

MEMORANDUM

TO: Laurie Fowler
FROM: Amit Bose, Jonathan Lyman, Jennifer Nelson, Katie Willcox, J.R. Woolf, & Erica Wright
RE: HCP Advisory Committee Questions Concerning Georgia's Erosion & Sedimentation Control Act
DATE: December 12, 2003

- I. Under the Erosion & Sedimentation Control Act can counties enact ordinances that create or strengthen 'bad boy' and repeat offender provisions without conflicting with the express language or implied structure and purposes of the Act or would such ordinances be preempted?
- II. Under the Georgia Erosion & Sedimentation Control Act, what kinds of road crossings are exempted and which require variances?
- III. What prevents a developer from abusing the silvicultural exception to the Erosion & Sedimentation Control Act by saying he's cutting down trees as part of ongoing silvicultural activities and then immediately converting the property to commercial, residential, or other non-silvicultural use? Are there tax penalties or other kinds of penalties for developing the land in this way?

DISCUSSION

[GEORGIA'S EROSION & SEDIMENTATION CONTROL ACT, O.C.G.A. §§ 12-7-1 ET SEQ. (2003), WAS RECENTLY AMENDED BY THE LEGISLATURE. THESE AMENDMENTS BECAME EFFECTIVE ON JULY 1, 2003]

I. 'Bad Boy' and Repeat Offender Provisions

A. Preemption

The 1983 Georgia Constitution addresses preemption in the uniformity clause, which provides:

Laws of a general nature shall have uniform operation throughout this state and **no local or special law shall be enacted in any case for which provision has been made by an existing general law, except** the General Assembly may by general law **authorize local governments** by local ordinance or resolution **to exercise police powers which do not conflict with general laws.**

(Emphasis added) Franklin County v. Fieldale Farms Corporation, 270 Ga. 272, 275 (1998), quoting Ga. Const. of 1983, art. III, sec. VI, para. IV(a). The Georgia Supreme Court has addressed this issue in a variety of contexts and recognized that "counties are creatures whose limited powers must be strictly construed." Wood v. Gwinnett County, 243 Ga. 833 (1979). Much like federal law preemption under the Supremacy Clause of the Constitution, the Georgia Constitution's uniformity clause places state law in a superior position to local law. Franklin

County at 273. In any case of conflict between state law and local law, state law will prevail unless there has been an express grant of authority to the local level of government to exercise police powers. In all cases, local laws must not conflict with the general state laws. For this reason, a state statute may either expressly (by its language) or impliedly (by its content and structure) preempt a local law.

The court has recently addressed preemption under the Georgia Water Quality Act, O.C.G.A. § 12-5-20 to § 12-5-53 (1996) (“GWCA”), in Franklin County v. Fieldale Farms Corp., 270 Ga. 272 (1998). There, the county refused to issue the plaintiff a local sludge permit under a local ordinance which the county adopted to supplement the state permitting process outlined in GWCA. Id. at 273. Holding that the state reserved to itself the authority to deny sludge permits under the GWCA rather than granting counties the authority to enact regulations, the Court reasoned that the state’s treatment of the matter preempted the local ordinance on the same matter from having legal effect. Id.

The court’s analysis in Franklin focused on the language, structure and intent of the GWCA. The Franklin county ordinance conflicted with the GWCA provisions granting sole responsibility to the state for water quality and water supplies. The GWCA only granted to local governments the limited power to assess monitoring fees. Therefore the Court reasoned that because GWCA explicitly contemplated limited authority for local governments but did not contemplate any authority over permitting, the state legislature did not intend to grant the county any authority beyond the monitoring fees authority, and particularly not the authority to issue a supplemental permit under a local scheme. Id. In this way, the ordinance was preempted.

The court in Franklin County discussed preemption analysis at length. The primary focus of this discussion was legislative intent because “Generally preemption is based on legislative intent.” Id. at 273. The court determined that “under the first provision [of the uniformity clause of the Georgia Constitution], preemption may be express or implied.” Id. at 275. Whether express or implied, “under... preemption analysis, the provision meant that ‘once the legislature entered a field by enacting a general law, that field must thereafter be reserved exclusively to general legislation and could not be open to special or local laws.’” Id. at 274. The court in Franklin County went on to state that

[t]he clause’s second provision provides for an exception to the general rule of preemption when general law authorizes the local government to act and the local ordinance does not conflict with local law. We have concluded that there was no conflict when the local law did not impair the general law’s operation but rather augmented and strengthened it.

(Emphasis added) Id. However, the supplemental Franklin County sludge permitting scheme did not fall into this exception because there was no express authorization for a supplemental local permitting process. This lack of authority to permit stood in stark contrast to the explicit authority to impose fines, indicating that the state legislature had considered and decided which areas would be appropriate for local regulation. After such consideration, the legislature did not include permitting authority, and thus an intent not to allow local government to create its own permitting scheme can be inferred.

1. Express Preemption

Preemption is express where the language of a statute reflects an intent by the legislature to exclude local government from a field of regulation. The Georgia Supreme Court addressed express preemption in City of Buford v. Georgia Power Company, 276 Ga. 590 (2003). There, the city of Buford enacted a local enforcement ordinance limiting construction of electric power substations near residentially zoned areas. The court affirmed the lower court holding that the ordinance was expressly preempted by state law. Id. The state law in question was O.C.G.A. § 36-35-6 (2003), which deals with the allocation of local and state powers over public utilities and services. The specific section in question, §36-35-(a)(5), “provides for the express preemption of local ordinances ‘expanding the power of regulation over any business activity regulated by the Public Service Commission beyond that authorized by charter or general law or by the Constitution.’” City of Buford at 590.

The court determined that the grant of authority to the Public Service Commission under the statute was so inclusive that it left nothing to the local authorities to regulate by ordinance. Id. at 591. While the city of Buford did retain some police power under the statute to regulate public utilities’ use of public property, the statutory grant of authority to the PSC over all other areas severely limited the scope of local police powers. The intent of the state legislature was to restrict local authority and grant greater authority to a state agency. Id. Coupled with the express preemption provision of O.C.G.A. §36-35-6(a)(5), the court found that this legislative intent left no room for action by the local authority. “Because the City’s ordinance conflicts with state law giving the Public Service Commission exclusive authority to regulate the business activity of Georgia Power,” the court concluded that the statute expressly preempted local regulation of business activity. Id.

2. Implied Preemption

The intent to exclude a local government from regulation may be embraced not only in the express wording of the statute, but in its overall structure and intent. In such cases, preemption is implied. The Georgia Supreme Court found implied preemption in Franklin County:

Based on the language and legislative history of the state statute, we conclude that the General Assembly **has failed to authorize** local governments to regulate the application of sludge to land, except in the specific area of monitoring.

(emphasis added) 270 Ga. at 278. The court relied on the structure of the GWCA, in which “[t]he General Assembly expressly granted local governments **limited authority** to act in the field of applying sludge to land.” Id. at 277. From an express grant of limited authority, the intent to prohibit any regulation beyond that authority may be inferred. Additionally important to the Court’s analysis was the General Assembly’s assignment of developing permit requirements directly to the state, which “implies that the General Assembly did not intend to give counties concurrent jurisdiction to regulate through a permit system.” Id.

The primary focus of the court’s analysis of implied preemption in Franklin County was whether the state legislature had intended to preempt local regulation of sludge and if so, whether that intent was fairly implied by the statute. The court looked beyond the mere text of the statute to discover legislative intent:

Preemption may be **inferred generally from the comprehensive nature of O.C.G.A. § 12-5-30.3 and its implementing regulations**. In its **policy statement**, the Georgia Water Quality Control Act grants the state the responsibility for both water quality and water supplies without mentioning the role of local governments, unlike the statutes in some states. O.C.G.A. § 12-5-30.3 **specifically directs the Board** of Natural Resources to adopt technical and procedural regulations and requires the state EPD director to approve permits to apply sludge to land. As part of its responsibilities, the **board has adopted extensive regulations** dealing with land disposal and permit requirements under the Georgia Water Quality Control Act.

(emphasis added) Id. at 276-277. Thus the court looked to the language and structure of the act as well as to its underlying policies and the way in which it was implemented in determining that, on the whole, the state legislature intended to preempt local action.

3. Limited Exception to General Preemption Rule

As noted above, a county ordinance that strengthens, rather than impairs, a state law does not constitute a conflict between the laws and the preemption doctrine need not apply. Franklin County at 275. As the court notes, this amendment to the state Constitution was adopted in 1983 in order to clarify the scope of local authority under state law generally. Nonetheless, local authority can in no circumstances conflict with an overarching state law scheme.

C. Home Rule

The 1983 Constitution of Georgia provides in part: “counties have legislative power to adopt...ordinances...**for which no provision has been made by the general law** and which are not inconsistent with this Constitution.” (emphasis added) Ga. Const. art. IX § II para. I (a). This language suggests that the home rule power of a county or municipality is restricted to those matters that have not already been addressed by state law, or those not preempted. Further support for this conclusion can be found in subsection (b) of the same paragraph, which notes that subsection (a) “**shall not be construed to limit the power of the General Assembly to further define this power or to broaden, limit, or otherwise regulate the exercise thereof.**” (emphasis added) Id. at art. IX, § II, para. I(b). Subsection (c) adds in part that that the abovementioned power “shall not be construed to extend to...matters which the General Assembly by general law has preempted or may hereafter preempt...” Id. at art. IX, § II, para. I(c). These state constitutional provisions are also codified at O.C.G.A. § 36-35-3 (2002) and § 36-35-6 (2002). Thus, under the Georgia Constitution, a county cannot exercise home rule if a state law covers the same subject matter and does not expressly authorize a county to act on that subject matter. Even if the county is authorized to act under the home rule provision, this authority may be regulated at any time by a statute enacted by the state.

