetlands not included in item 3 (i.e., RMA wetlands);
    6. 100-year floodplains as designated by chapter 24 of the county code; and
    7. Slopes 25 percent or greater.
  - b. Wetlands delineations shall be performed consistent with the procedures specified in the *Federal Manual for Identifying and Delineating Jurisdictional Wetlands* currently approved for use by the Army Corps of Engineers.
  - c. The environmental inventory shall be drawn at the same scale as the preliminary site plan or subdivision plan and shall be certified as complete and accurate by a person or firm competent to make the inventory.

- d. The environmental inventory shall include a reliable, site specific evaluation to determine whether water bodies on or adjacent to the development site have perennial flow. This evaluation shall be provided by the person applying to use or develop the site using one of the county or state approved methods of in-field indicators of perennial flow unless the county has already made a field determination of perennial flow for the site. These site-specific determinations shall be confirmed by the manager and shall be used to establish the boundaries of the RPA.
- (3) *Clearing plan.* A clearing plan shall be submitted in conjunction with site plan review or subdivision plan review. No clearing or grading of any lot or parcel shall be permitted without an approved clearing plan. For existing single-family lots, a clearing line shown on the plat plan normally submitted as part of the building permit application shall satisfy clearing plan requirements. No clearing or grading shall occur on existing single-family lots until a complete building permit application is submitted.

Clearing plans shall be prepared and/or certified by design professionals practicing within their areas of competence as prescribed by the Code of Virginia.

a. Contents of the plan:

1. The clearing plan shall be drawn to scale and clearly delineate the location, size and description of existing and proposed plant material. All existing trees on the site 12 inches or greater diameter at breast height (DBH) shall be shown on the clearing plan, or where there are groups of trees, the woodlines of the group may be outlined instead. The specific number of trees 12 inches or greater DBH to be preserved outside of the impervious cover and outside the groups shall be indicated on the plan. Trees to be removed and woodlines to be changed to create desired impervious cover shall be clearly delineated on the clearing plan.
2. Any required buffer area shall be clearly delineated and any plant material to be added to establish or supplement the buffer area, as required by this chapter, shall be shown on the clearing plan.
3. Within the RPA buffer area, trees to be removed for sight lines, vistas, access paths, and BMPs, as provided for in this chapter, shall be shown on the plan. Vegetation required by this chapter to replace any existing trees within the buffer area shall also be shown on the clearing plan.
4. Erosion and sediment controls shall be provided as necessary and in accordance with chapter 8 of the County Code.

b. Plant specifications:

1. All plant materials necessary to supplement the buffer area or vegetated areas outside the impervious cover shall be installed according to standard planting practices and procedures.
2. All supplementary or replacement plant materials shall be living and in healthy condition. Plant materials shall conform to the standards of the most recent edition of the *American Standard for Nursery Stock*, published by the American Association of Nurserymen.
3. Where areas to be preserved, as designated on an approved clearing plan, are encroached, replacement of existing trees and other vegetation will be achieved at a ratio of two planted trees to one removed. Replacement trees shall be a minimum 1-1/2 inches caliper at the time of planting.

- c. Maintenance:
    - 1. The applicant shall be responsible for the maintenance, repair and replacement of all vegetation as may be required by the provisions of this chapter.
    - 2. In buffer areas and areas outside the impervious cover, plant material shall be tended and maintained in a healthy growing condition and free from refuse and debris. Unhealthy, dying or dead plant materials shall be replaced during the next planting season, as required by the provisions of this chapter.
  - d. Installation and bonding requirements:
    - 1. Where buffer areas are required, no certificate of occupancy shall be issued until the installation of required plant material to establish or supplement the buffer is completed, in accordance with the approved clearing plan.
    - 2. When the occupancy of a structure is desired prior to the completion of the plan, a certificate of occupancy may be issued only if the applicant provides a form of surety satisfactory to the county attorney in an amount equal to the costs of the remaining plant materials, related materials and installation costs.
    - 3. All required plant material shall be installed and approved by the first planting season following issuance of a certificate of occupancy or the surety may be forfeited.
- (4) *Stormwater management plan.* A stormwater management plan shall be submitted as part of the plan of development process required by this chapter and in conjunction with site plan or subdivision plan preliminary approval. A stormwater management plan is not required for existing single family lots.

