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Tips on Representing Your Locality Before the General Assembly: A Twenty-two Year Retrospective

Karen J. Harwood

The Virginia General Assembly meets in session every year, beginning on the second Wednesday in January. In odd-numbered years, such as the upcoming 2013 session, the entire legislative session traditionally lasts 46 days, including weekends and holidays. In even-numbered years, the session lasts 60 days, including weekends and holidays. Procedural resolutions adopted by the House of Delegates and the Senate establish numerous deadlines that are important to remember, such as the requirement that all committee and floor action on all introduced legislation, except the Budget Bill and revenue bills, must be completed in the house of origin no later than typically the Tuesday following the half-way point of the session (28th day of a 46-day session; 35th day of a 60-day session). This day is called "crossover" because after that day, the House of Delegates will take up those bills and resolutions that originated in and were adopted by the Senate and the Senate will do the same with bills and resolutions that originated in and were adopted by the House.

It is not unusual for between two and three thousand bills and resolutions to be introduced during a session, sometimes even more. Given the volume of legislation that must be considered in a limited period of time, the legislative process necessarily moves at a rapid pace. Typically, a bill may be filed and introduced as late as the 10th day of the session. Where all action must be completed on that bill in the house of origin by the 28th

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TABLE OF CONTENTS

Chairman's Message

I hope you enjoy this issue of the *Journal* with its timely articles addressing the wrath of Superstorm Sandy, the challenge of the upcoming General Assembly, and the flood of regulations coming with the Integration Bill on stormwater. Many thanks to Greg Langlois of FEMA, Karen Harwood, formerly with Fairfax County, and Ann Neil Cosby of Sands, Anderson for authoring these informative articles.

It is hard to believe that 2012 is wrapping up. I wish you the best that all the upcoming holidays have to offer and also a Happy New Year.

Leo P Rogers
Chairman

day of a "short session" (46-day session), that would leave a period of 18 days to deal with the bill, six of which would fall on weekends when subcommittees and committees most likely would not be meeting and most members of the General Assembly would not be in their offices.

Depending upon the meeting schedule of the subcommittee and committee to which the bill will be assigned, there may be only one or two meetings where the substance of the bill would be discussed and considered before the crossover deadline. The opportunity to seek amendments and otherwise affect the course of specific legislation that survives crossover continues when House bills are taken up by Senate committees and when committees of the House of Delegates consider Senate bills, however, in instances where some local government representatives may have collaborated and negotiated amendments to a problematic bill during the first half of the session, additional amendments after crossover may be difficult to achieve.

Much of the legislation introduced during a General Assembly Session will not impact local government. Occasionally, legislation may be introduced that would be helpful to localities. In those instances, depending upon the circumstances, the most helpful approach may be to remain low-key and inform those Delegates and Senators who represent your locality of your support, especially if one of them is a member of the subcommittee or committee that will consider the bill, leaving the contact of Delegates and Senators who represent other localities to officials and employees from those localities. An exception would be where a particular bill or proposed amendment is an initiative of the Virginia Association of Counties (VACo) or the Virginia Municipal League (VML) for which broad, active support is sought.

The Problematic Bill

At some point during your tenure as a local government official, you will likely learn of legislation pending before the Virginia General Assembly that would be harmful to your locality, if enacted. You may learn of such legislation from a colleague or from a VACo Capitol Contact Alert or VML Action Call broadcast by e-mail to their membership during the General Assembly session. Efforts to alter the course of pending legislation must occur quickly and are best undertaken in coordination with other localities and interest groups that also oppose the bill.

As soon as you learn of pending legislation that would or could be expected

to negatively impact your locality, the following actions should be taken, right away:

- carefully read the bill to get a sense of what it does; note ambiguities and determine whether they would likely work to the benefit of a locality, and therefore left as is, or whether they should be clarified if the bill should ultimately pass;
- forward a pdf version of the bill to key staff in your local departments that administer, regulate, or enforce the subject matter addressed in the bill and ask that staff assess its impact on how the department conducts its business;
- if your locality is a member of VACo, VML, the Virginia Coalition of High Growth Localities or Virginia First Cities, contact the point person within the organization and gather whatever background information that they may have as to why the bill was introduced; when the bill is likely to be heard in subcommittee or committee; the names of other local government representatives and interest groups who may be working on the bill, including possible amendments; and ask to be kept in the loop on future developments and offer to serve on any ad hoc work group that will be working on the bill;
- identify and alert potential allies of the bill's existence, particularly the local government attorney or other representative of other local governments who have a Delegate or Senator on the subcommittee and committee that will hear the bill; send them a pdf copy of the bill for their easy reference and if you know the date and time when the bill is likely to be heard, include that information; if their locality has concerns or objects to the bill, ask them to please let their Delegate or Senator on the subcommittee or committee know before the bill is heard;
- where the bill impacts one department or official in particular, such as the zoning administrator, the planning director, the building official, the police department or fire department, ask your local official to please alert their counterparts in other localities and any statewide professional association to the bill's existence;
- as a courtesy to the Delegate or Senator who introduced the bill (the "chief patron"), let him or her know that your locality has concerns or objections to the bill and why; if true, advise that staff is continuing to evaluate the legislation for its impacts and for possible amendments that may minimize its impacts; ask why the bill was introduced and whether there is someone else that you might contact in order to get additional background information; and
- if your locality has a legislative liaison in Richmond, be sure to discuss and coordinate the foregoing with him or her; on the really big issues, your liaison may have the most up-to-date information about the status of the legislation.

Local Impact Assessment

When the bill is forwarded for analysis to key staff in the departments that would be affected by the proposed changes, ask that staff comment on any changes that would have an impact on how the department conducts its business, from the standpoint of the subject matter or substance of the work of the department, staffing levels, process time and costs. Will current staffing levels be able to adequately handle any new requirements or will additional staff positions be needed? Will there be increased direct costs, for example, costs attributable to an increase in public hearing advertising requirements or an increase in certain fees that the locality would have to pay? Does the legislation provide a source of funding to the locality to cover the costs of implementing any new mandates imposed by the General Assembly? Does the legislation eliminate or reduce existing sources of revenue available to the locality? Does the legislation eliminate or reduce existing regulatory authority granted to the locality? Where appropriate, ask staff their opinion

whether there might be an amendment to the proposed changes that would make the bill livable. Impress upon staff the importance of receiving their input as soon as possible. Information gleaned from the staff analysis may be helpful when explaining to others, particularly your locality's delegation, the reasons why your locality opposes the legislation.

Distill Your Message and Get the Word Out

When communicating with Delegates and Senators, brevity is essential. You need to be able to explain why your local government opposes or supports a bill in one to two minutes. Your points need to be basic and fundamental without being highly technical and complex. You need to understand and be able to articulate your opponent's key arguments and your counterarguments. Keep in mind that each committee on which a Delegate and Senator serve may consider well over one hundred bills during the course of a session, and each member serves on more than one committee. You need to be sensitive to information overload.