As an extension of its reasoning on preemption, the Georgia Supreme Court in Board of Commissioners of Atkinson County v. Guthrie, reinforced the view that **home rule is only valid in the face of state law when the state law expressly grants the local government the power to regulate a matter**. (emphasis added) 273 Ga. 1 (2000). In that case, a county ordinance made property owners liable for waste collection fees for rental properties. The relevant state law, the Georgia Comprehensive Solid Waste Management Act, O.C.G.A. § 12-8-20 *et. seq.* (2002), expressly granted the local government the authority to charge a fee for waste collection services in addition to the power to enforce payment of the fees charged. *Id.* at 3. As such, the local ordinance was not inconsistent with the state law and was therefore valid under the home rule provision of the Georgia Constitution.

If either ‘bad boy’ provisions or repeat offender provisions are not preempted by ESCA, home rule will probably sustain them when adopted by local ordinance. The ESCA provides for the powers delegated to local governments in detail. As discussed above, the Georgia Supreme Court in Board of Commissioners of Atkinson County v. Guthrie, interpreted home rule as only applicable where a statutory scheme exists when that statutory scheme provides local governments regulatory power. 273 Ga. 1 (2000). By its express terms, the ESCA in O.C.G.A. § 12-7-4 (2003) authorizes counties and municipalities to adopt ordinances addressing land-disturbing activities, providing in part:

The governing authority of each county and each municipality shall adopt a comprehensive ordinance establishing the procedures and governing the land disturbing activities within their respective boundaries. Such ordinances shall be consistent with the standards provided by the chapter...

Id. In fact, O.C.G.A. § 12-7-4 gives counties and municipalities some freedom in the manner in which they choose to adopt such ordinances, allowing the local government to integrate such ordinances into other related ordinances. *Id.* In O.C.G.A. §§ 12-7-8 to 12-7-12 the ESCA further addresses counties or municipalities as licensing authorities. (2003). These sections discuss the powers of counties and municipalities under the ESCA, laying out in some detail and with specificity the requirements such local issuing authorities shall adopt as local issuing authorities. *Id.* Because the ESCA provides for delegation of power to local issuing authorities, and because the express limits the statute provides do not encompass a repeat offender provision, such a provision is likely preserved by home rule. First, however, those provisions must escape preemption by the statute.

B. Preemption and ESCA: Can Bad Boy or Repeat Offender Provisions be Adopted?

1. ‘Bad Boy’ Provisions

Two Georgia environmental statutes contain provisions that could allow local governments to refuse to allow past violators to obtain new permits. Under the Georgia Constitution, these so-called ‘bad boy’ provisions must be consistent with the overall structure of the statutes they are adopted under and must not exceed the authority granted to the local government under those

statutes. This section provides a brief summary of the ‘bad boy’ provisions in the Georgia Solid Waste Management Act (“SWMA”) and the Georgia Water Quality Control Act (“WQCA”), illustrating the difference on scope of authority permitted to localities under each. Please note that ‘bad boy’ provisions are not distinct sections of either act, but exist under a combination of provisions in each act that allow local governments to have some authority in the permitting process and allow the permitting body to consider past bad acts in making the decision to withhold a permit. The authority to withhold a permit at the local level is much clearer under the SWMA, and in fact may not exist at all under the WQCA. Such ‘bad boy’ provisions will only provide a sound example of provisions that might be adopted under ESCA if that statute allows for equal local authority.

The SWMA sets standards for the management of solid waste, sets fines for violations of those standards and establishes a process for the issuance of permits. It is interesting to note that in addition to leaving room for a consideration of past bad acts in the permitting process, SWMA also has regular repeat offender provisions such as those discussed below, both in the civil and criminal context. Under O.C.G.A. § 12-8-30.9 (2003), entitled, “Powers of local governmental bodies and state not limited by this part,” SWMA specifically allows more stringent local ordinances that are not in direct conflict with the other provisions of SWMA. Under O.C.G.A. § 12-8-23.1 (2003), the director of the state Environmental Protection Division (EPD) is authorized to issue all permits contemplated by SWMA under O.C.G.A. §12-8-23 (2003). The director may consider a number of equitable factors and can refuse the permit in his discretion based on prior offenses.

While SWMA does not have a section that expressly allows local authorities to participate in the permitting process and make these determinations, these sections taken as a whole constitute the ‘bad boy’ provisions of SWMA. Under this structure, a local government might be able wanted to enact an ordinance under SWMA that required that all permits be denied to repeat offenders. SWMA permits are covered in O.C.G.A.12-8-24 (2003). Internally, that section does not require permits to be withheld from repeat violators, nor does it mention any ‘bad boy’ provision. In conjunction with the sections above however there is authority for the program director to withhold a permit in his discretion. Coupled with the provisions of SWMA that expressly allow local government to enact more stringent ordinances that are not inconsistent with the provisions of SWMA, there may be room under SWMA for local ‘bad boy’ ordinances requiring refusal of permits to past violators.

However, SWMA may be read to limit authority over the permitting process to the director of EPD. There does not appear to be in SWMA a mandatory requirement that permits could not be issued to bad boys. In fact, the section that mentions the ‘bad boy’ provision leaves it to the director’s discretion – notably, this discretionary decision making capacity is vested in the director of the EPD rather than in local authorities. The statutory scheme theoretically allows a local ordinance to deal more strictly with repeat violators, but that is subject to the condition of falling within the overall statutory scheme. It is very unclear whether the director can delegate permitting power to the locality or not under this scheme. Even less clear if whether the local government, if delegated a role in the permitting process, would have the same discretionary denial powers that the director is expressly (and arguably, exclusively) granted.

The ‘bad boy’ provisions of SWMA may be contrasted with the structure and permitting scheme of the WQCA. Like SWMA, WQCA begins by giving to the board the authority to prescribe procedure for permitting. OCGA §12-5-23 (a)(1)(A) (2003) goes on to describe the mandatory duties of the director and once again, the language dealing with the director’s duties related to permits is discretionary. It allows the director to require a permit applicant to submit a violation history and allows the director to refuse a permit for prior violation of any environmental law or WQCA specifically, just like SWMA does. Although this appears under the director’s his mandatory duties, O.C.G.A. §§ 12-5-23 (d) and (e) (2003) are couched in terms of “may” and what he is authorized to do – thus its is highly discretionary. These sections notably do not provide authority for the director to delegate his permitting duties to the local level.

Permitting under the WQCA is covered at O.C.G.A. §12-5-30 (2003), which states that all permits shall be obtained from the director. That section does not refer to the director’s discretion in withholding permits from ‘bad boys’, nor does it indicate in any way that the director has the discretion to delegate his permitting authority to the local level. However, when taken in combination with the director’s discretionary authority under O.C.G.A. § 12-5-23 (2003), it appears that the director may use that discretion in granting or denying O.C.G.A. §12-5-30 (2003) permits.

A thorough reading of the WQCA, O.C.G.A. §§2-5-20 through 12-5-73 (2003), reveals no reference to local permitting authority or the ability to enact more stringent ordinances related to permitting. This is the primary difference from SWMA and is most significant. Even if an argument can be made under the totality of the provisions in SWMA that the legislature intended to allow local ordinances to adopt more stringent, mandatory permit denial ‘bad boy’ provisions, that argument cannot be extended to WQCA because SWMA contains provisions expressly authorizing more stringent but consistent local ordinances whereas WQCA does not. Given the high level of discretion authorized to the state director of the EPD and the highly regulated permitting process under each statute, it seems unlikely that the state legislature intended local authorities to have a role in the permitting process at any rate. Even though SWMA allows for some more stringent but consistent local ordinances, it seems that the structure of SWMA does not contemplate that those ordinances would appear in the area of permitting.

In order to determine whether local Etowah counties could enact more stringent ordinances that required denial of permits to past offenders, one must determine if ESCA expressly or impliedly preempts this sort of ordinance. Such authority is clearly not expressly preempted by ESCA. Unlike WQCA but more like SWMA, ESCA expressly grants some level of authority to local counties. Recall that ESCA provides in part:

The governing authority of each county and each municipality shall adopt a comprehensive ordinance establishing procedures governing land-disturbing activities which are conducted within their respective boundaries. Such ordinances shall be consistent with the standards provided by this chapter.

O.C.G.A. § 12-7-4 (2003). The extent of local authority permitted by ESCA was clearly considered at great length by the state legislature, since the amendments to ESCA not only grant

this authority but also limit it in specific ways. The ESCA specifically limits local issuing authorities' powers under the ESCA in a discrete list of areas. O.C.G.A. § 12-7-8 (a) (1) provides in part:

If a county or municipality has enacted ordinances that meet or exceed the standards, requirements, and provisions of this chapter and the state general permit, except that the standards, requirements, and provisions of the ordinances for monitoring, reporting, inspections, design standards, turbidity standards, and education and training shall not exceed the state general permit requirements, which are enforceable by such county and municipality...the director may certify such county or municipality as a local issuing authority...

(2003). Thus, the text of the statute simply does not expressly preempt local authority in the permitting process.

It is difficult to determine whether a court would find implied preemption when viewing the totality of the provisions of ESCA. The statute clearly states the legislative intent "to provide for the establishment and implementation of a **state-wide comprehensive** soil erosion and sediment control program..." (emphasis added) O.C.G.A. § 12-7-2 (2003). In developing this comprehensive program, the state legislature established a permitting process in ESCA just as it did in SWMA and WQCA. Unlike those statutes, however, ESCA expressly vests permitting authority in the local government. O.C.G.A. §12-7-7 (2003) requires that an individual or corporation obtain "a permit from a local issuing authority" or notify EPD of its intent before conducting a land-disturbing activity. That section then differentiates between localities certified as local issuing authorities under O.C.G.A. §12-7-8 (2003) and those which are not.

O.C.G.A. §12-7-8 (2003) lists the requirements that a county must meet in order to become a local issuing authority. One of these requirements is that the local ordinance not exceed the statutory or general permit requirements already set forth in certain areas. If certified, local issuing authorities then have authority over permits within their jurisdiction under O.C.G.A. §12-7-7(b) (2003). However, if the county is not certified as a local issuing authority, O.C.G.A. §12-7-7(c) (2003) instructs that no individual land disturbing permit will be required but rather that the conditions of the general state-wide permit will apply. In those cases, permit applications are waived but notice of intent to the director of EPD is required in order to ensure that the individual or corporation will comply with the general permit conditions.