To control stormwater runoff structural BMPs shall be required for site plans with impervious cover exceeding ten percent of site area and for subdivisions with more than one-half dwelling unit per acre. However, all projects are subject to the stormwater provisions of chapter 8 of this Code. Single-family subdivisions of five lots or less shall not be subject to this requirement. Any contiguous property owned by the same subdivider, or deemed by the manager as a logical part of a contiguous subdivision, cannot be subdivided into greater than five lots without complying with the requirements of this chapter. BMPs shall be designed and constructed in accordance with guidelines established by the manager.

Performance assurances shall be provided that all BMPs required in plans of development shall be constructed to comply with the performance criteria set forth therein. The form of agreement and type of bond, letter of credit or other security shall be to the satisfaction of and approved by the county attorney. The amount of bond, letter of credit or other security and designated length of completion time shall be set by the manager or his authorized designee.

- a. Contents of the plan: At a minimum, the stormwater management plan shall contain the following:
  - 1. Location and design of stormwater-control devices and BMPs.
  - 2. Procedures for implementing nonstructural stormwater-control practices.
- b. The plan shall establish a long-term schedule for inspection and maintenance of stormwater management facilities that includes all maintenance requirements and persons responsible for performing maintenance. If the designated maintenance responsibility is with a party other than James City County, then a maintenance agreement shall be executed between the responsible party and the county.

- (5) *Erosion and sediment-control plan.* Erosion and sediment-control plan in accordance with chapter 8 of this Code.
- (6) *Landscaping plan.* Landscaping plan in accordance with chapter 24 of this Code.
- (7) *Final plan.* Final site plans or final subdivision plans for all lands within CBPAs shall include the following information:
  - a. Delineation of the RPA boundary;
  - b. Delineation of required buffer areas;
  - c. Delineation of RMA wetlands;
  - d. All wetlands permits required by law;
  - e. Delineation of slopes 25 percent or greater; and
  - f. BMP maintenance agreement to ensure proper maintenance of BMPs in order to continue their functions.

(Ord. No. 183, 8-6-90; Ord. No. 183A-1, 11-12-96; Ord. No. 183A-3, 11-25-03)

#### **Sec. 23-11. Water quality impact assessment.**

A water quality impact assessment shall be required for any proposed land disturbance development or redevelopment within RPAs and for development or redevelopment in RMAs, when required by the manager, because of the unique characteristics of the site or intensity of the proposed development or redevelopment or potential impact on water quality or RPAs. A water quality impact assessment shall identify impacts of proposed development on water quality and land in RPAs and recommended measures for mitigation of these impacts. Water quality impact assessments shall address NSP components set forth in section 23-3 of this chapter and shall follow guidelines established by the manager. Development or redevelopment within an RMA shall not require a water quality impact assessment when impervious cover is less than 40 percent of the total site area. (Ord. No. 183, 8-6-90; Ord. No. 183A-1, 11-12-96; Ord. No. 183A-3, 11-25-03)

#### **Sec. 23-12. Waivers for noncomplying structures.**

The manager through an administrative process may permit the continued use, alteration, or the expansion of any structure in existence on August 6, 1990, which is not in conformity with the provisions of this chapter. The process requires that:

- (1) The manager grant a waiver for noncomplying structures on legal nonconforming lots or parcels to provide for alterations or expansions to such nonconforming structures provided that:
  - a. There will be no increase in nonpoint source pollution load;
  - b. 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
  - c. For expansion of a principal noncomplying structure, the manager makes the following findings:
    1. The request for the waiver is the minimum necessary to afford relief;