For bills of major significance that your local government opposes, prepare a one page handout that briefly and clearly states the reasons why the bill is a bad bill that should be defeated. Try to set your reasons out in bullet points rather than narrative paragraphs. Be clear on what you are asking the Delegate or Senator to do, such as "Vote NO on HB XXX!" Be sure to give a copy of this handout to any Delegate or Senator who represents your locality and who is on the subcommittee or committee to which the bill has been assigned. If time allows, also give a copy to other Delegates or Senators on the subcommittee or committee before the bill is considered. Assume that the proponents of the bill that you oppose will be given a copy of the handout. Be aware of any VACo Capitol Contact Alerts and VML Action Calls that may be sent out concerning bills that your local government opposes. Points made therein may be helpful as you prepare your handout.

The majority of House and Senate Committees have subcommittees that have standard meeting times. With rare exception, all bills assigned to the full committee will first be heard in subcommittee. The subcommittee meetings are very important. Testimony is taken, amendments are considered and under some adopted rules of procedure, bills that are not reported out of subcommittee simply die on the vine and are never included on the agenda for the full committee absent special action of the committee chair. In order of priority, focus first on getting your points across to members of the subcommittee to which the bill has been assigned. Should the bill survive the subcommittee vote, then concentrate on other members of the full committee. Should the bill be voted out of committee, inform other members who represent your locality of your local government's opposition to the bill.

Amendment Possibilities

It is not always possible to derail the problematic bill. Sometimes, upon learning the background of why a bill has been introduced and what the chief patron hopes to achieve, perhaps amendments may be drafted that eliminate or reduce many of the objectionable aspects but that address the concerns of the chief patron. Rather than take your chances that sufficient votes exist to defeat a harmful bill, only to find out that enough "no" votes do not materialize, it is worth the time it will take to explore whether amendments are possible that could render a harmful bill livable and that would be acceptable to the chief patron and the person for whom the bill was introduced. Be aware that it is not unusual for identical bills to be introduced in the House of Delegates and in the Senate, thereby causing two parallel tracks that will need to be followed with separate opportunities for amendments to be considered. Something to keep in mind should acceptable amendments to a problematic bill not be achieved: in odd-numbered years, legislation may be carried over, or continued, to the following year. Sometimes, when dealing with a dynamic, controversial topic, the decision may be made to carry the bill over, perhaps with a referral to a special work group or commission for further study and recommendations. From a strategy standpoint, advocating that a problematic bill be carried

over so that the parties may continue to work on the issue may be preferred than risking that the bill would pass if put to a vote.

When drafting amendments, be sure to draft them to the most recently printed pdf version of the bill. In the pdf versions, each line of the bill is numbered, which then provides a convenient point of reference for each amendment. Amendments need to specify where on a line that text is to be stricken and where new proposed text is to be inserted. Where possible, try to keep proposed amendments to a bill to a minimum that will address your concerns. Now is not the time to try to rewrite the entire Virginia Code section to your preferred style.

Coordinate your proposed amendments with other local government attorneys and liaisons whom you know are opposed to the bill and with VACo and VML staff assigned to cover the House or Senate committee that will consider the bill. Try to reach consensus among local government representatives who are seeking amendments to the bill so that local governments may appear to be united before the subcommittee and full committee. If the chief patron introduced the bill for an interest group that has a representative in Richmond who is fairly easy to contact, share the proposed amendments with that person and try to reach agreement.

Once you have proposed amendments ready, go to the chief patron to explain them and to see if he or she will accept them as friendly amendments. Let the chief patron know of the status of efforts to reach agreement with the person for whom the bill was introduced. If the amendments are accepted by the chief patron, then the subcommittee and committee in all likelihood will accept them, as well. If the chief patron will not accept the amendments, then you will need to find a member of the subcommittee, or the full committee where there is no subcommittee, to offer the amendments for consideration. Sometimes the chief patron will not agree to accept the amendments, but will tell you that he or she will not object if someone on the subcommittee or committee offers the amendments. That is important information to know because it should make it easier for you to find a subcommittee or committee member who would be willing to offer the amendments. When the bill is to be heard by the subcommittee or committee, be sure that you have brought sufficient copies of the amendments for each subcommittee or committee member, the chief patron, three committee staff members, and a few extra for other interested parties.

Be aware that bills may be amended at several steps of the legislative process. Committees of the House of Delegates and Senate may adopt amendments when a bill is before the committee. Bills may be amended on the floor of the House and Senate. After crossover, bills that have survived the first half of the session must go through the subcommittee and committee process in the other house and will be subject to possible further amendment in committee and on the floor. The point is that for those bills that really cause concern, take care to follow those bills through each step of the legislative process so that you may be aware of surprise amendments that may surface. Even the Governor may send down amendments to bills for consideration after the legislation has been adopted by the House of Delegates and the Senate.

General Assembly Websites

A vast array of information concerning the General Assembly including the status of legislation; links to copies of legislation; House and Senate Committee and subcommittee membership, meeting dates and times and dockets; and information about individual members of the General Assembly, including contact information and a listing of the counties and cities that each represents, is available from the following websites:

Virginia General Assembly Legislative Information System (LIS) [http://leg1.state.va.us]

Virginia General Assembly Website [http://virginiageneralassembly.gov]

Familiarity With FEMA Will Help When Disaster Strikes

Gregory J. Langlois

In recent years, communities across the country have suffered the effects of an increasing number of natural or man-made events so devastating that Federal Government assistance was needed to assist with response and recovery efforts. In 2011, the President declared 29 emergencies and a record number of major disasters under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (the "Stafford Act").[1] Last year's record of 99 major disasters surpassed a prior record of 81 set in 2010.[2]

Communities in Virginia have not escaped this trend. Just recently, the effects of Hurricane Sandy produced severe flooding, heavy snowfall, more than 280 road closures, and widespread power outages in the Commonwealth, which requested and received a Stafford Act emergency declaration in advance of landfall and then, a few weeks later, a major disaster declaration.[3] This past summer, the "derecho" band of severe thunderstorms and sustained winds that swept across the Midwest and Mid-Atlantic states left more than one million Virginia residents without power—in the middle of a heat wave—and caused 15 deaths in the Commonwealth.[4] Last year, Stafford Act major disaster declarations for Virginia resulted from the 5.8-magnitude earthquake centered in Louisa County,[5] Hurricane Irene,[6] and Tropical Storm Lee.[7] In addition, Virginia received an emergency declaration for pre-landfall preparations in advance of Hurricane Irene.

When such disasters strike, the U.S. Department of Homeland Security's Federal Emergency Management Agency (FEMA) works closely with Federal, state and territorial, local, and tribal government partners, the private and nonprofit sectors, and other stakeholders to support communities' immediate response and long-term recovery. By becoming familiar with statutes,[8] regulations,[9] and policies[10] governing Federal disaster response and assistance, attorneys representing Virginia local governments can play a key role in ensuring that their communities coordinate successfully with the Commonwealth and FEMA to obtain the full extent of assistance for which they are eligible. This article provides a brief primer on Federal disaster assistance law, highlighting the major disaster and emergency declaration process and a program of particular significance to local governments: the Public Assistance (PA) Program.