Although O.C.G.A. §12-7-7 (2003) allows local issuing authorities to adopt substantive ordinances so long as they do not exceed the limitations of O.C.G.A. §12-7-8 (2003), neither section deals with the procedure of permit applications. Rather, the permitting process is set forth in O.C.G.A. §§12-7-9 through 12-7-11 (2003). Most relevantly, O.C.G.A. §12-7-11 (2003) requires the county to set forth reasons for denial of the permit. This section requires that the issuing authority specify in what way the permit application is deficient when denying an application. One such possible reason is a history of prior violations under O.C.G.A. §12-7-7(f)(1) (2003), which states that:

If a permit applicant has had two or more violations of previous permits or this Code section within three years prior to the date of filing of the application under consideration, the local issuing authority may deny the permit application.

Thus, O.C.G.A. §12-7-7(f) (2003) minimally allows certified local issuing authorities acting within the scope of their permitting authority to deny permits where the violator has had two or more violations in the past three years. It is arguable whether the local issuing authority may go any further and deny permits wherever there is any evidence of past violation at any point in time. Upon first glance, it seems that a certified local issuing authority under O.C.G.A. § 12-7-8 (2003) is authorized to adopt more stringent standards than the state permit in many areas. As noted above, the exceptions to this provided in the statute do not expressly prohibit more stringent ‘bad boy’ ordinances.

However, O.C.G.A. §12-7-8 (2003) is not intended to define the scope of local authority to enact ordinances. Rather, that section defines the circumstances under which a local authority may be certified to issue permits. That is, the local authority may only issue permits where its ordinances do not exceed the general permit in the areas of monitoring, reporting, inspection, design standards, turbidity standards and education and training. It is O.C.G.A. § 12-7-6(b) (2003) which speaks directly to the requirements for ordinances adopted pursuant to ESCA, requiring, “as a minimum, protections as least as stringent as the state general permit.” Only O.C.G.A. §12-7-6(c) (2003) expressly allows localities to adopt ordinances which exceed state permit stream buffer minimum requirements. No other subsection of ESCA that mentions a circumstance in which localities are expressly authorized to exceed the standards of the general permit or the statute.

If faced with review of a local Etowah ordinance which attempted to impose a more stringent ‘bad boy’ provision than O.C.G.A. §12-7-7(f) (2003), a judge would have to consider the overall structure of the act as well as the legislative intent. It seems likely that the judge would have to determine the proper function of each of the subsections discussed above within the framework of ESCA as a whole. While none of these subsections expressly preempt a more stringent local ordinance regarding the ‘bad boy’ provision, it seems that the legislature did not contemplate local authority to enact a more stringent provision in this area. That stands in contrast to O.C.G.A. §12-7-6(c) (2003) where the legislature did in fact consider and expressly grant authority to adopt a more stringent provision.

Thus, ESCA is a statute that like SWMA expressly grants some authority to local government to enact ordinances and operate a local permitting process. However, in the sections that contemplate the content of those ordinances, ESCA only expressly requires that the ordinances no be weaker than the provisions of the general permit and only authorizes stronger standards with regards to stream buffers. The legislature then expressly contemplated and provided a limited ‘bad boy’ provision which by its own language applies to local permitting authorities. Therefore, because ESCA expressly contemplates minimal standards, expressly states the sole circumstance in which the legislature declared an intent to allow stronger standards, and expressly sets forth a limited ‘bad boy’ provision, it is probable that a court would find the area of ‘bad boy’ provisions to be impliedly preempted. While a weak argument can be made that O.C.G.A. §12-7-8 (2003) authorizes stronger ordinances in all categories not expressly

restricted, this argument is limited both by the actual purpose of that section (to establish when a local authority may be certified) and by the language of the section.

C. Repeat Offender Provisions

ESCA does not have an explicit repeat offender provision. Currently, only O.C.G.A. § 12-7-12 (2003), titled “Orders directed to violators; stop work order procedures” directly addresses the issue of repeat violators. O.C.G.A. §12-7-2 (c) (2003) prescribes procedures for issuing stop work orders. It distinguishes between the first/second violation and subsequent violations. The violator must be given written notice upon the first and/or second violation and allowed five days to correct the problem. Id. If the violation is not remedied in five days, a stop work order may then be entered. If the violation in question is a third or later violation, however, the statute allows the stop work order to be issued immediately. Id. In any case, if the violation “presents an imminent threat to public health or waters of the state,” a stop work order can be issued immediately without notice. Id.

Although O.C.G.A. § 12-7-12 does address the issue of multiple violations in the context of stop work orders, it is not a true repeat offender provision because it does not provide harsher consequences for subsequent violations. In fact, the section does not address penalties or fines at all. Rather, it proscribes standards of procedural fairness in the issuance of stop work orders. The section is clearly crafted to ensure procedural fairness, not to discourage repeat violations.

O.C.G.A. § 12-7-15 (2003) addresses civil penalties. This section establishes both minimum and maximum penalties, but does not specify an increased or special penalty for repeated violations. However, this section leaves the amount within the range to be determined at the Administrator or judge’s discretion. O.C.G.A. § 12-7-15(c) (2003) lists several equitable factors that the enforcing party may consider. That subsection specifically includes:

- 1) The amount of civil penalty necessary to ensure immediate and continued compliance and the extent to which the violator may have profited by failing or delaying to comply; ...
- 3) The conduct of the person incurring the civil penalty in promptly taking all feasible steps and procedures necessary or appropriate to comply or to correct the violation or failure;...
- 4) ***Any prior violations or failures to comply by such person with statutes, rules, regulations, orders, or permits administered, adopted or issued by the director...*** Id. (emphasis added).

Thus, the subsection specifically instructs the director, the local enforcement official and the court to consider prior violations, as well as instructing them to consider other related equitable factors. These considerations could result in de facto increased fines for repeat offenders, but could in no case exceed \$2500.00 per day. O.C.G.A. § 12-7-15(c) (2003) functions analogously to a repeat offender provision, but does rely on the equitable analysis of the judge rather than establishing a per se rule.

It is worth noting here that these penalty provision most likely impliedly preempt the adoption by ordinance at the local level of more stringent fine schedules for repeat offenders. Many of the arguments discussed above regarding ‘bad boy’ provisions apply. The case for preemption of repeat offender provisions is only strengthened by the comprehensive nature of the penalty section and by the fact that it establishes an absolute cap on penalties of \$2500 per day. The fact that it closely resembles other equitable repeat offender provisions discussed below completes the argument for preemption since it strengthens the argument that the state legislature considered and addressed the problem of repeat offenders already. In fact, the per diem cap on penalties may even border on an express preemption where a local ordinance that increased penalties would stand in direct conflict with the no-greater-than penalty scheme set forth in the statute.

Repeat offender provisions appear in many areas of statutory law. Most relevantly, repeat offender statues can be found in federal environmental acts and in state erosion and sedimentation statutes. Below is a review of many of the provisions already available.

1. Repeat Offender Provisions in Federal Environmental Acts

Of the federal environmental acts, three contain express repeat offender provisions. 110 Yale L.J.733 at fn. 3. First, the Clean Water Act at 33 U.S.C. §§1319 (c) (1), (2) (2003) (CWA), states:

(c) Criminal penalties.

(1) Negligent violations. Any person who [negligently violates the Act in the manner specified under this subsection]... shall be punished by a fine of not less than \$ 2,500 nor more than \$ 25,000 per day of violation, or by imprisonment for not more than 1 year, or by both. **If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than \$ 50,000 per day of violation, or by imprisonment of not more than 2 years, or by both.**

(2) Knowing violations. Any person who [knowingly violates the Act in the manner specified under this subsection]... shall be punished by a fine of not less than \$5,000 nor more than \$ 50,000 per day of violation, or by imprisonment for not more than 3 years, or by both. **If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than \$ 100,000 per day of violation, or by imprisonment of not more than 6 years, or by both. *Id.* (emphasis added).**

Thus, the CWA addresses repeat offenders in the limited context of negligent or knowing criminal violations of the Act. The repeat offender provisions of CWA emphasized above essentially double the potential penalties for such violators. However, CWA does not require mandatory increased fines for repeat offenders. Rather, it is left to the discretion of the Administrator and/or the courts to determine whether increased penalties are appropriate within the increased range allowed. The Clean Air Act contains repeat offender provisions substantially similar in language and effect to those of the CWA. They are located at 42 U.S.C.S. §7413(c)(1) (2003) (CAA).

The Comprehensive Environmental Response, Compensation and Liability Act also contains repeat offender provisions at 42 U.S.C. §9609(b)(5) and 9609(c) (2003) (CERCLA). Subsection (b)(5) imposes increased class II administrative civil penalties for repeat offenses, stating that “in the case of a second or subsequent violation the amount of such penalty may be not more than \$ 75,000 for each day during which the violation continues.” *Id.* Subsection (c) addresses judicial assessment of fines upon motion of the President of the United States under certain circumstances. Under such motion, “in the case of a second or subsequent violation (or failure or refusal), the amount of such penalty may be not more than \$ 75,000 for each day during which the violation (or failure or refusal) continues.” *Id.* Thus, the language of the repeat offender provisions of CERCLA is arguably even more permissive than the language contained in the CWA and the CAA.

Under CWA and CAA, the administrator or the court has the authority to issue increased fines that shall not exceed the specified amount. In CERCLA, the language allows the judge to increase fines by employing the term ‘may’, indicating the legislature’s intent that the judge use her discretion in determining the appropriate fine. This reading of CERCLA is supported by language following the repeat offender provision that instructs the judge to refer to section 104(e) [42 U.S.C.S. § 9604(e)] “for additional provisions providing for judicial assessment of civil penalties for failure to comply with a request or order.” *Id.*

Other federal environmental statutes, like the Endangered Species Act, do not address repeat offenders at all. Some, like the Toxic Substances Control Act (TSCA), establish per day per violation caps on penalties but also expressly requiring the judge to consider equitable factors in determining the appropriate penalty. TSCA requires the Administrator to consider “the nature, circumstances, extent and gravity of the violation or violations and, with respect to the violator, ability to pay, effect on ability to continue doing business, *any history of prior such violations*, the degree of culpability, and such other matters as justice may require.” 15 U.S.C.S. §2615(a)(1)(B). The Agricultural Adjustment Act of 1938 (AAA) addresses civil penalties for environmental pesticide control violations by allowing the Administrator to determine the penalty amount at his discretion so long as that penalty fell within the overall cap on damages. AAA admonishes the Administrator to consider “the appropriateness of such penalty to the size of the business of the person charged, the effect on the person’s ability to continue in business, and the gravity of the violation.” 7 U.S.C.S. §1361(a)(4). Unlike TSCA, the AAA does not require the Administrator to consider the history of prior violations per se. Although the Administrator could consider the violator’s past acts under gravity of the violation (under the theory that the past acts exacerbate this violation), AAA does not require such equitable consideration and is therefore weaker.

