

Accounting For Growth Policy

Grandfathering Options

During the public outreach on the State's proposed Accounting for Growth policy during the summer of 2012, many comments were received regarding how this new regulatory policy would be implemented. Concerns about how the new offset requirements would apply to pending and on-going development activity were raised by several stakeholders, including entities representing the development community, local government, and environmental advocates.

The State has confronted the issue of "grandfathering" several times over the past 3 years: during the rollout of the new permit requirements for Confined Animal Feeding Operations (CAFO's), after the final adoption of the State's Stormwater Management regulations in 2009, and as part of the negotiations for the Sustainable Growth and Agricultural Preservation Act of 2012. Each of these cases presented a different set of implementation issues and resulted in three different approaches to "grandfathering."

1. CAFO Permit example - Specified regulatory implementation date, compliance with specific permit provisions described within the permit language.

The regulations and corresponding permit requirements for Confined Animal Feeding Operations became effective on January 12, 2009 and required CAFO operations that were subject to the permit to formally register by February 27, 2009. In this case, the registration deadline was driven by a specific federal requirement. The registration process was kept relatively simple, and permittees were required to submit certifications and additional documentation at various times during the permit life of five years. There are advantages and disadvantages to this approach. Although it is simple to enact, enforce, and explain, it may be difficult to define timeframes for specific permit provisions if new processes and procedures need to be put into place prior to issuance. For instance, in the CAFO case, there was significant uncertainty about the capacity within the State to develop comprehensive nutrient management plans, which was a critical component of the permit. In the case of nutrient offset requirements, the availability of a fee-in-lieu would obviate difficulties that might arise if, for example, the trading market were slow to develop.

2. Stormwater Management Regulations - administrative waiver for project in the approval pipeline, hard end date for construction

As originally introduced, local approving authorities were required to apply Maryland's new stormwater regulations to all new development projects one year after final adoption of the regulations. In response to concerns raised about the imposition of new design requirements on projects that had already received approval but had not yet been initiated, new regulations were subsequently adopted which created an exemption for certain projects. These new grandfathering provisions attempted to define projects that had received, or were in the process of receiving, local approval.

The primary challenge that the Department and a small group of stakeholders faced in developing these regulations was defining the concept of "approval" in the context of local development approval processes, which differ from jurisdiction to jurisdictions. Ultimately what was agreed to was a series of definitions for "Final Project Approval", "Preliminary project approval", and what a "plan" constitutes. The regulatory definitions for these concepts were as detailed and unambiguous

as possible. In addition, the waiver process incorporated several dates by which projects had to proceed to final approval and a hard end date of May 4, 2017 for all projects to be completed.

3. Sustainable Growth and Agricultural Preservation Act (the Act) of 2012 - preliminary approval of subdivision granted or soil percolation test requested, hard end date for local approval

The grandfathering provisions of Sustainable Growth and Agricultural Preservation Act were designed to apply the same "preliminary approval" concept in the Stormwater Management Act grandfathering provisions to the subdivision approval process. The challenge in this case was to capture a common element in the myriad of local subdivision approval processes. In this case, consensus was reached on a series of criteria that were tied to receipt of the subdivision request by October 1, 2012 (3 months after the effective date of the legislation) in counties where no soil percolation test is required, a perc test request by July 1, 2012 (the effective date of the legislation) in those counties where the test is required prior to the subdivision request, and a hard end date of October 1, 2016 (4 years after the initial request) for approval, regardless of the circumstances.

Discussion

Each of these grandfathering approaches has strength and weaknesses. The imposition of any grandfathering provision for the growth and offset regulations should be tied to specific elements of the implementation mechanism that are easily verifiable by the approving authority. The second and third grandfathering examples above were developed with the understanding that the local approving entities had ready access to information about the projects and their status in the local approval process, and relied on concepts and definitions that were applicable at the local level.

State permitting processes are generally reliant on specific effective dates which provide for adequate transition periods which allow the permittee to implement the new conditions over a reasonable period of time. Because they have generic provisions that are intended to apply equally to every regulated entity within a class, General Permits typically have standard timeframes (60 days, 1 year, within the permit term) for most permit provisions and do not provide for a case by case grandfathering assessments.

In the Stormwater Management Act example, a case was made to "hold harmless" many projects that were in process because of the cost and effort associated with incorporating the new technical requirements into a development project that had already received local approval. In the Sustainable Growth and Agricultural Preservation Act example, consideration of the cost and legal implications of halting a subdivision process midstream was a critical element of the legislation. In both cases, the State recognized the need for flexibility to account for the differences in the local processes, but also a desire to have the certainty of a hard end date, after which the new regulatory requirements would always apply.

With respect to the design of a growth and offset policy grandfathering provision, consideration should be given to the cost of implementation, the mode of regulation (i.e., local versus state approval), the verifiability of the criteria (where does the information reside), the enforceability of the provision, the expected application and approval timeframes (days, weeks or months), and the environmental impact of each project that is grandfathered.