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Presidential Declarations: Turning "on" Stafford Act Assistance

FEMA may provide and coordinate the financial and direct assistance authorized under the Stafford Act only upon a declaration by the President that an event constitutes a major disaster or an emergency. A presidential declaration, in turn, can be made only upon a request from the affected state's governor seeking Federal assistance because the event is so severe that state and local governments cannot effectively respond. These procedures are consistent with federalism principles under which individual states retain the authority to exercise the police power[11] within their borders, as well as with Congress' intent that Federal disaster assistance supplements the efforts of local and state authorities.[12] A presidential declaration under the Stafford Act triggers the Federal Government's authority to render supplementary assistance.

Governors may request, and the President may declare, either a "major disaster"[13] or an "emergency."[14] Each declaration covers different types of events and authorizes different levels of assistance. A "major disaster" is "any natural catastrophe (including any hurricane, tornado, storm, high water, winddriven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, or drought), or, regardless of

cause, any fire, flood, or explosion, in any part of the United States," that the President determines causes damage so severe that Federal disaster assistance under the Stafford Act is warranted.[15] An "emergency" is "any occasion or instance for which, in the determination of the President, Federal assistance is needed to supplement State and local efforts and capabilities to save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe in any part of the United States."[16] A major disaster, therefore, involves damage caused by natural forces or by a fire, flood, or explosion of any origin, whereas an emergency involves any event for which Federal assistance is needed—even if a catastrophe or damage has not actually materialized. Under an emergency declaration, FEMA may provide direct Federal assistance (under which FEMA or a Federal agency that FEMA assigns performs the work) and financial assistance for certain activities and programs, including debris removal under the PA Program and certain assistance to individuals and households, such as housing assistance.[17] Under a major disaster declaration, in addition to those types of assistance, FEMA also may provide, *inter alia*, assistance under the PA Program to repair, restore, or replace damaged facilities;[18] additional types of assistance to individuals and households;[19] and assistance under FEMA's Hazard Mitigation Grant Program to mitigate the risk of damage from future events.[20]

A governor (or acting governor) must request a major disaster declaration within 30 days of the incident[21] or, for an emergency declaration,[22] within five days after the need becomes apparent (but no longer than 30 days after the incident).[23] The request must be based on a finding that the event "is of such severity and magnitude that effective response is beyond the capabilities of the State and the affected local governments and that Federal assistance is necessary."[24] The governor must identify the type of incident involved; name the affected counties, independent cities, and Indian tribal lands; describe state and local efforts and resources that have been used or committed to response efforts; and certify that he or she has taken appropriate action under state law and executed the state's emergency plan.[25] For both major disaster and emergency declaration requests, the governor provides a preliminary estimate of the types and amount of Federal assistance needed under the Stafford Act and from other Federal agencies. Typically, this information is based on Preliminary Damage Assessments (PDAs) undertaken by teams of Federal, state and local or tribal representatives, and the results of PDAs usually are included in the governor's request.[26] For major disaster declaration requests, the governor identifies specific FEMA programs requested (such as the PA Program) and the counties for which each program is requested.

A governor submits a major disaster or emergency declaration request to the President through the FEMA Regional Administrator for the appropriate region. The Regional Administrator analyzes the request and PDAs and submits a report with a formal recommendation to the FEMA Administrator.[27] After an independent review based on a number of factors, the FEMA Administrator submits FEMA's final recommendation to the President.[28] If the President issues a declaration, it will be published in the Federal Register and include, *inter alia*, a description of the type of incident, the incident period, a designation of affected geographic areas eligible for Stafford Act assistance (usually on a county basis, and on tribal lands, if applicable), and, typically, a designation of the types of assistance to be provided and the Federal Government's share in the costs of that assistance.[29]

With a major disaster or emergency declaration in place, supplemental Federal disaster assistance can begin flowing to affected communities.

Public Assistance: Aiding Efforts to Respond and Rebuild

The PA Program is one of FEMA's primary disaster assistance programs and one that local government attorneys can expect to become thoroughly familiar with if an

event affecting their communities results in a Stafford Act declaration authorizing PA assistance.[30] FEMA administers the PA Program to carry out broad Stafford Act authorities providing grant assistance, and in some circumstances, funding direct Federal assistance to state, local, and tribal governments and certain private, nonprofit entities for debris removal, emergency protective measures, and reconstruction activities. The PA Program is authorized and governed by the Stafford Act[31] and its implementing regulations[32] issued by FEMA. FEMA also has issued an extensive set of policies (the "9500 Series"[33]), several guidebooks (including the Public Assistance Guide[34] and the Debris Management Guide[35]), and other helpful, publicly available guidance covering program operation.[36]

FEMA most often provides PA funding in the form of Federal grants, with states (or, in some cases, Indian tribal governments) serving as the grantee.[37] The grantee administers PA Program funds provided by FEMA, and is responsible for, *inter alia*, helping identify eligible projects and ensuring that potential program applicants are aware of available assistance.[38] Eligible applicants include local governments,[39] broadly defined to include "a county, municipality, city, town, township, local public authority, school district, special district, intrastate district, council of governments … regional or interstate government entity, or agency or instrumentality of a local government."[40] If a local government's project is approved, the local government becomes a subgrantee accountable to the grantee for the use of funds it is provided.[41]

The process for obtaining assistance usually begins with an "Applicants' Briefing" conducted by the grantee (again, usually the state) and attended by FEMA personnel. At this meeting, potential PA subgrantees obtain a broad overview of application procedures, administrative requirements, funding, and eligibility criteria. An applicant must submit to the grantee a one-page Request for Public Assistance (RPA) form within 30 days after the applicant's area is designated for PA assistance, which notifies FEMA of the applicant's intent to seek project funding.[42] After an applicant submits an RPA, a more detailed, individualized "Kickoff Meeting" is held for that applicant, in which state and FEMA personnel (including a FEMA Project Specialist who works directly with the applicant) review eligibility, costs, and other aspects of the applicant's specific proposed projects. A "Project Worksheet" (PW) is developed for each project; this form identifies the eligible scope of work and includes an estimate of the cost.[43] For small projects (currently, those with an estimate of eligible costs under $67,500), FEMA provides assistance based on estimates.[44] For large projects, FEMA provides assistance based on the actual cost of the work, not the estimate. FEMA's reimbursement is based on the Federal share of eligible costs—a percentage set in the President's declaration—which usually is 75 percent (the minimum Federal share).[45]

For a project to be eligible for PA Program funding, the work must be required as a result of the major disaster or emergency event, be located within the areas designated in the President's declaration, and be the legal responsibility of an eligible applicant.[46] When a project involves a facility (such as a public library), ownership of the facility usually establishes legal responsibility. Questions regarding legal responsibility can arise, however, when a facility is being leased to another entity or is under construction at the time of the disaster.

The PA Program provides funding for a variety of types of work, which FEMA broadly classifies as either "emergency work" or "permanent work." Emergency work involves actions taken in anticipation of, during, and in the immediate aftermath of a major disaster or emergency. Permanent work involves longer-term efforts to repair, restore, rebuild, or replace facilities damaged by a major disaster or emergency. Under an emergency declaration, only emergency work may be eligible for PA Program assistance; under a major disaster declaration, both emergency work and permanent work may be eligible.