2. Repeat Offender Provisions in Other Areas of Federal Law

Many other federal statutes and regulations incorporate repeat offender provisions like those in the environmental arena, including for example, the Occupational Health and Safety Act at 29 U.S.C. § 666(a) (2003) (OSHA) and the Control of Employment of Aliens regulations at 8 C.F.R. §274a.10 (2000) (CEA regulations). 110 Yale L.J.733 fnt 3. OSHA’s repeat offender provisions are quite severe, increasing penalties up to ten times for repeat violations. That provision reads:

(a) Willful or repeated violation. Any employer who willfully or repeatedly violates the requirements of section 5 of this Act [29 U.S.C.S. § 654], any standard, rule, or order promulgated pursuant to section 6 of this Act [29 U.S.C.S. § 655], or regulations prescribed pursuant to this Act may be assessed a civil penalty of not more than \$70,000 for each violation, but not less than \$ 5,000 for each willful violation. Id.

Uniquely, OSHA's repeat offender provision is the lead-off provision in the penalty section. Also, OSHA's provision establishes a minimum fine for each willful violation, distinguishing it from other repeat offender provisions that merely increase the range of discretionary penalties. The structure of OSHA's penalty provisions supports a tough enforcement stance across the board, including separate provisions for serious violations, failure to correct a violation, willful violation resulting in death of an employee, and false statements. Id. Authority to determine the seriousness of a violation is vested in the Commission and a number of equitable considerations are specified in the statute.

The CEA regulations also establish a range of penalties for repeat offenses similar to the OSHA repeat offender provisions. Under the CEA regulations, both per se repeat offenses and 'patterns or practices of violations' are addressed. The Attorney General has the prerogative to determine that such a pattern or practice exists, and where it does, the following criminal penalty applies:

(a) Any person or entity which engages in a pattern or practice of violations of subsection (a)(1)(A) or (a)(2) of the Act shall be fined not more than \$3,000 for each unauthorized alien, imprisoned for not more than six months for the entire pattern or practice, or both, notwithstanding the provisions of any other Federal law relating to fine levels.

Furthermore, the regulation addresses actual repeat offenses in a three-tiered approach. Either the Service or an administrative law judge will order the violator to pay a fine consistent with the following:

(A) First offense -- not less than \$ 250 and not more than \$ 2,000 for each unauthorized alien with respect to whom the offense occurred before September 29, 1999, and not less than \$ 275 and not exceeding \$ 2,200, for each unauthorized alien with respect to whom the offense occurred occurring on or after September 29, 1999.

(B) Second offense -- not less than \$ 2,000 and not more than \$ 5,000 for each unauthorized alien with respect to whom the second offense occurred before September 29, 1999, and not less than \$ 2,200 and not exceeding \$ 5,500, for each unauthorized alien with respect to whom the second offense occurred on or after September 29, 1999; or

(C) More than two offenses -- not less than \$ 3,000 and not more than \$ 10,000 for each unauthorized alien with respect to whom the third or subsequent offense occurred before September 29, 1999, and not less than \$ 3,300 and not exceeding \$ 11,000, for each

unauthorized alien with respect to whom the third or subsequent offense occurred on or after September 29, 1999... Id.

The CEA regulations also contain provisions addressing increased additional penalties for failure to comply with that order, which penalties shall be determined with reference to a number of equitable factors, including “the size of the business of the employer being charged; the good faith of the employer; the seriousness of the violation; whether or not the individual was an unauthorized alien; **and the history of previous violations** of the employer.” Id. (emphasis added). Thus, like OSHA, the CEA regulations establish increased penalties with a minimum fine for repeat offenders. Additionally, where per se repeat offenses cannot be proven, the CEA regulations allow the Attorney General to go forward under a ‘pattern of violation’ provision. The pattern provisions combined with the three tiered repeat offender provisions create a strong enforcement mechanism in the case of multiple violations.

3. Repeat Offender Provisions in State Statutes

Like Georgia, many states have adopted state erosion and sedimentation control statutes. Although none contain per se repeat offender provisions, many address the issue of repeat offenders in some way. Some do not address repeat violations at all but do provide a range. For example, New Jersey’s Soil and Erosion Sedimentation Control Act, N.J. Stat. § 4:24-49 *et. seq.* (2003), contains a penalty section that establishes a range of potential penalties but does not address repeat violations in any way. N.J. Stat. § 4:24-53 (2003). Other state erosion control statutes provide a range of penalties and call for the application of equitable factors. This is similar to the current approach under Georgia law discussed above. North Carolina’s Sedimentation Pollution Control Act of 1973, N.C. Gen Stat. § 113A, *et. seq.* (2003), provides another example of such a scheme. Under the penalties section of that statute, civil penalties may be imposed within a range not to exceed \$5,000 per violation. N.C. Gen. Stat. §113A-64 (2003). That penalty is to be determined by an administering government body. In making a penalty determination, the statute instructs the administrator to factor in equitable considerations, such as:

... the degree and extent of harm caused by the violation, the cost of rectifying the damage, the amount of money the violator saved by noncompliance, whether the violation was committed willfully and ***the prior record of the violator in complying or failing to comply with [the statute]***.” Id. at (a)(3) (emphasis added).

It is worth noting that the North Carolina statute also contains separate criminal penalties. Under N.C. Gen. Stat. §113A-64(b), it is a class 2 misdemeanor to knowingly or willfully violate the statute or any ordinance or order promulgated under it. The statute authorizes a distinct criminal penalty not to exceed \$5,000, which appears to be applicable in addition to the civil penalties. Id. If so, one may argue under the North Carolina that one action is both a civil and criminal violation of the statute, and should incur both penalties. This argument is particularly appealing in the case of repeat violations where, because the violator had been put on past notice of violations and chose to continue violating, it may be easier to demonstrate that the violator acted with knowledge or intent. Thus, when taken in combination, the civil and criminal penalties of the North Carolina statute have the same effect of increasing fines for willful repeat violators that an outright repeat offender provision would have.

Some states go a step further and explicitly increase the fine schedule in cases where the violator has been given notice of a violation in the past or is the subject of a court order, but fails to stop the ongoing violation or prevent future violations. Whereas North Carolina's penalty provisions merely leave double fines open as an option to the administrator or the court, the statutory schemes in Delaware and Michigan require increased fines where prior notice of violation or a court order has essentially been ignored by the violator. Under the penalty provisions of Delaware's Erosion and Sedimentation Control statute, 7 Del. C. § 4001, *et. seq.* (2003), a range of penalties (\$200-\$2000 per offense) is established for first offenses. 7 Del. C. §4015(a). That section goes on to state:

(b) Any person who intentionally, knowingly, and after written notice to comply, violates or refuses to comply with any notice issued pursuant to § 4012 of this title shall be fined not less than \$ 500 or more than \$ 10,000 for each offense. Each day the violation continues shall constitute a separate offense.

Id. at §4015(b). Subsection (b) admittedly does not expressly state that it applies to repeat offenses. However, in practice, it would result in increased fines for repeat violators who, at one site, had repeatedly refused to abate a problem. It is at best questionable whether the subsection would apply to violators who had committed similar violations on a different, currently existing site. One might argue that if those violators were given notice of the type of violation on the first site, that on all future sites they should therefore have reasonable notice to comply as well.

One way to avoid such confusion if the Delaware statute were adopted as a model for a Georgia repeat offender statute would be to state that ‘any person who intentionally, knowingly and after written notice to comply with a specific provision of this Act at any site, violates or refuses to comply with any notice issued pursuant to the act or with the specified provision for which notice has been provided in the past, shall be fined...’ Notably, the Delaware statute does increase the range of penalties in these situations but nonetheless maintains a discretionary range. Equitable factors for consideration are not specified in either section of the Delaware statute. If a similar provision were included in the Georgia statute, however, such equitable factors as those discussed above (particularly the violation history) could be included for clarity and flexibility.

Michigan likewise includes increased penalties for violations after notice in its Soil Erosion and Sedimentation Control statute, M.C.L. §324.9101, *et. seq.* (2003). Michigan's penalty section establishes a penalty range for both ordinary violations, malicious violations (for example, presenting false facts and claims in an erosion and sedimentation control plan when applying for a permit) and violations after notice. *Id.* The statute prescribes increased penalties for malicious violations and violations after notice as follows:

(2) A person who knowingly violates this part or knowingly makes a false statement in an application for a permit or in a soil erosion and sedimentation control plan is responsible for the payment of a civil fine of not more than \$10,000.00 for each day of violation.

(3) A person who knowingly violates this part after receiving a notice of determination under section 9112 or 9117 is responsible for the payment of a civil fine of not less than \$2,500.00 or more than \$25,000.00 for each day of violation.

Id. at §§324.9121 (2),(3). The Michigan statute is structured like the Delaware statute and thus subject to many of the same comments and criticisms. However, the argument for increased fines for the same violation at different sites is stronger under the Michigan statute. Unlike the Delaware statute, the Michigan statute does not connect the increased fine to the violation that was the subject of the notice of determination, or at least fails to do so expressly. Nonetheless, the recommended clarification of Delaware law above would clarify the Michigan format as well.