2. Granting the waiver will not confer upon the applicant any specific privileges that are denied by this chapter to other property owners in similar situations;
  3. The waiver is in harmony with the purpose and intent of this chapter and does not result in water quality degradation;
  4. The waiver is not based on conditions or circumstances that are self-created or self-imposed;
  5. Reasonable and appropriate conditions are imposed, as warranted, that will prevent the waiver from causing a degradation of water quality;
  6. Other findings, as appropriate and required by the manager are met; and
  7. In no case shall this provision apply to accessory structures as defined in chapter 24 of the County Code.
- d. The waiver does not conflict with the comprehensive plan or any applicable approved watershed management plan.
- (2) An application for a waiver shall be made in writing to the manager and shall include for the purpose of proper enforcement of this chapter, the following information:
- a. Name and address of applicant and property owner;
  - b. Legal description of the property and type of proposed use and development;
  - c. A sketch of the dimensions of the lot or parcel, location of buildings and proposed additions relative to the lot lines, and boundary of the Resource Protection Area;
  - d. Location and description of any existing private water supply or sewage system; and,
  - e. A plan that depicts the impacts to components of the environmental inventory as required by section 23-10(2) of this chapter, and identification of the amount of impact to each component.
- (3) A waiver shall become null and void if building foundations are not completed within twelve months from the date issued.
- (Ord. No. 183, 8-6-90; Ord. No. 183A-1, 11-12-96; Ord. No. 183A-3, 11-25-03)

**Sec. 23-13. Exemptions.**

- (a) *Public utilities, railroads, public roads, and related facilities.*
- (1) Construction, installation, operation and maintenance of electric, natural gas, fiber-optic, and telephone transmission lines, railroads, and public roads and their appurtenant structures in compliance with (i) the Erosion and Sediment Control Law (section 10.1-560 et seq. of the Code of Virginia) and the Stormwater Management Act (section 10.1-603.1 et seq. of the Code of Virginia), (ii) an erosion and sediment control plan and a stormwater management plan approved by the Virginia Department of

Conservation and Recreation, or (iii) this chapter's water quality protection criteria which is at least as stringent as the above state requirements will be deemed to comply with the regulations adopted pursuant to the Act. The exemption of public roads is further conditioned on the following:

- a. The road alignment and design have been optimized, consistent with all applicable requirements, to prevent or otherwise minimize the encroachment in the RPA and to minimize the adverse effects on water quality.
- (2) Construction, installation and maintenance by public agencies of water and sewer, natural gas, and underground telecommunications and cable television lines owned, permitted or both, by the county or a regional service authority shall be exempt from this chapter; provided that:
- a. To the degree possible, the location of such utilities and facilities should be outside RPAs;
  - b. No more land shall be disturbed than is necessary to provide for the proposed utility installation;
  - c. All such construction, installation and maintenance of such utilities and facilities shall be in compliance with all applicable federal, state and county permits and designed and conducted in a manner that protects water quality; and
  - d. Any land disturbance exceeding an area of 2,500 square feet complies with chapter 8 of this Code.
- (b) *Exemptions for silvicultural activities.* Silvicultural activities are exempt from the requirements of this chapter; provided that silvicultural operations adhere to water quality protection procedures prescribed by the Department of Forestry in its *Virginia's Forestry Best Management Practices for Water Quality*.
- (c) *Exemptions for Resource Protection Areas.* The following land disturbances may be exempted by the manager from the requirements of this chapter provided that they comply with subdivisions 1 through 3 of this subdivision: (i) water wells; (ii) passive recreational facilities, such as boardwalks, trails, and pathways; and, (iii) historic preservation and archaeological activities.
- (1) Any required permits, except those to which this exception specifically applies, shall have been issued;
  - (2) Sufficient and reasonable proof is submitted that the intended use will not deteriorate water quality; and,
  - (3) Any land disturbance exceeding an area of 2,500 square feet shall comply with chapter 8 of this Code.
- (Ord. No. 183, 8-6-90; Ord. No. 183A-3, 11-25-03)