Debris removal (designated as "Category A" work) is a

significant emergency work activity undertaken by local governments. Debris can include trees and other vegetative material; building components and contents; sand, mud, silt, and gravel; and wreckage resulting from the declared event. To be eligible for PA assistance, debris removal must be in the "public interest,"[47] which FEMA has defined via regulation.[48] Eligibility also depends on the location of the debris; generally, debris must be on an applicant's improved property (such as a park) or right-of-way for the costs of removal to be eligible. FEMA often determines debris from roadways to be in the "public interest" and, therefore, eligible for assistance because the debris may block passage of emergency vehicles or access to emergency facilities. Generally, the costs of debris removal from private property rarely are eligible for reimbursement, as typically, such debris fails to meet the public interest threshold required by the Stafford Act. (Moreover, private property owners often carry insurance covering the costs of such work.) However, in some cases, FEMA will reimburse applicants for the costs of removing debris that that has been placed along public rights-of-way.

Emergency protective measures ("Category B" work) are emergency work consisting of various activities essential to "save lives, to protect public health and safety, and to protect improved property."[49] To be eligible, emergency protective measures must eliminate or lessen immediate threats (1) to life, public health, or safety; or (2) of significant additional damage to improved property.[50] The costs of a range of emergency protective measures may be eligible for assistance, including evacuating those in harm's way; providing sheltering and emergency mass care; offering food, water, and other necessities; establishing temporary facilities; protecting property; and removing health and safety hazards.

Permanent work involves repairing, restoring, rebuilding, or replacing damaged facilities, including government-owned "public" facilities.[51] As with emergency work, FEMA designates specific types of permanent work into subcategories. "Category C" work addresses roads and bridges; "Category D" work addresses water control facilities; "Category E" work addresses buildings and equipment; "Category F" work addresses utilities; and "Category G" work addresses parks, recreational areas, and other facilities. Generally, assistance is limited to the costs to restore a facility to its pre-disaster design, function, and capacity (but taking into account applicable codes and standards that may require design alteration).[52] The PA Program, however, does allow for flexibility. Under certain circumstances, a subgrantee may elect (at its own cost) to improve upon a facility's pre-disaster design or capacity or, if restoring the facility is not in the public interest, apply a portion of eligible assistance to an alternate project.[53] Regulations also govern when a facility should be replaced, rather than repaired,[54] and when relocation is required.[55]

Local government attorneys are particularly well-suited to be aware of and help address a number of important considerations affecting PA Program eligibility and funding amounts. For example, all disaster assistance provided under the Stafford Act is subject to a prohibition on recipients receiving a duplication of benefits based on benefits available from other sources, such as insurance.[56] Local attorneys can assist with identifying available insurance policies and proceeds and informing FEMA about such coverage.[57] All FEMA grants also are subject to various agency administrative regulations, which require that, *inter alia*, subgrantees use procurement procedures that conform to Federal procurement law.[58] Importantly, this means that subgrantees generally must provide full and open competition when procuring grant-related property and services.[59] Competition generally is required even for emergency work.[60] Also, as discussed, restoration of damaged facilities under the PA Program takes into consideration applicable codes and standards (even ones adopted after the facility was built, as long as they were adopted and enforced before the declared event). Local government attorneys can flag applicable codes and

standards and confirm whether they have been uniformly applied and actually enforced at the time of the disaster.[61] These are issues for which local government attorneys are in a unique position to advise their clients.

Conclusion

Responding to and recovering from disasters and emergencies is primarily the responsibility of local communities and, if necessary, the states in which they are located. When such events overwhelm the capabilities of local and state governments, however, the Federal Government, upon request, stands ready to assist. FEMA coordinates this Federal assistance in cooperation with numerous partners and stakeholders, including local communities. Attorneys representing the local governments suffering the effects of major disasters or emergencies can help make their partnerships with FEMA strong by developing an understanding of Federal disaster assistance law and key assistance programs, including the PA Program. The topics, authorities, and resources discussed in this article should provide a foundation for building that expertise.

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[1] 42 U.S.C. §§ 5121-5207.

[2] Detailed, historical information on federally declared major disasters, emergencies, and fire management assistance can be found on the Web site of the Federal Emergency Management Agency ("FEMA") at http://www.fema.gov/disasters.

[3] *See* Va. Dep't of Emergency Mgmt. Hurricane Sandy Blog, http://hurricanesandy2012.tumblr.com; Virginia Hurricane Sandy, FEMA-EM-3359-VA, http://www.fema.gov/disaster/3359; Virginia Hurricane Sandy, FEMA-DR-4092-VA, http://www.fema.gov/disaster/4092.

[4] *See* Va. Dep't of Emergency Mgmt. Press Release, "Governor McDonnell Declares State of Emergency for Severe Weather," (June 30, 2012), http://www.vaemergency.com/news/news-releases/soe_derecho; Virginia Emergency Operations Center 2012-06-09 Situation Report #19, http://www.vaemergency.gov/webfm_send/487/VERTSitRep19-21July2012.pdf. Under the major disaster declaration for this event (FEMA-DR-4072-VA) federal assistance is available in 69 Virginia counties and independent cities. *See* 77 Fed. Reg. 47655-56 (Aug. 9, 2012); 77 Fed. Reg. 50708 (Aug. 14, 2012).

[5] *See* Virginia Earthquake, FEMA-DR-4042-VA, http://www.fema.gov/disaster/4042.

[6] *See* Virginia Hurricane Irene, FEMA-DR-4024-VA, http://www.fema.gov/disaster/4024.

[7] *See* Virginia Remnants of Tropical Storm Lee, FEMA-DR-4045-VA, http://www.fema.gov/disaster/4045.

[8] The Stafford Act, as amended, is the principal statute governing federal emergency management and disaster assistance.

[9] FEMA's regulations are codified in title 44 of the Code of Federal Regulations, "Emergency Management and Assistance."

[10] Policies, manuals, and other guidance addressing an array of FEMA programs and activities are available on FEMA's Web site at www.fema.gov.

[11] The police power is "[t]he inherent and plenary power of a sovereign to make all laws necessary and proper to preserve the public security, order, health, morality, and justice." *See* Black's Law Dictionary (2d Pocket Ed. 2001), at 534.

[12] *See* 42 U.S.C. § 5121(a)(2) (finding that special federal measures "designed to assist the efforts of the affected States in expediting the rendering of aid, assistance, and emergency services" is necessary); *see*, § 5121(b) (explaining intent to provide federal means of assistance "to State and local governments in carrying out their responsibilities to alleviate the suffering and damage" resulting from disasters); *see*, §§ 5170 & 5191(a) (providing that governors' requests for major disaster and emergency declarations be based on a finding that the event "is of such severity and magnitude that effective response is beyond the capabilities of the State and the affected local governments and that Federal assistance is necessary").

[13] *See* 42 U.S.C. § 5170.

[14] *See* 42 U.S.C. § 5191.

[15] *See* 42 U.S.C. § 5122(2).

[16] *See* 42 U.S.C. § 5122(1).

[17] *See* 42 U.S.C. § 5192. The amount of assistance under an emergency declaration is capped at $5 million, but the President has the authority to exceed that amount after determining that certain circumstances warrant it. 42 U.S.C. § 5193(b).