One further aspect of the Michigan statute, while not directly on point, is interesting and worth noting. The Michigan statute goes beyond only setting a range of civil penalties for violations of the act. It also allows a civil action by the state to recover property damages as follows:

(6) In addition to a fine assessed under this section, a person who violates this part is liable to the state for damages for injury to, destruction of, or loss of natural resources resulting from the violation. The court may order a person who violates this part to restore the area or areas affected by the violation to their condition as existing immediately prior to the violation.

Id. at §324.9121 (6). This particular section is interesting because it gives the state another mechanism for imposing liability on the violator. The state may choose to use this mechanism when all other remedies, including repeat offender provisions, have been exhausted and the violator in question still does not respond to the penalties.

Finally, some states assess penalties for violations through local ordinance rather than through state statute. Rhode Island's Soil Erosion and Sediment Control statute is one example. R.I. Gen. Laws §45-46-1, *et. seq.* (2003). Under that statute, local governments are authorized to establish their own erosion and sedimentation control ordinances. Id. at §45-46-4. However, the statute provides guidance in formulating those ordinances by providing a model ordinance. Id. at §45-46-5, attached as Appendix B. Under Article 8, section 2, of the Rhode Island model ordinance, penalties are prescribed. The penalty plan places a heavy emphasis on notifying the violator of the violation. However, if the violator fails to comply with the ordinance after such notice, the city is authorized to impose a fine according to a schedule of fines adopted by the city, up to \$250 per violation. Additionally,

should the applicant owner fail to take the temporary corrective measures within the five (5) day period and the permanent corrective measures within the thirty (30) day period, the city or town then has the right to take whatever actions it deems necessary to correct the violations and to assert a lien on the subject property in an amount equal to the costs of remedial actions.

Id. The model ordinance itself neither authorizes nor prohibits the adoption of an actual repeat offender provision. The ordinance both favors the violator by imposing a low fine and favors enforcement by allowing the state to recover costs of remedial actions. A lien provision suffers from obvious limitations, such as the need to ascertain causation before assessing the lien and the feasibility of remedial measures. Such a lien provision may ultimately be a more effective deterrent than an increased fine schedule for repeat violators. Whereas the penalties under a fine schedule may seem at least partially contrived, recovery of clean-up costs under a lien provision

bears a quantifiable relationship to the violation in question. Furthermore, a lien provision produces a direct and visible result (namely, removal of sediment) that cannot be produced by a mere fine schedule. For these reasons and the reasons discussed below, a lien provision may be a more effective and acceptable deterrent when contrasted with repeat offender provisions.

Other state environmental laws do contain repeat offender provisions more like those incorporated at the federal level. 110 Yale L. Rev 733, at fn. 3. For example, see the Virginia Pesticide Control Act, Va. Code Ann. §3.1-249.70 (Michie 1994), attached as Appendix C. Thus, most repeat offender provisions in environmental statutes, at both the state and federal level, are structured as equitable considerations within the discretion of the judge and the administrator. Few states have adopted repeat offender provisions that increase the fine automatically after notice of the violation has been issued. No state erosion statutes could be located with a per se repeat violator provision (that is, one that imposes an increased fine scale based on past violations with no discretion on the part of the Administrator or the court). Only three of the federal environmental law incorporate strict repeat offender provisions. Such provisions are even endorsed by the Advisory Working Group on Environmental Offenses of the U.S. Sentencing Commission, in its “Report from Advisory Group on Environmental Sanctions 13-15” (1993), available at <http://www.ussc.gov/environ.pdf>. That report “recommend[s] upward adjustments in criminal sanctions based on past criminal, civil, and/or administrative adjudications”. 110 Yale L.J.733 at fn 3. Furthermore, the U.S. Sentencing Commission’s “Supplementary Report on Sentencing Guidelines for Organizations 20” (1991), also available at <http://www.ussc.gov/environ.pdf>, indicates that organizations typically do receive higher criminal sanctions for repeat offenses regardless of such provisions. 110 Yale L.J.733 at fn 3.

However, strict repeat offender provisions may thwart the efficacy of such environmental statutes. Several law review articles question whether repeat offender provisions with escalating penalties for multiple offenses do more harm than good, or at least are not cost efficient. For example, see Rethinking the Puzzle of Escalating Penalties for Repeat Offenders, 110 Yale L.J.733 (2001). Daniel Dana discusses repeat offender provisions from the perspective of law and economics, highlighting several considerations about the behavior and expectations of violators that should be considered when drafting repeat offender provisions. According to Dana, the concept of escalating penalties for repeat offenders conflicts with economic theory in the following way:

In the standard economic model, the purpose of penalties is to deter conduct that creates greater social costs than benefits; where the system of penalties is calibrated to produce ‘optimal deterrence,’ offenses that produce net social costs will be deterred while offenses that produce net social benefits will go undeterred. Within this paradigm, the key factor in assessing the optimal penalty for a given offense is the social harm that will result from the offense. But the social harm from a given offense would seem to have nothing to do with the offense history of the offender; the illegal discharge of waste into the ocean causes as much social harm when the discharging company is a first-time offender as when it has a long history of such offenses. Thus, standard economic analysis would seem to suggest that, contrary to actual practice, penalties should not escalate based on offense history. *Id.* at 736-737.

Repeat offender provisions thus stand at the crossroads of human behavior (and by extension, corporate behavior) when that behavior is assumed to be economically motivated and rational, and the regulation of that behavior by law for the social good. Obviously, the law assumes that individual rational actors will not always be motivated to act in ways that are the most socially beneficial, especially when the costs of socially beneficial behavior fall on the actor but the benefits of that behavior are spread throughout the community at large. When the actor fails to comply with a socially beneficial law, the cost of the benefit shifts from the actor to society at large – essentially, the actor is able to gain for himself the value of not complying with the law by imposing on society the cost of his violation. However, through economic and social penalties (such as imposed fines or criminal sanctions), the social costs of such behavior can be internalized to the actor. In theory, those costs will give the actor an incentive to comply with a law that otherwise costs him money. Given a choice between the lesser of two evils, the cost of compliance will be less than the potential penalty.

There are factors that may undermine this deterrence-based model of behavior, as it arises in the context of escalating penalties for repeat offenders. For one thing, the model described above assumes that the actor perceives law as a legitimate force and feels not only a financial pressure to comply but a social impetus as well. This is not often the case in the context of environmental regulations. Environmental regulations are a relatively new area of law in the United States, with the first serious round of legislation passed during the 1960s. While no individual or corporate actor would be likely to actually argue that the laws lack legitimacy (that is, aside from certain constitutional challenges), their incentives to comply with the law are radically undermined if the law is perceived as an illegitimate or unjust curtailment of property rights or business ventures.

Repeat offender provisions are only likely to increase a public perception of the illegitimacy and unfair nature of environmental laws. This is especially true where a state does not enforce or only rarely enforces repeat offender provisions in other areas of the law. Additionally, repeat offender provisions may unfairly target those who are most likely to get caught:

...holding all other variables constant, people and entities with 'records' have a higher probability of having their offenses detected than people and entities without records. Moreover, people and entities with records assume higher risks of audits for previously undetected past offenses when they commit new offenses.

110 Yale L.J. 733, 737. If past violators are more likely to be caught because they are more closely regulated, the existence of a repeat offender provision could taint the legitimacy of an otherwise accepted environmental law by raising issues of due process, equal enforcement of the laws and substantive fairness.

This example is but one of several concerns raised about the use of repeat offender provisions in the context of environmental regulations. Dana's article goes on to address the efficacy of repeat offender provisions in depth.

II. Road Crossings

ESCA, by its plain language, treats most road crossings as exemptions or exceptions to the statutory requirements for erosion and sedimentation control measures and does not require variances. ESCA refers to road crossings as “roadway drainage structures,” and defines this term as “a device, such as a bridge, culvert or ditch ... that conveys water under a roadway ...” O.C.G.A. § 12-7-3(13). There is a statutory distinction between public and private roadway drainage structures and a further distinction within private roadway drainage structures of subdivisions or “common plans of development.” O.C.G.A. § 12-7-17(8),(9). ESCA also establishes a minimum buffer requirement of 25 feet along the banks of all state waters, with certain exceptions. O.C.G.A. § 12-7-6(b)(15). (For the definition of “state waters” see O.C.G.A. § 12-7-3(16).)

One of the exceptions expressly contemplated is “where a ... roadway drainage structure *must be* constructed.” O.C.G.A. § 12-7-6(b)(15) (emphasis added). The statute is silent on what degree of necessity is required for a roadway drainage structure to fall within this exception. For example, it is unclear from the plain language whether the “must be constructed” exception is triggered by a roadway drainage structure that is merely “appropriate” or whether the structure must be deemed “indispensable” for the exception to apply.

The Environmental Protection Division’s Rules and Regulations do not elaborate further and there is no case law on point. The only limitation that the statute imposes on this “must be constructed” exception is that “adequate erosion control measures be incorporated and implemented.” *Id.* This same exception for roadway drainage structures applies to state waters classified as “trout streams,” which are treated separately in ESCA. O.C.G.A. § 12-7-6(b)(16).

ESCA also delineates certain activities that are exempted from coverage. O.C.G.A. § 12-7-17. For example, most public and some private roadway drainage structures are deemed exempt as suggested by the plain language of the statute.

O.C.G.A. § 12-7-17(8) addresses private roadway drainage structures and exempts any activities that disturb less than one acre. This exemption, however, does *not* apply to small-scale disturbances that are part of a larger common plan of development that involves a total planned disturbance area of one acre or greater. *Id.* Therefore, a privately-financed roadway drainage structure for a single family home will be exempt from ESCA’s provisions, but the same privately-financed roadway drainage structure for a single home in a 15-acre subdivision would not be exempt (assuming that both roadway drainage structures disturb less than one acre in area). Subdivisions and other common plans of development which contemplate a total disturbance area of less than one acre are still outside the exception if the disturbance is within 200 feet of the bank of any state waters. *Id.* ESCA’s definition of “state waters” is refined for the purposes of this provision to exclude channels, certain drainageways, and intermittent streams. *Id.*

Public roadway drainage structures are also exempt from ESCA’s coverage. O.C.G.A. § 12-7-17(9). These include construction or maintenance projects by the Department of Transportation (DOT), Georgia Highway Authority (GHA), and State Road and Tollway Authority (SRTA). *Id.*

Also included are any road construction or maintenance projects undertaken by any county or municipality. The requirement for this exemption to apply is not burdensome. All that is required is that the roadway drainage structure be undertaken or financed, at least in part, by one of the named entities and that an erosion and sediment control plan is in place, pursuant to O.C.G.A. § 12-7-7.1.