#### **Sec. 23-14. Exceptions.**

Exceptions to the requirements of section 23-7 of this chapter may be granted, provided that:

(a) A request for an exception to the requirements of this section shall be made in writing to the Chesapeake Bay Board (Board), which is comprised of the members of the James City County Wetlands Board. The request shall identify the impacts of the proposed exception on water quality and on lands within the RPA through the performance of a water quality impact assessment which complies with the provisions of section 23-11.

(b) No later than 60 days after receipt of a complete exception request, the board shall hold a public hearing on the request. The board shall notify the affected public of any such exception requests and shall consider these requests in a public hearing in accordance with section 15.2-2204 of the Code of Virginia, except that only one hearing shall be required. Also, when giving any required notice to the owners, their agents, or the occupants of abutting property and property immediately across the street or road from the property affected, the notice shall be given by first-class mail to the last known address as shown on the current real estate tax assessment book or records.

(c) The board shall review the request for an exception and the water quality impact assessment and may grant the exception with such conditions and safeguards as deemed necessary to further the purpose and intent of this chapter if the board finds that:

- (1) The exception request is the minimum necessary to afford relief;
- (2) Granting the exception will not confer upon the applicant any special privileges denied by this chapter to other property owners similarly situated in the vicinity;
- (3) The exception request will be in harmony with the purpose and intent of this chapter, and is not of substantial detriment to water quality;
- (4) The exception request is not based on conditions or circumstances that are self-created or self-imposed, nor does the request arise from conditions or circumstances either permitted or non-conforming that are related to adjacent parcels; and
- (5) Reasonable and appropriate conditions are imposed which will prevent the exception request from causing a degradation of water quality.

(d) If the board cannot make the required findings or refuses to grant the exception, the board shall return the request for an exception together with the water quality impact assessment and the written findings and rationale for the decision to the applicant.

(e) A request for an exception to the requirements of provisions of this chapter other than sections 23-7 shall be made in writing to the manager. The manager may grant these exceptions provided that:

- (1) Exceptions to the requirements are the minimum necessary to afford relief; and
- (2) Reasonable and appropriate conditions are placed upon any exception that is granted, as necessary, so that the purpose and intent of this chapter is preserved.
- (3) Exceptions to section 23-9 may be made provided the findings as noted in section 23-14(c) are made.

(Ord. No. 183, 8-6-90; Ord. No. 183A-1, 11-12-96; Ord. No. 183A-3, 11-25-03)

**Sec. 23-15. Applications for exceptions.**

Applications for exceptions shall be made in writing to the board or the manager as appropriate in accordance with sections 23-14(a) and (e), and shall include the following:

- (1) Name and address of applicant and property owner;
- (2) Legal description of the property and type of proposed use and development;
- (3) A sketch of the dimensions of the lot or parcel, location of buildings and proposed additions relative to the lot lines, the RPA, slopes greater than 25 percent and all wetlands;
- (4) Location and description of any existing private water supply or sewage system;
- (5) A water quality impact assessment completed in accordance with section 23-11 of this chapter and guidelines established by the manager;
- (6) For exceptions that must be granted by the Chesapeake Bay Board, a nonrefundable processing fee of \$125 shall accompany each application to cover the cost of processing;
- (7) For exceptions that must be granted by the manager, a nonrefundable processing fee of \$25 shall accompany each application to cover the cost of processing. This fee shall be collected for any administrative approval, waiver, exception, exemption, variance and buffer modification which may be necessary through the plan of development process as outlined in sections 23-5, 23-7(a), 23-7(c), 23-9, 23-10, 23-12, 23-13, and 23-14(e).
- (8) Payment of any permit fees established in section 23-15 shall be waived for the county, any entity created solely by the county and those regional entities to which the county is a party provided that: (1) The other parties to the regional entity similarly waive fees; and (2) The regional entity has locations in more than one locality.