[18] *See* 42 U.S.C. § 5172.

[19] Such additional assistance can include unemployment assistance, crisis counseling, and legal services. *See* 42 U.S.C. § 5177, 5182, & 5183.

[20] *See* 42 U.S.C. § 5170c.

[21] *See* 44 C.F.R. § 206.36(a).

[22] There is an exception to the requirement that a state request a declaration for emergencies in cases where the Federal Government has primary responsibility and authority. *See* 42 U.S.C. § 5191(b). The President has exercised this authority to declare an emergency in the absence of a state request on only a few occasions, such as the 1995 bombing of the Alfred P. Murrah Federal Building in Oklahoma City, the 2001 terrorist attack on the Pentagon, and the 2003 Space Shuttle Columbia disaster.

[23] *See* 44 C.F.R. § 206.35(a).

[24] *See* 42 U.S.C. §§ 5170 & 5191(a).

[25] See 42 U.S.C. §§ 5170 & 5191(a); 44 C.F.R. §§ 206.35 & 206.36.

[26] *See* 44 C.F.R. § 206.33.

[27] *See* 44 C.F.R. § 206.37(b).

[28] *See* 44 C.F.R. § 206.37(c). Unlike many Stafford Act authorities delegated to FEMA, the President has retained the authority to issue major disaster and emergency declarations.

[29] For the derecho event, for example, the President authorized the PA Program and the Hazard Mitigation Grant Program, with the Federal Government's share of eligible costs set at 75 percent. 77 Fed. Reg. 47655-56. The Hurricane Sandy emergency declaration authorized FEMA to provide emergency protective measures under the PA Program, limited to direct Federal assistance, also with the Federal share of eligible costs set at 75 percent. *See* Federal Aid Programs for the Commonwealth of Virginia Emergency Declaration, *available at* http://www.fema.gov/news-release/federal-aid-programs-commonwealth-virginia-emergency-declaration.

[30] Whether the PA Program is authorized is based on a several factors, including the estimated cost of needed assistance (usually based on PDAs) in relation to the population of the state and affected areas. *See* 44 C.F.R. § 206.48(a). If, statewide, the per capita cost (i.e., the total amount of estimated costs divided by the state's population) exceeds a certain amount ($1.37 for disasters declared after October 1, 2012), it is an indication that PA is warranted. Similarly, if a countywide per capita cost exceeds a certain amount ($3.45 for disasters declared after October 1, 2012), it is an indication that PA should be available to applicants in that county. These per capita impact indicators are adjusted annually based on the Consumer Price Index for all Urban Consumers. 44 C.F.R. § 206.48(a)(1); 77 Fed. Reg. 61423-24 (Oct. 9, 2012) (current statewide indicator); 77 Fed. Reg. 61011-12 (Oct. 5, 2012) (current countywide indicator).

[31] *See* 42 U.S.C. §§ 5170b ("Essential Assistance"), 5172 ("Repair, Restoration, and Replacement of Damaged Facilities"), 5173 ("Debris Removal"), 5192 ("Federal Emergency Assistance"), & 5193 ("Amount of Assistance").

[32] *See* 44 C.F.R. Part 206, Subparts G ("Public Assistance Project Administration"), H ("Public Assistance Eligibility") & I ("Public Assistance Insurance Requirements"). Other regulations apply, including uniform grant and cooperative agreement administrative requirements applicable to state and local governments issued by FEMA. 44 C.F.R. Part 13.

[33] *See* 9500 Series Policy Publications, http://www.fema.gov/9500-series-policy-publications.

[34] *See* FEMA 322, Public Assistance Guide (June 2007), http://www.fema.gov/pdf/government/grant/pa/paguide07.pdf.

[35] FEMA 325, Debris Management Guide (July 2007), http://www.fema.gov/pdf/government/grant/pa/demagde.pdf.

[36] More information about the PA Program is available on FEMA's Web site at http://www.fema.gov/public-assistance-local-state-tribal-and-non-profit.

[37] *See* 44 C.F.R. § 206.201(e).

[38] *See* 44 C.F.R. § 206.202(b)

[39] *See* 44 C.F.R. § 206.222(a).

[40] *See* 42 U.S.C. § 5122(7)(A); 44 C.F.R. § 206.2(a)(16)(i).

[41] *See* 44 C.F.R. § 206.201(o).

[42] *See* 44 C.F.R. § 206.202(c).

[43] *See* 44 C.F.R. § 206.202(d)(i).

[44] The monetary threshold distinguishing "large projects" from "small projects" is adjusted annually, also based on the Consumer Price Index for All Urban Consumers. *See* 44 C.F.R. § 206.203(c). For major disasters or emergencies declared on or after October 1, 2012, large projects are those with an approved estimate of eligible costs of $67,500 or more. *See* 77 Fed. Reg. 61423 (Oct. 9, 2012).

[45] *See* 42 U.S.C. §§ 5170b(b), 5172(b), 5173(d), & 5193(a); 44 C.F.R. § 206.47(a).

[46] *See* 44 C.F.R. § 206.223(a). There is an exception to the requirement that the work be located within the major disaster or emergency designated areas; sheltering and evacuation activities may be located outside those areas.

[47] *See* 42 U.S.C. §§ 5173(a).

[48] *See* 44 C.F.R. § 206.224(a) (providing that debris removal is in the "public interest" when needed to, *inter alia*, eliminate immediate threats to life, public health, or safety; eliminate immediate threats of significant damage to improved property; or ensure economic recovery of the affected community to the benefit of the community at large).

[49] *See* 44 C.F.R. § 206.225(a)(1).

[50] *See* 44 C.F.R. § 206.225(a)(3).

[51] *See* 42 U.S.C. § 5122(9) (defining "public facility" as certain facilities owned by a state or local government, including those providing flood control, navigation, irrigation, reclamation, public power, sewage treatment and collection, water supply and distribution services; airport facilities; non-federal-aid roads; parks; and "[a]ny other public building, structure, or system, including those used for educational, recreational, or cultural purposes").

[52] *See* 42 U.S.C. § 5172(a); 44 C.F.R. § 206.226.

[53] *See* 44 C.F.R. § 206.203(d).

[54] *See* 44 C.F.R. § 206.226(f).

[55] *See* 44 C.F.R. § 206.226(g).

[56] *See* 42 U.S.C. § 5155.

[57] To avoid a duplication of benefits, FEMA reduces actual and anticipated insurance amounts from eligible project costs. 44 C.F.R. §§ 206.250(c), 206.250(d), 206.252(a), & 206.253(a).

[58] *See* 44 C.F.R. § 13.36(b)(1).

[59] *See* 44 C.F.R. §§ 13.36(c) & (d).