While the statutory language is relatively clear and unambiguous, any interpretation of ESCA is subject to future interpretation by the court. The strongest argument for preventing road construction within a stream buffer seems to be to attack the “necessity” of the roadway under O.C.G.A. § 12-7-6(b)(15). However, since ESCA was so recently amended, no judicial interpretations currently exist and the potential success of this argument is unclear.

III. Silvicultural Exceptions

The HCP Advisory Committee wanted to acquire additional information about the exemption from ESCA permitting requirements that is contained in the recently amended ESCA for silvicultural activities. For the purposes of this section we assumed that the plain meaning of “silvicultural” includes forestry land management practices, as stated in O.C.G.A. § 12-7-17 (6). Specifically, there is concern that a developer can claim he/she is cutting down trees at a site as part of forestry land management practices and receive the exemption even if that was not the primary purpose of the project or even a lesser-related activity. By claiming the cutting was a forestry land management practice, the developer would be able to bypass ESCA’s permit requirements on land disturbing activities, and subsequently conduct land disturbance activities on the land after receiving the exemption. There was an additional question of whether there are tax or any other penalties for developing the property in such a way.

The forestry land management practices exemption must be viewed in the context of the Georgia Code, and existing State of Georgia case law. O.C.G.A. § 12-7-17 (6) contains an exemption for forestry activities, stating:

This chapter shall not apply to the following activities...(6) Forestry land management practices...no other land-disturbing, except for normal forest management practices, shall be allowed upon the entire property upon which the forestry practices were conducted for a period of three years after the completion of such forestry practices...

The three-year ban on all land disturbing activity except for normal forest management practices exists as a means of ensuring that developers do not abuse the forestry land management practices exemption.

In searching for the answers to the legal questions presented, the group consulted a variety of sources of information. First, there was an effort to contact specific agencies that have statutory authority over the ESCA and non-governmental organizations that follow erosion and sedimentation issues. The agency in charge of administering the ESCA is the Environmental Protection Department (EPD) of the Department of Natural Resources. In addition to visiting the EPD website, we also contacted the Georgia Soil and Water Conservation Commission, the

Metropolitan North Georgia Water Planning District, the Georgia Municipal Association, the Atlanta Regional Commission, and the Clean Water Campaign. None of these agencies and organizations was able to provide cases where a developer took advantage of forestry land management practices exemption by conducting land disturbance activity within the three-year ban on such activity. They also did not provide any cases where a local government or the State used this provision to halt non-forestry land management activity that occurred on the site within the three-year ban.

Another issue to bear in mind is what occurs when a non-developer receives the forestry land management practices exception, clear cuts his/her land, and then sells his/her land to a developer who may or may not be subject to the three-year ban on land disturbance activities. The plain language of O.C.G.A. § 17-7-17 (6) indicates that no land disturbing activity is allowed on the exempted land for three years. On the other hand, a contrary interpretation of the statute by the courts might determine that the three-year ban applies only to the owner who conducted the forestry land management practices, not the exempted land itself. There is no caselaw on how the courts would interpret this issue.

Even though the interpretation of the statute section is unresolved, it may be possible for a locality to interpret the statute as it chooses by having a three-year land disturbance activity moratorium on the exempted land. The locality could do this by adding this definition to its local erosion & sedimentation ordinance.

The group was unable to find any tax penalties or other penalties in local ordinances for developing land after clear-cutting it, using the forestry land management practices exemption. . One option is to make the state moratorium for land disturbance activity on exempted land longer than three years. Another option is for localities to actually enforce a fine for land disturbance activity that occurs on exempted land within the three-year period. It also seems possible for a locality to add a provision to its erosion & sedimentation ordinance to have the three-year moratorium continue from the person who received the exemption to the person who purchased the land within the three-year period. But this does not prevent someone from receiving the exemption, clear cutting the land, waiting three years, and after three years selling the land to someone whom later conducts land-disturbing activity on it. To counter this, it seems possible for localities to impose a longer moratorium on land disturbance activities on exempted land. And nothing in the statute seems to prohibit this option.

While an exemption in the ESCA allows developers not to have permits when they claim to conduct forestry land management practices on a site, the exemption does not allow land disturbance activity on the site for three years. In addition, as mentioned above, other means are available under current law to narrow the exemption further.

APPENDIX A – RHODE ISLAND MODEL REPEAT OFFENDER ORDINANCE

R.I. GEN. LAWS §45-46-5

§ 45-46-5. MODEL ORDINANCE -- SOIL EROSION AND SEDIMENT CONTROL

ARTICLE I

SECTION I. PURPOSE.

(A) THE (CITY OR TOWN) COUNCIL FINDS THAT EXCESSIVE QUANTITIES OF SOIL ARE ERODING FROM CERTAIN AREAS THAT ARE UNDERGOING DEVELOPMENT FOR NON AGRICULTURAL USES SUCH AS HOUSING DEVELOPMENTS, INDUSTRIAL AREAS, RECREATIONAL FACILITIES, AND ROADS. THIS EROSION MAKES NECESSARY COSTLY REPAIRS TO GULLIES, WASHED OUT FILLS, ROADS, AND EMBANKMENTS. THE RESULTING SEDIMENT CLOGS THE STORM SEWERS AND ROAD DITCHES, MUDDIES STREAMS, LEAVES DEPOSITS OF SILT IN PONDS AND RESERVOIRS, AND IS CONSIDERED A MAJOR WATER POLLUTANT.

(B) THE PURPOSE OF THIS ORDINANCE IS TO PREVENT SOIL EROSION AND SEDIMENTATION FROM OCCURRING AS A RESULT OF NON AGRICULTURAL DEVELOPMENT WITHIN THE CITY OR TOWN BY REQUIRING PROPER PROVISIONS FOR WATER DISPOSAL, AND THE PROTECTION OF SOIL SURFACES DURING AND AFTER CONSTRUCTION, IN ORDER TO PROMOTE THE SAFETY, PUBLIC HEALTH, AND GENERAL WELFARE OF THE CITY OR TOWN.

ARTICLE II

SECTION I. APPLICABILITY.

THIS ORDINANCE IS APPLICABLE TO ANY SITUATION INVOLVING ANY DISTURBANCE TO THE TERRAIN, TOPSOIL OR VEGETATIVE GROUND COVER UPON ANY PROPERTY WITHIN THE CITY OR TOWN OF _____ AFTER DETERMINATION OF APPLICABILITY BY THE BUILDING OFFICIAL OR HIS OR HER DESIGNEE BASED UPON CRITERIA OUTLINED IN ARTICLE III. COMPLIANCE WITH THE REQUIREMENTS AS DESCRIBED IN THIS ORDINANCE SHALL NOT BE CONSTRUED TO RELIEVE THE OWNER/APPLICANT OF ANY OBLIGATIONS TO OBTAIN NECESSARY STATE OR FEDERAL PERMITS.

ARTICLE III

SECTION I. DETERMINATION OF APPLICABILITY.

(A) (1) IT IS UNLAWFUL FOR ANY PERSON TO DISTURB ANY EXISTING VEGETATION, GRADES, AND CONTOURS OF LAND IN A MANNER WHICH MAY INCREASE THE POTENTIAL FOR SOIL EROSION, WITHOUT FIRST APPLYING FOR A DETERMINATION OF APPLICABILITY FROM THE BUILDING OFFICIAL OR HIS OR HER DESIGNEE. UPON DETERMINATION OF APPLICABILITY, THE OWNER/APPLICANT SHALL SUBMIT A SOIL EROSION AND SEDIMENT CONTROL PLAN FOR APPROVAL BY THE BUILDING OFFICIAL OR HIS OR HER DESIGNEE, AS PROVIDED IN ARTICLE IV. THE APPLICATION FOR DETERMINATION OF APPLICABILITY SHALL DESCRIBE THE LOCATION, NATURE, CHARACTER, AND TIME SCHEDULE OF THE PROPOSED LAND DISTURBING ACTIVITY IN SUFFICIENT DETAIL TO ALLOW THE BUILDING OFFICIAL OR HIS OR HER DESIGNEE TO DETERMINE THE POTENTIAL FOR SOIL EROSION AND SEDIMENTATION RESULTING FROM THE PROPOSED PROJECT. IN DETERMINING THE APPLICABILITY OF THE SOIL EROSION AND SEDIMENT CONTROL ORDINANCE TO A PARTICULAR LAND DISTURBING ACTIVITY, THE BUILDING OFFICIAL OR HIS OR HER DESIGNEE SHALL CONSIDER SITE TOPOGRAPHY, DRAINAGE PATTERNS, SOILS, PROXIMITY TO WATERCOURSES, AND OTHER INFORMATION DEEMED APPROPRIATE BY THE BUILDING OFFICIAL OR HIS OR HER DESIGNEE. A PARTICULAR LAND DISTURBING ACTIVITY SHALL NOT BE SUBJECT TO THE REQUIREMENTS OF THIS ORDINANCE IF THE BUILDING OFFICIAL OR HIS OR HER DESIGNEE FINDS THAT EROSION RESULTING FROM THE LAND DISTURBING ACTIVITY IS INSIGNIFICANT AND REPRESENTS NO THREAT TO

ADJACENT PROPERTIES OR TO THE QUALITY OF ANY COASTAL FEATURE OR WATERCOURSE, AS DEFINED IN ARTICLE IX. THE CURRENT "RHODE ISLAND SOIL EROSION AND SEDIMENT CONTROL HANDBOOK," U.S. DEPARTMENT OF AGRICULTURE SOIL CONSERVATION SERVICE, R.I. DEPARTMENT OF ENVIRONMENTAL MANAGEMENT, AND R.I. STATE CONSERVATION COMMITTEE SHALL BE CONSULTED IN MAKING THIS DETERMINATION.