(Ord. No. 183, 8-6-90; Ord. No. 183A-1, 11-12-96; Ord. No. 183A-3, 11-25-03; Ord. No. 183A-6, 5-27-08; Ord. No. 183A-8, 8-9-11)

**Sec. 23-16. Granting waivers or exceptions.**

The board or the manager may grant waivers or exceptions as set forth herein. When reviewing applications, the board or the manager will consider written comments from the county engineer, the director of planning and other interested parties. Waivers or exceptions granted will become null and void if building foundations are not completed within 12 months.

- (a) The manager shall act on a complete application for an administrative waiver or exception as described in section 23-15 within 21 calendar days of receipt;
- (b) The board shall make its determination within 30 days of the hearing; and
- (c) If the board or the manager fails to act within these time frames, the application shall be deemed to be approved.

(Ord. No. 183, 8-6-90; Ord. No. 183A-1, 11-12-96; Ord. No. 183A-3, 11-25-03)

**Sec. 23-17. Appeals.**

(a) An owner of property subject to an administrative decision, order or requirement under this chapter may appeal by submitting a written application for review to the board no later than 30 days from the rendering of such decision, order or requirement. The board shall hear the appeal as soon as practical after receipt of the application. The appellant, the board of supervisors, the manager, the planning director and any person or agency expressing an interest in the matter shall be notified by the board not less than ten days prior to the date of the hearing. Published notice of the board's public meetings shall state that appeals from decision under the Chesapeake Bay Preservation Ordinance may be heard.

(b) In rendering its decision, the board shall balance the hardship to the property owner with the purpose, intent and objectives of this chapter. The board shall not decide in favor of the appellant unless it finds:

- (1) The hardship is not generally shared by other properties in the vicinity;
- (2) The Chesapeake Bay, its tributaries and other properties in the vicinity will not be adversely affected; and
- (3) The appellant acquired the property in good faith and the hardship is not self-inflicted.

(c) The board may impose conditions to the granting of any waiver, exception or appeal as it may deem necessary in the public interest, and may, to ensure compliance with the imposed conditions, require a cash escrow, bond with surety, letter of credit or other security as is acceptable to the county attorney.

(d) An owner of a property subject to a board decision, order or requirement may appeal to the circuit court of James City County no later than 30 days from the rendering of such decision, order or requirement.

**State law reference** - Code of Va., § 10.1-2109(F)

(Ord. No. 183, 8-6-90; Ord. No. 183A-1, 11-12-96; Ord. No. 183A-3, 11-25-03; Ord. No. 183A-7, 3-22-11)

**Sec. 23-18. Violations; penalties.**

(a) Without limiting the remedies which may be obtained under this section, any person who violates any provision of this chapter or who violates, fails, neglects, or refuses to obey any variance or permit condition authorized under this chapter shall, upon such finding by the circuit court, be assessed a civil penalty not to exceed \$5,000.00 for each day of violation. Such 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 within the county, in such a manner as the court may direct by order.

(b) Without limiting the remedies which may be obtained under this section, and with the consent of any person who has violated any provision of this chapter, or who has violated, failed, neglected, or refused to obey any variance or permit condition authorized under this chapter, the county 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 \$10,000.00 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 in the county. Civil charges shall be in lieu of any appropriate civil penalty that could be imposed under subdivision (a) of this section. Civil charges may be in addition to the costs of any restoration required by the board of supervisors.

(c) In addition to, and not in lieu of, the penalties prescribed in sections (a) and (b) hereof, the county may apply to the circuit court for an injunction against the continuing violation of any of the provisions of this ordinance and may seek any other remedy authorized by law.

(Ord. No. 183A-2, 8-17-99; Ord. No. 183A-3, 11-25-03)

**State law reference** - Code of Va., § 10.1-2109(E).