[60] The applicable regulations and FEMA policy permit some exceptions to the competition requirement for emergency work. Non-competitive procurement is allowed when favored procurement procedures—small purchase procedures (where the costs involved are under a set threshold), sealed bidding, and competitive proposals—are not feasible and when certain circumstances apply, including when "[t]he public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation." *See* 44 C.F.R. 13.36(d)(4)(i). Specifically as to debris removal, FEMA recognizes that public health and safety may require debris clearance and removal efforts to begin before a standard competitive process can be completed. FEMA generally believes that such circumstances can exist for up to approximately 70 hours following a disaster or emergency event. If a PA Program applicant had not hired its debris removal contractor through competitive procedures, at the 70-hour point, the applicant should immediately solicit a new contract for the remaining work using a competitive process. In all cases in which competition is not followed, an applicant should complete a sole-source justification before any contract is awarded. In addition, an applicant should complete a cost analysis to demonstrate reasonableness of costs for any work completed under a non-competed contract.

[61] *See* 44 C.F.R. §§ 206.226(d)(4) & (5).

Revisions to Virginia's Stormwater Management Act: New Programs and Challenges for Local Governments

M. Ann Neil Cosby[1]

When the 2012 General Assembly passed Senate Bill 407, commonly known as the "Integration Bill," its summary purpose was to "[i]ntegrate[] elements of the Erosion and Sediment Control Act, the Stormwater Management Act, and the Chesapeake Bay Preservation Act so that these regulatory programs can be implemented in a consolidated and consistent manner, resulting in greater efficiencies (one-stop shopping) for those being regulated." *See* http://leg1.state.va.us/cgi-bin/legp504.exe?ses=121&typ=bil&val=sb407. What may have taken some local governments by surprise, particularly those west of Interstate 95, however, was the effect that certain requirements of the Integration Bill would have on regulatory and program requirements for land development at the local level. That is because, among its many changes to the various acts referenced above, the Integration Bill requires that **all** localities in Virginia establish a Virginia Stormwater Management Program (VSMP), "to manage the quality and quantity or runoff resulting from land-disturbing activities." *See* Va. Code §10.1-603.2 (definition of VSMP). Towns are not required to adopt or administer a local program, but may elect to be covered by the program of the county in which they lie. Va. Code §10.1-603.3(B).

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The VSMP that a locality is required to establish must provide for, at minimum, the administration and enforcement of the state's General VSMP Permit for Discharges of Stormwater from Construction Activities regulations (the "General Permit Regulations"). The General Permit Regulations make up Part XIV of the Virginia Stormwater Management Program (VSMP) Permit Regulations (the "Stormwater Regulations.") See 4 VAC 50-60-1100, et seq. The General Permit Regulations were adopted by the Commonwealth of Virginia following the delegation to the state of the permitting of nonpoint discharges including certain construction activities, under the federal Clean Water Act (CWA) National Pollution Discharge Elimination System (NPDES) permit program. The General Permit Regulations authorize stormwater discharges from regulated construction activities, and require that any operator (as that term is defined in the Stormwater Regulations), disturbing more than one acre of total land area must apply for and obtain permit coverage under the General Permit Regulations. Under the General Permit Regulations, a general permit is not "issued" to an operator, but the operator obtains permit "coverage" under the state's "General Permit." The General Permit authorizes a category of discharges under the CWA and the Stormwater Management Act (the "Act"). See Va. Code §10.1-603.1 et seq., and 4 VAC 50-60-10 [definition of General Permit].

Requirements for obtaining General Permit coverage include, but are not limited to, the preparation of a Stormwater Pollution Prevention Plan (SWPPP) which is an umbrella term that requires the preparation of the following minimum documents: 1) an approved erosion and sediment control plan; 2) an approved stormwater management plan; 3) a pollution prevention plan for land-disturbing activities; and 4) a description of any additional control measures necessary to address a TMDL (a total maximum daily load of pollutants that an impaired water body may receive under the federal Clean Water Act). Operators who disturb less than one acre may also be required to obtain General Permit coverage (and prepare a SWPPP) if the land disturbance is done as part of a larger common plan of development or sale that will ultimately disturb once acre or more. See 4 VAC 50-60-10 [definition of small construction activity].

As the administrator of an approved VSMP, localities will be required to, among other things, make sure an operator completes a registration statement seeking permit coverage, review and approve E&S plans and stormwater management plans, collect necessary fees, inspect construction activities, retain proper records and enforce the Stormwater Regulations as may be necessary. Even with all this oversight and responsibility at the local level, the actual authority to grant General Permit coverage remains

with the state (as administered through the Virginia Department of Conservation and Recreation (DCR)). Because the CWA does not allow states to delegate NPDES permit approval to its local governments, DCR remains an integral partner in the VSMP process. However, states can, and Virginia now does, authorize local governments to administer and enforce NPDES permit requirements for the state. This division of authority allows the Commonwealth to remain in compliance with the CWA, and allows the regulated community the "one stop shop" that the General Assembly sought to establish in the Integration Bill.

Short Review of a Long History of Stormwater Regulation

The complexity of the state's new stormwater permitting program may actually be less confusing than past programs which sought to separately regulate water quantity and water quality. These programs applied to varying degrees depending on where in the state the discharge was occurring. In 1973, Virginia enacted the Virginia Erosion & Sediment Control Law (Va. Code §10.1-560 et seq.), which was primarily intended to address water quantity. Stormwater *quantity* generally refers to the volume and velocity of runoff leaving a site. Excess quantities of stormwater can lead to flooding and erosion.

In 1988, the General Assembly enacted the Chesapeake Bay Preservation Act (the "CBPA") (Va. Code §10.1-2100 et seq.) and the [Stormwater Management] Act. The CBPA was intended to address water quality, while the Act provided localities the authority to voluntarily address stormwater impacts. Stormwater *quality* generally refers to the pollutants carried in runoff leaving a site. Excess levels of pollutants in stormwater can lead to water pollution and degradation of water quality. The CBPA is mandatory for areas in Tidewater, Virginia (generally east of Interstate 95). The Act was enacted as a voluntary program available to localities statewide. Meanwhile, in 1987, amendments to the federal CWA were adopted by Congress which authorized states to administer NPDES permits, including those for industrial facilities, construction activities, and municipal separate storm sewer systems (MS4). In response to the CWA amendments, the Virginia Department of Environmental Quality (DEQ) adopted the General Permit Regulations, and commenced requiring coverage for regulated construction activities under these regulations and in accordance with federal law (as referenced previously).

Not surprisingly, by 2004, Virginia's stormwater program involved four boards and three departments.[2] In an effort to consolidate these various programs, the Warner Administration studied the situation and recommended successful legislation to the 2004 General Assembly that, among other things, consolidated Virginia's stormwater management program under DCR, and established the Virginia Soil & Water Conservation Board (SWCB) as the regulatory authority. *See* 2004 Acts, Ch. 372 [H1177]. This same legislation also called for revisions to the technical criteria of the Stormwater Management Regulations, and required that localities located in the Tidewater area (and those required to obtain coverage under an MS4 permit), adopt a local stormwater program to administer the General Permit Regulations in lieu of DCR. *See id.* All other localities were provided the option of administering their own local programs or allowing DCR to continue administering a VSMP for their jurisdiction.

The Integration Bill, introduced by the current state administration, was passed in 2012. This legislation removed the opt-in provision for localities outside the Tidewater area and made adoption of a VSMP mandatory throughout the Commonwealth. The 2012 legislation requires that local programs be adopted by June 2013, but provides that up to a twelve (12) month extension may be granted by the SWCB to a locality that has made "substantive progress" towards establishing a program. Va. Code §10.1-603.3(A). All local programs must be implemented by July 1, 2014. *See* Va. Code §10.1-603.3.[3] Thus, while local administration of the state's stormwater obligations under federal law has been a long time coming, it must now happen very quickly.