(2) THIS ORDINANCE SHALL NOT APPLY TO EXISTING QUARRYING OPERATIONS ACTIVELY ENGAGED IN EXCAVATING ROCK BUT SHALL APPLY TO SAND AND GRAVEL EXTRACTION OPERATIONS.

(B) NO DETERMINATION OF APPLICABILITY IS REQUIRED FOR THE FOLLOWING:

(1) CONSTRUCTION, ALTERATION, OR USE OF ANY ADDITIONS TO EXISTING SINGLE FAMILY OR DUPLEX HOMES OR RELATED STRUCTURES; PROVIDED, THAT THE GROUNDS COVERAGE OF ADDITION IS LESS THAN ONE THOUSAND (1,000) SQUARE FEET, AND CONSTRUCTION, ALTERATION AND USE DOES NOT OCCUR WITHIN ONE HUNDRED (100') FEET OF ANY WATERCOURSE OR COASTAL FEATURE, AND THE SLOPES AT THE SITE OF LAND DISTURBANCE DO NOT EXCEED TEN PERCENT (10%).

(2) USE OF A HOME GARDEN IN ASSOCIATION WITH ONSITE RESIDENTIAL USE.

(3) ACCEPTED AGRICULTURAL MANAGEMENT PRACTICES SUCH AS SEASONAL TILLING AND HARVEST ACTIVITIES ASSOCIATED WITH PROPERTY UTILIZED FOR PRIVATE AND/OR COMMERCIAL AGRICULTURAL OR SILVACULTURAL PURPOSES.

(4) EXCAVATIONS FOR IMPROVEMENTS OTHER THAN THOSE DESCRIBED IN SUBSECTION (B)(1) OF THIS SECTION WHICH EXHIBIT ALL OF THE FOLLOWING CHARACTERISTICS:

(I) DOES NOT RESULT IN A TOTAL DISPLACEMENT OF MORE THAN FIFTY (50) CUBIC YARDS OF MATERIAL;

(II) HAS NO SLOPES STEEPER THAN TEN FEET (10') VERTICAL IN ONE HUNDRED FEET (100') HORIZONTAL OR APPROXIMATELY TEN PERCENT (10%); AND

(III) HAS ALL DISTURBED SURFACE AREAS PROMPTLY AND EFFECTIVELY PROTECTED TO PREVENT SOIL EROSION AND SEDIMENTATION.

(5) GRADING, AS A MAINTENANCE MEASURE, OR FOR LANDSCAPING PURPOSES ON EXISTING DEVELOPED LAND PARCELS OR LOTS; PROVIDED, THAT ALL BARE SURFACE IS IMMEDIATELY SEEDED, SODDED OR OTHERWISE PROTECTED FROM EROSION, AND ALL OF THE FOLLOWING CONDITIONS ARE MET:

(I) THE AGGREGATE AREA OF ACTIVITY DOES NOT EXCEED TWO THOUSAND (2,000) SQUARE FEET; AND

(II) THE CHANGE OF ELEVATION DOES NOT EXCEED TWO FEET (2') AT ANY POINT; AND

(III) THE GRADING DOES NOT INVOLVE A QUANTITY OF FILL GREATER THAN EIGHTEEN (18) CUBIC YARDS; EXCEPT WHERE FILL IS EXCAVATED FROM ANOTHER PORTION OF THE SAME PARCEL AND THE QUANTITY DOES NOT EXCEED FIFTY (50) CUBIC YARDS.

(6) GRADING, FILLING, REMOVAL, OR EXCAVATION ACTIVITIES AND OPERATIONS UNDERTAKEN BY THE CITY OR TOWN UNDER THE DIRECTION AND SUPERVISION OF THE DIRECTOR OF PUBLIC WORKS FOR WORK ON STREETS, ROADS, OR RIGHTS-OF-WAYS DEDICATED TO PUBLIC USE; PROVIDED, THAT ADEQUATE AND ACCEPTABLE EROSION AND SEDIMENT CONTROLS ARE INCORPORATED, IN ENGINEERING PLANS AND SPECIFICATIONS, AND EMPLOYED. APPROPRIATE CONTROLS APPLY DURING CONSTRUCTION AS WELL AS AFTER THE COMPLETION OF THESE ACTIVITIES. ALL WORK SHALL BE UNDERTAKEN IN ACCORDANCE WITH THE PERFORMANCE PRINCIPLES PROVIDED FOR IN ARTICLE V, SECTION 1(C) AND THE STANDARDS AND DEFINITIONS THAT MAY BE ADOPTED TO IMPLEMENT THE PERFORMANCE PRINCIPLES.

ARTICLE IV

SECTION I. PROVISIONS OF PLAN -- PROCEDURES.

(A) *PLAN.*

(1) TO OBTAIN APPROVAL FOR A LAND DISTURBING ACTIVITY AS FOUND APPLICABLE BY THE BUILDING OFFICIAL OR HIS OR HER DESIGNEE UNDER ARTICLE III, AN APPLICANT SHALL FIRST FILE AN EROSION AND SEDIMENT CONTROL PLAN SIGNED BY THE OWNER OF THE PROPERTY, OR AUTHORIZED AGENT, ON WHICH THE WORK SUBJECT TO APPROVAL IS TO BE PERFORMED. THE PLAN OR DRAWINGS, AS DESCRIBED IN ARTICLE V, SHALL INCLUDE PROPOSED EROSION AND SEDIMENT CONTROL MEASURES TO BE EMPLOYED BY THE APPLICANT OR THE APPLICANT'S AGENT.

(2) R.I. FRESHWATER WETLANDS PERMIT: WHERE ANY PORTION OF A PROPOSED DEVELOPMENT REQUIRES APPROVAL UNDER ANY PROVISION OF THE GENERAL LAWS APPROVED BY THE GENERAL ASSEMBLY OR WHERE THE APPROVAL CONTAINS PROVISIONS FOR SOIL EROSION AND SEDIMENT CONTROLS, THAT APPROVED PLAN SHALL BE A COMPONENT OF THE OVERALL SOIL EROSION AND SEDIMENT CONTROL PLAN REQUIRED UNDER THIS ORDINANCE FOR THE DEVELOPMENT.

(B) *FEEES.*

THE CITY OR TOWN ADOPTING THIS ORDINANCE MAY COLLECT FAIR AND REASONABLE FEES FROM EACH APPLICANT REQUESTING APPROVAL OF A SOIL EROSION AND SEDIMENT CONTROL PLAN FOR THE PURPOSES OF ADMINISTERING THIS ORDINANCE.

(C) *PLAN REVIEW.*

(1) WITHIN FIVE (5) WORKING DAYS OF THE RECEIPT OF A COMPLETED PLAN, THE BUILDING OFFICIAL OR HIS OR HER DESIGNEE SHALL SEND A COPY OF THE PLAN TO THE REVIEW AUTHORITIES WHICH MAY INCLUDE THE PUBLIC WORKS DEPARTMENT, THE PLANNING BOARD OR PLANNING DEPARTMENT, AND CONSERVATION COMMISSION FOR THE PURPOSE OF REVIEW AND COMMENT. THE BUILDING OFFICIAL OR HIS OR HER DESIGNEE MAY ALSO, WITHIN FIVE (5) WORKING DAYS, SUBMIT COPIES OF THE PLAN TO OTHER LOCAL DEPARTMENTS OR AGENCIES, INCLUDING THE CONSERVATION DISTRICT THAT SERVICES THEIR COUNTY, IN ORDER TO BETTER ACHIEVE THE PURPOSES OF THIS CHAPTER. FAILURE OF THESE REVIEW AUTHORITIES TO RESPOND WITHIN TWENTY-ONE (21) DAYS OF THEIR RECEIPT OF THE PLAN SHALL BE DEEMED AS NO OBJECTION TO THE PLAN AS SUBMITTED.

(2) THE TIME ALLOWED FOR PLAN REVIEW SHALL BE COMMENSURATE WITH THE PROPOSED DEVELOPMENT PROJECT, AND SHALL BE DONE SIMULTANEOUSLY WITH OTHER REVIEWS.

(D) *PLAN APPROVAL.*

(1) THE BUILDING OFFICIAL OR HIS OR HER DESIGNEE SHALL TAKE ACTION IN WRITING, EITHER APPROVING OR DISAPPROVING THE PLAN, WITH REASONS STATED WITHIN TEN (10) DAYS AFTER THE BUILDING OFFICIAL HAS RECEIVED THE WRITTEN OPINION OF THE REVIEW AUTHORITIES.

(2) IN APPROVING A PLAN, THE BUILDING OFFICIAL OR HIS OR HER DESIGNEE MAY ATTACH CONDITIONS DEEMED REASONABLY NECESSARY BY THE REVIEW AUTHORITIES TO FURTHER THE PURPOSES OF THIS ORDINANCE. THE CONDITIONS PERTAINING TO EROSION AND SEDIMENT CONTROL MEASURES AND/OR DEVICES, MAY INCLUDE, BUT ARE NOT LIMITED TO, THE ERECTION OF WALLS, DRAINS, DAMS, AND STRUCTURES, PLANTING VEGETATION, TREES AND SHRUBS, FURNISHINGS, NECESSARY EASEMENTS, AND SPECIFYING A METHOD OF PERFORMING VARIOUS KINDS OF WORK, AND THE SEQUENCE OR TIMING OF THE WORK. THE APPLICANT/OWNER SHALL NOTIFY THE BUILDING INSPECTOR, OR HIS OR HER DESIGNEE, IN ADVANCE OF HIS OR HER INTENT TO BEGIN CLEARING AND CONSTRUCTION WORK DESCRIBED IN THE EROSION AND SEDIMENT CONTROL PLAN. THE APPLICANT SHALL HAVE THE EROSION AND SEDIMENT CONTROL PLAN ON THE SITE DURING GRADING AND CONSTRUCTION.