One proposal for effective date/grandfathering under the Accounting for Growth process would be to adopt the regulations with the provision that offsets would be required for any covered project that had not obtained coverage under an individual permit or a General Permit for the Discharge of Stormwater Associated with Construction Activity by a specific date. Dates of January 1, 2014, December 31, 2014, and December 31, 2015 have been suggested.

|

Appendix 1. Stormwater Management Act of 2007 - Grandfathering Provision/Regulation

26.17.02.01-2

.01-2 Grandfather Provisions.

A. In this regulation, the following terms have the meanings indicated:

(1) Administrative Waiver.

(a) "Administrative waiver" means a decision by the approving agency pursuant to this regulation to allow the construction of a development to be governed by the stormwater management ordinance in effect as of May 4, 2009, in the local jurisdiction where the project will be located.

(b) "Administrative waiver" is distinct from a waiver granted pursuant to Regulation .05C of this chapter.

(2) Approval.

(a) "Approval" means a documented action by a county or municipality following a review to determine and acknowledge the sufficiency of submitted material to meet the requirements of a specified stage in a local development review process.

(b) "Approval" does not mean an acknowledgement by the approving agency that submitted material has been received for review.

(3) Final Project Approval.

(a) "Final project approval" means approval of the final stormwater management plan and erosion and sediment control plan required to construct a project's stormwater management facilities.

(b) "Final project approval" includes securing bonding or financing for final development plans if either is required as a prerequisite for approval.

(4) "Preliminary project approval" means an approval as part of a local preliminary development or planning review process that includes, at a minimum:

(a) The number of planned dwelling units or lots;

(b) The proposed project density;

(c) The proposed size and location of all land uses for the project;

(d) A plan that identifies:

(i) The proposed drainage patterns;

(ii) The location of all points of discharge from the site; and

(iii) The type, location, and size of all stormwater management measures based on site-specific stormwater management requirement computations; and

(e) Any other information required by the approving agency including, but not limited to:

(i) The proposed alignment, location, and construction type and standard for all roads, access ways, and areas of vehicular traffic;

(ii) A demonstration that the methods by which the development will be supplied with water and wastewater service are adequate; and

(iii) The size, type, and general location of all proposed wastewater and water system infrastructure.

B. An approving agency may grant an administrative waiver to a development that received a preliminary project approval prior to May 4, 2010. Administrative waivers expire according to §C of this regulation and may be extended according to §D of this regulation.

C. Expiration of Administrative Waivers.

(1) Except as provided for in §D of this regulation, an administrative waiver shall expire on:

- (a) May 4, 2013, if the development does not receive final project approval prior to that date; or*
- (b) May 4, 2017, if the development receives final project approval prior to May 4, 2013.*

(2) All construction authorized pursuant to an administrative waiver must be completed by May 4, 2017, or, if the waiver is extended as provided in §D of this regulation, by the expiration date of the waiver extension.

D. Extension of Administrative Waivers.

(1) Except as provided in §D(2) of this regulation, an administrative waiver shall not be extended.

(2) An administrative waiver may only be extended if, by May 4, 2010, the development:

- (a) Has received a preliminary project approval; and*
- (b) Was subject to a Development Rights and Responsibilities Agreement, a Tax Increment Financing approval, or an Annexation Agreement.*

(3) Administrative waivers extended according to §D(2) of this regulation shall expire when the Development Rights and Responsibilities Agreement, the Tax Increment Financing approval, or the Annexation Agreement expires.

Appendix 2. Sustainable Growth and Agricultural Preservation Act of 2012 - Grandfathering Provision/Statutory

Section 9-206, Environment Article

- (B) (2) *Subsections (F) through (K) do not apply to an application for approval of a residential subdivision under § 9-512(E) of this title if:*
- (I) 1. *By October 1, 2012, a submission for preliminary plan approval is made to a local jurisdiction that includes, at a minimum, the preliminary engineering, density, road network, lot layout, and existing features of the proposed site development;*
2. *By July 1, 2012, in a local jurisdiction that requires a soil percolation test before a submission for preliminary approval:*
- A. *An application for a soil percolation test approval for all lots that will be included in the submission for preliminary approval is made to the local health department; and*
- B. *Within 18 months after approval of the soil percolation tests for the lots that will be included in the submission for preliminary approval, a submission for preliminary approval is made to a local jurisdiction that includes, at a minimum, the preliminary engineering, density, road network, lot layout, and existing features of the proposed site development;*
or
3. *By July 1, 2012, in a local jurisdiction that requires a soil percolation test before a submission for preliminary approval and the local jurisdiction does not accept applications for soil percolation tests year round:*
- A. *Documentation that a Maryland professional engineer or surveyor has prepared and certified under seal a site plan in anticipation of an application for soil percolation tests;*
- B. *An application for a soil percolation test approval for all lots that will be included in the submission for preliminary approval is made to the local health department at the next available soil percolation test season; and*
- C. *Within 18 months after approval of the soil percolation tests for the lots that will be included in the submission for preliminary approval, a submission for preliminary approval is made to a local jurisdiction that includes, at a minimum, the preliminary engineering, density, road network, lot layout, and existing features of the proposed site development;*
and
- (II) *By October 1, 2016, the preliminary plan is approved.*