Local VSMP Submittal Requirements

So what does a locality need to do to obtain state approval for its local stormwater program? The answer is expressly set forth in the Stormwater Regulations. A locality must submit an application package to the SWCB which, at minimum, contains the following: 1) the policies and procedures that will be utilized by the locality to administer the local VSMP program; 2) a funding and

staffing plan; and 3) a draft local stormwater management program ordinance. *See* 4 VAC 50-60-150. Upon receipt of an application package, the SWCB is allowed 30 calendar days to determine whether the application package includes all of the necessary criteria. The SWCB is then allowed an additional 120 calendar days to review the application package, unless an extension of time is requested. During the 120-day review period, the SWCB either approves or disapproves the application, or notifies the locality of a time extension for the review, and communicates its decision to the locality in writing. If an application is not approved, the locality must be notified in writing of the SWCB's reasons for not approving the application. *Id*.

Where a locality seeks an extension of time to submit an application to the SWCB, "substantive progress" must be shown. To successfully demonstrate substantive progress, the locality must submit 1) the name of the primary contact for the development of the local VSMP; 2) a preliminary draft ordinance; and 3) draft funding and staffing plan that includes a list of program funding sources, a description of staff roles and numbers of staff personnel by locality department. A final application packet must then provide all of the required information.

Policies and Procedures Requirements

The policies and procedures that must be included in a locality's application packet to the SWCB should address all of the following criteria (Program Criteria): 1) identification of the authority accepting complete registration statements and of the authorities completing plan review, plan approval, inspection, and enforcement; 2) submission and approval of erosion and sediment control plans in accordance with the Virginia Erosion and Sediment Control Law and attendant regulations and the submission and approval of stormwater management plans; 3) requirements to ensure compliance with the requirements for stormwater pollution prevention plans, stormwater management plans, and pollution preventions plans; 4) requirements for inspections and monitoring of construction activities by the operator for compliance with state and local laws; 5) requirements for long-term inspection and maintenance of stormwater management facilities; 6) collection, distribution to the state if required, and expenditure of fees; 7) enforcement procedures and civil penalties; 8) policies and procedures to obtain and release bonds, if applicable; and 9) procedures for complying with the applicable reporting and recordkeeping requirements set forth in the Stormwater Regulations. *See* 4 VAC50-60-148. If all of the Program Criteria are not addressed to the satisfaction of the SWCB, approval of the local VSMP may not be granted.

Funding and Staffing Requirements

The funding and staffing plan that must be included in an application packet must demonstrate that the locality has adequate resources to administer its local program. The Act includes a schedule of fees that apply to projects covered under the General Permit. *See* 4 VAC 50-60-820 through 830. These fees range from $200 (for certain small construction projects located in a Chesapeake Bay Preservation Act locality) to $9,600 for large construction activities on sites disturbing greater than 100 acres. The fee schedule has two components – a state share and a local share. As required by the Act, a locality is required to forward 28% of the state fee schedule amount to DCR to support the agency's program oversight and technical assistance activities. *See* 4 VAC 50-60-780. The locality retains the remaining 72% of the fees to cover the cost of the local VSMP program. While a locality has the authority to reduce or increase fees, subject to SWCB approval, the locality must remit 28% of the state fee amount to DCR regardless of the fee imposed by the locality.[4]

The required funding and staffing plan must demonstrate that the fees charged to operators will be sufficient to effectively administer the local VSMP program consistent with the Stormwater Regulations. If fees alone will not cover program costs, other program funding sources (i.e., stormwater utility fees, general funds, grants, etc.), should be identified in the application packet. Funding must be sufficient to cover additional staffing, training, equipment, vehicles, etc. Importantly, the fees that may be charged pursuant to the state's fee schedule do not include the imposition of fees to cover the long-term inspection of stormwater facilities (BMPs), or any future maintenance costs. Should a locality wish to collect fees to cover future inspection costs, the locality would need to include these fees in its funding plan, and seek approval from the SWCB before doing so.

While some localities may find that the fees generated by a local VSMP (and/or available from other sources, if any) do not cover the cost of the program, it is important to note that localities are not required to "go it alone" in administering a local VSMP. The Act specifically authorizes a locality to "enter into agreements or contracts with soil and water conservation districts, adjacent localities, or other public or private entities to carry out or assist with the responsibilities of [the Stormwater Act]," however it appears that such coordination may be limited to "plan review and inspections." *See* Va. Code §10.1-603.3(A) and (H). Factors a locality may wish to consider when determining whether to work jointly with another public or private entity or to administer its local VSMP on its own include the average number of land-disturbing activities requiring General Permit coverage that are estimated to occur annually in the jurisdiction as compared to the full operational costs of running a local VSMP.

Draft Ordinance Requirements

The draft ordinance that must be submitted with the application packet must incorporate all of the Required Criteria except the requirements related to the collection, distribution, and expenditure of fees; the policies and procedures to obtain and release bonds, if applicable; and the procedures for complying with the applicable reporting and recordkeeping requirements. *See* 4VAC50-60-148. In addition, the local ordinance must, at minimum, be consistent with the Stormwater Regulations, address responsibility for and maintenance of stormwater BMPs, and integrate the local VSMP with 1) erosion and sediment control; 2) flood insurance; 3) flood plain management; and 4) other programs requiring compliance prior to authorizing construction. *See id*. The draft ordinance does not need to have been adopted by the local governing body at the time of submittal.

DCR is currently in the process of developing a model stormwater ordinance (the "Model Ordinance") which should be a helpful resource for localities as they develop their own ordinances. However, while the programmatic requirements that are required to be included in a local ordinance may be ascertained from the Model Ordinance, careful scrutiny of the relevant provisions of the Act, the Stormwater Regulations, and a locality's existing ordinances remains necessary. This is because local ordinances will need to integrate existing E&S program requirements as well as other local requirements applicable to construction activities. In addition, even with the Model Ordinance, certain requirements of a local program, including those related to formal hearing and appeal procedures, enforcement, and grandfathering provisions may be difficult to address and implement at the local level. Local government attorneys should closely scrutinize the following state law provisions to determine how these requirements should best be addressed in their jurisdiction.

Formal hearings

Section 10.1-603.12:6 of the *Code of Virginia* requires that:

> Any permit applicant, permittee, or person subject to state permit requirements under this article aggrieved by any action of the VSMP authority [the locality], Department [DCR], or Board [SWCB] taken without a formal hearing, or by inaction of the VSMP authority, Department, or Board, may demand in writing a formal hearing by the Board or VSMP authority causing such grievance, provided a petition requesting such hearing is filed with the Board or the VSMP authority within 30 days after notice of such action.

"Formal hearings" are a creature of state administrative process. They are not a creature of most local governments. Given that most, if not all, local VSMP's will be administered at the staff level, most, if not all, decisions will be taken without a formal hearing. This means that a formal hearing must be held <u>any time</u> an operator or another person claims to be "aggrieved" by a decision of the VSMP program administrator.

When a formal hearing is held under this section by the SWCB or by DCR, the procedure is established by state law. Such hearings "may conducted by the [SWCB] itself at a regular or special meeting of the [SWCB], or by at least one member of the [SWCB] designated by the chairman to conduct such hearings on behalf of the [SWCB] at any other time and place authorized by the [SWCB]." *See* Va. Code §10.1-603.12:7(A). A verbatim record of the proceedings of such hearings must be taken, and depositions may be taken and read as in actions at law. *See* Va. Code §10.1-603.12:7(B). The SWCB has the power to issue

subpoenas and subpoenas duces tecum, and at the request of any party shall issue such subpoenas. Witnesses who are subpoenaed shall receive the same fees and reimbursement for mileage as in civil actions. *See* Va. Code §10.1-603.12:7(C).

VSMP authorities holding hearings under §10.1-603.12:6 of the *Code of Virginia* are required to do so "in a manner consistent with [the above] section." This means that local governing bodies (or whomever of their members are designated to hear such cases), will be required to hear and decide cases in quasi-judicial settings, on topics involving any number of issues related to stormwater management. This may be a disconcerting undertaking for local legislators who may not be familiar with the Act, the Stormwater Regulations, and/or the best practices to address water quality and water quantity in Virginia.

Appeals

How appeals of local VSMP decisions will be handled at the local level is another area where local government attorneys should carefully scrutinize the Act and its requirements. Notably, while the Act provides an express right of appeal for "any permittee or party aggrieved by a state permit or enforcement decision of the Department [DCR] or Board [SWCB] … in accordance with the provisions of the Administrative Process Act (§ 2.2-4000 et seq.)," the Act states only that "decisions rendered by localities … shall be conducted in accordance with local appeal procedures." *See* Va. Code §10.1-603.13. There is no reference to or guidance on what "local appeal procedures" should be utilized – to the extent such procedures even exist. As such, this language appears to give a locality broad discretion to implement its own appeal procedures.

These appeal procedures may arguably include a standing requirement that differs from the "permittee or party aggrieved" standard established in §10.1-603.13 of the *Code of Virginia* for appeals of the decisions of SWCB or DCR. This is because when the General Assembly amended §10.1-603.13 in 2012, it struck decisions of "permit issuing authorit[ies]" from the list of decisions for which a right of appeal was provided by statute. See 2012 Acts, Ch. 819 [S407]. As such, under current law, while local appeals must be conducted in compliance with local appeal procedures, it is unclear who has standing to appeal a local determination.

Enforcement

Another area that warrants close analysis is the enforcement requirements that must be included in a local VSMP. The Stormwater Regulations provide that a local VSMP *must* incorporate provisions for administrative and judicial procedures in accordance with the Stormwater Regulations. In accordance with 4 VAC 50-60-116(A), localities must include enforcement components from a regulatory list of administrative remedies (4 VAC 50-60-116(A)(1)) and a list of judicial remedies (4 VAC 50-60-116(A)(2)). Administrative remedies include 1) verbal warnings and inspection reports; 2) notices of corrective action; 3) consent special orders and civil charges in accordance applicable sections of the Act; 4) notices to comply in accordance with the Act; 5) special orders [in accordance with subdivision 7 of §10.1-603.2:1 of the Act]; 6.) emergency special orders [in accordance with subdivision 7 of §10.1-603.2:1 of the Act]; and 7) public notice and comment periods for proposed settlements and consent special orders [pursuant to 4VAC50-60-660]. Unfortunately, the last three remedies referenced in the regulation only apply to the SWCB. As such, it is unclear how a locality would implement special orders, emergency special orders and/or proposed settlements and consent special orders under Virginia law.

Similar concerns may exist in regard to required judicial procedures. The civil and criminal judicial enforcement procedures that may be included in a local program include 1) adoption schedule of civil penalties [in accordance with §10.1-603.14 of the Act]; 2) criminal penalties [in accordance with §10.1-603.14 B and C of the Act]; and 3) injunctions [in accordance with §§10.1-603.12:4, 10.1-603.2:1 and 10.1-603.14 D 1 of the Act]. As the criminal penalties provided for in §10.1-603.14(c) establish felony offenses, such penalties may need to be reconciled with the general law that limits local fines and punishments for violations of local ordinances to Class I misdemeanors. *See* Va. Code §15.2-1429.

Vested Rights

A fourth area that may be a cause of concern for local governments relates to the grandfathering of projects under the Act. The Stormwater Regulations provide that until June 30, 2019, certain land-disturbing activities that were approved by a governing body on July 1, 2012 are grandfa-

thered under the state's existing technical criteria for stormwater management. *See* 4 VAC 50-60-48. Grandfathered projects include, among other things, preliminary subdivision plats and preliminary site plans that include a conceptual drawing providing for specified stormwater management facilities. *See id.*; *see also* 4 VAC 50-60-10 [definition of layout]. However, the grandfathering of preliminary subdivision plats and preliminary site plans based solely on approval by the locality is at odds with Virginia's vested rights statute, §15.2-2307 of the *Code of Virginia*. This statute provides for the vesting of preliminary plats and plans only if "the applicant diligently pursues approval of the final plat or plan within a reasonable period of time under the circumstances." Under the Act, once a preliminary plat or plan is approved, it is grandfathered, at least for purposes of stormwater management facilities, regardless of whether the operator pursues final plat or plan approval. Such grandfathered status may be problematic if this same preliminary plat becomes void under §15.2-2307 because the operator has failed to diligently pursue final plat approval. How such cases should or must be addressed is not reconciled in the Act, the Stormwater Regulations, or the Model Ordinance.

Conclusion

With the General Assembly's adoption of the Integration Bill in 2012, many local governments in Virginia are now required to undertake a significant amount of work, in a short amount of time. Local VSMP application packets must be submitted to DCR next June [2013]. Alternatively, a request for an extension of time based on a showing of substantive progress must be submitted to DCR by next April [2013]. While the state's Model Ordinance should assist local government attorneys in developing a local ordinance, local ordinances should be specifically tailored to integrate existing development requirements at the local level. The ordinance should also attempt to reconcile (as best as it can) state law requirements related to formal hearings, appeals, enforcement procedures, and vested rights. When these local programs are all implemented on June 1, 2014, they will hopefully be "one-stop-shops" that benefit local governments alike. However, localities have much to do and to figure out before the shop opens.

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[2] This included the Board of Conservation of Recreation, the Chesapeake Bay Local Assistance Board, the Virginia Soil & Water Conservation Board and the State Water Control Board; as well as the Chesapeake Bay Local Assistance Department, the Department of Conservation and Recreation, and the Department of Environmental Quality.

[3] Code of Va. §10.1-603.3 requires adoption of local stormwater program not more than twenty-one (21) months following the effective date of the regulation that established the local program and criteria. These regulations were adopted May 24, 2011 and became effective September 13, 2011.

[4] The local share of the required fees is intended to represent the average cost of running a local stormwater program, and was developed with input from several localities. The state share was allowed by the Act to be up to 30% of the fee; however this amount was ultimately reduced by DCR to the current 28%.

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