(E) *APPEALS.*

(1) ADMINISTRATIVE PROCEDURES: (A) IF THE RULING MADE BY THE BUILDING OFFICIAL OR HIS OR HER DESIGNEE IS UNSATISFACTORY TO THE APPLICANT/OWNER, THE APPLICANT/OWNER MAY FILE A WRITTEN APPEAL. THE APPEAL OF PLANS FOR SOIL EROSION AND SEDIMENT CONTROL SHALL BE TO THE ZONING BOARD OF REVIEW OR OTHER APPROPRIATE BOARD OF REVIEW, AS DETERMINED BY THE CITY OR TOWN COUNCIL.

(B) APPEAL PROCEDURES SHALL FOLLOW CURRENT REQUIREMENTS FOR APPEAL TO THE ABOVE-MENTIONED BOARDS.

(C) DURING THE PERIOD IN WHICH THE REQUEST FOR APPEAL IS FILED, AND UNTIL THE TIME THAT A FINAL DECISION IS RENDERED ON THE APPEAL, THE DECISION OF THE BUILDING OFFICIAL OR HIS OR HER DESIGNEE REMAINS IN EFFECT.

(2) EXPERT OPINION: THE OFFICIAL, OR HIS OR HER DESIGNEE, THE ZONING BOARD OF REVIEW, OR OTHER BOARD OF REVIEW, MAY SEEK TECHNICAL ASSISTANCE ON ANY SOIL EROSION AND SEDIMENT CONTROL PLAN. THE EXPERT OPINION MUST BE MADE AVAILABLE IN THE OFFICE OF THE BUILDING OFFICIAL, OR HIS OR HER DESIGNEE, AS A PUBLIC RECORD PRIOR TO THE APPEALS HEARING.

ARTICLE V.

SECTION 1. SOIL EROSION AND SEDIMENT CONTROL PLAN.

(A) *PLAN PREPARATION.*

THE EROSION AND SEDIMENT CONTROL PLAN SHALL BE PREPARED BY A REGISTERED ENGINEER, OR LANDSCAPE ARCHITECT OR A SOIL AND WATER CONSERVATION SOCIETY CERTIFIED EROSION AND SEDIMENT CONTROL SPECIALIST, AND COPIES OF THE PLAN SHALL BE SUBMITTED TO THE BUILDING OFFICIAL OR HIS OR HER DESIGNEE.

(B) *PLAN CONTENTS.*

THE EROSION AND SEDIMENT CONTROL PLAN SHALL INCLUDE SUFFICIENT INFORMATION ABOUT THE PROPOSED ACTIVITIES AND LAND PARCELS TO FORM A CLEAR BASIS FOR DISCUSSION AND REVIEW AND TO ASSURE COMPLIANCE WITH ALL APPLICABLE REQUIREMENTS OF THIS CHAPTER. THE PLAN SHALL BE CONSISTENT WITH THE DATA COLLECTION, DATA ANALYSIS, AND PLAN PREPARATION GUIDELINES IN THE CURRENT "RHODE ISLAND SOIL EROSION AND SEDIMENT CONTROL HANDBOOK," PREPARED BY THE U.S. DEPARTMENT OF AGRICULTURE, SOIL CONSERVATION SERVICE, R.I. DEPARTMENT OF ENVIRONMENTAL MANAGEMENT, R.I. STATE CONSERVATION COMMITTEE, AND AT A MINIMUM, SHALL CONTAIN:

(1) A NARRATIVE DESCRIBING THE PROPOSED LAND DISTURBING ACTIVITY AND THE SOIL EROSION AND SEDIMENT CONTROL MEASURES AND STORMWATER MANAGEMENT MEASURES TO BE INSTALLED TO CONTROL EROSION THAT COULD RESULT FROM THE PROPOSED ACTIVITY. SUPPORTING DOCUMENTATION, SUCH AS A DRAINAGE AREA, EXISTING SITE, AND SOIL MAPS SHALL BE PROVIDED AS REQUIRED BY THE BUILDING OFFICIAL OR HIS OR HER DESIGNEE.

(2) CONSTRUCTION DRAWINGS ILLUSTRATING IN DETAIL EXISTING AND PROPOSED CONTOURS, DRAINAGE FEATURES, AND VEGETATION; LIMITS OF CLEARING AND GRADING, THE LOCATION OF SOIL EROSION AND SEDIMENT CONTROL AND STORMWATER MANAGEMENT MEASURES, DETAIL DRAWINGS OF MEASURES; STOCK PILES AND BORROW AREAS; SEQUENCE AND STAGING OF LAND DISTURBING ACTIVITIES; AND OTHER INFORMATION NEEDED FOR CONSTRUCTION.

(3) OTHER INFORMATION OR CONSTRUCTION PLANS AND DETAILS AS DEEMED NECESSARY BY THE BUILDING OFFICIAL OR HIS OR HER DESIGNEE FOR A THOROUGH REVIEW OF THE PLAN PRIOR TO ACTION BEING TAKEN AS PRESCRIBED IN THIS CHAPTER. WITHHOLDING OR DELAY OF INFORMATION MAY BE REASONS FOR THE BUILDING OFFICIAL OR HIS OR HER DESIGNEE TO JUDGE THE

APPLICATION AS INCOMPLETE AND PROVIDING GROUNDS FOR DISAPPROVAL OF THE APPLICATION.

(C) *PERFORMANCE PRINCIPLES.*

THE CONTENTS OF THE EROSION AND SEDIMENT CONTROL PLAN SHALL CLEARLY DEMONSTRATE HOW THE PRINCIPLES, OUTLINED IN THIS SUBSECTION, HAVE BEEN MET IN THE DESIGN AND ARE TO BE ACCOMPLISHED BY THE PROPOSED DEVELOPMENT PROJECT.

(1) THE SITE SELECTED SHALL SHOW DUE REGARD FOR NATURAL DRAINAGE CHARACTERISTICS AND TOPOGRAPHY.

(2) TO THE EXTENT POSSIBLE, STEEP SLOPES SHALL BE AVOIDED.

(3) THE GRADE OF CREATED SLOPES SHALL BE MINIMIZED.

(4) POST DEVELOPMENT RUNOFF RATES SHOULD NOT EXCEED PRE DEVELOPMENT RATES, CONSISTENT WITH OTHER STORMWATER REQUIREMENTS WHICH MAY BE IN EFFECT. ANY INCREASE IN STORM RUNOFF SHALL BE RETAINED AND RECHARGED AS CLOSE AS FEASIBLE TO ITS PLACE OF ORIGIN BY MEANS OF DETENTION PONDS OR BASINS, SEEPAGE AREAS, SUBSURFACE DRAINS, POROUS PAVING, OR SIMILAR TECHNIQUE.

(5) ORIGINAL BOUNDARIES, ALIGNMENT, AND SLOPE OF WATERCOURSES WITHIN THE PROJECT LOCUS SHALL BE PRESERVED TO THE GREATEST EXTENT FEASIBLE.

(6) IN GENERAL, DRAINAGE SHALL BE DIRECTED AWAY FROM STRUCTURES INTENDED FOR HUMAN OCCUPANCY, MUNICIPAL OR UTILITY USE, OR SIMILAR STRUCTURES.

(7) ALL DRAINAGE PROVISIONS SHALL BE OF A DESIGN AND CAPACITY SO AS TO ADEQUATELY HANDLE STORMWATER RUNOFF, INCLUDING RUNOFF FROM TRIBUTARY UPSTREAM AREAS WHICH MAY BE OUTSIDE THE LOCUS OF THE PROJECT.

(8) DRAINAGE FACILITIES SHALL BE INSTALLED AS EARLY AS FEASIBLE DURING CONSTRUCTION, PRIOR TO SITE CLEARANCE, IF POSSIBLE.

(9) FILL LOCATED ADJACENT TO WATERCOURSES SHALL BE SUITABLY PROTECTED FROM EROSION BY MEANS OF RIPRAP, GABIONS, RETAINING WALLS, VEGETATIVE STABILIZATION, OR SIMILAR MEASURES.

(10) TEMPORARY VEGETATION AND/OR MULCHING SHALL BE USED TO PROTECT BARE AREAS AND STOCKPILES FROM EROSION DURING CONSTRUCTION; THE SMALLEST AREAS FEASIBLE SHALL BE EXPOSED AT ANY ONE TIME; DISTURBED AREAS SHALL BE PROTECTED DURING THE NON GROWING MONTHS, NOVEMBER THROUGH MARCH.

(11) PERMANENT VEGETATION SHALL BE PLACED IMMEDIATELY FOLLOWING FINE GRADING.

(12) TREES AND OTHER EXISTING VEGETATION SHALL BE RETAINED WHENEVER FEASIBLE; THE AREA WITHIN THE DRIPLINE SHALL BE FENCED OR ROPED OFF TO PROTECT TREES FROM CONSTRUCTION EQUIPMENT.

(13) ALL AREAS DAMAGED DURING CONSTRUCTION SHALL BE RESODDED, RESEEDDED, OR OTHERWISE RESTORED. MONITORING AND MAINTENANCE SCHEDULES, WHERE REQUIRED, SHALL BE PREDETERMINED.

(D) *EXISTING USES AND FACILITIES.*

(1) THE BUILDING OFFICIAL AND/OR HIS OR HER DESIGNEE SHALL ACCEPT PLANS FOR EXISTING USES AND FACILITIES WHICH BY THEIR NATURE MAY CAUSE EROSION AND SEDIMENTATION, SUCH AS EXCAVATION AND QUARRYING OPERATIONS; PROVIDED, THAT THIS SECTION SHALL NOT APPLY TO ARTICLE III, SECTION 1(A)(1). PLANS OR SATISFACTORY EVIDENCE TO DEMONSTRATE THAT THE EXISTING OPERATIONS ACCOMPLISH THE OBJECTIVES OF THE SECTION SHALL BE SUBMITTED TO THE BUILDING OFFICIAL AND/OR HIS/HER DESIGNEE WITHIN ONE HUNDRED TWENTY (120) DAYS FROM THE DATE OF THE DETERMINATION OF APPLICABILITY. IMPLEMENTATION OF THE PLAN SHALL BE INITIATED UPON APPROVAL OF THE PLAN.

(2) WHEN THE PREEXISTING USE IS A GRAVEL EXTRACTION OPERATION, THE PROPERTY OWNER SHALL CONDUCT THE OPERATION IN A MANNER SO AS NOT TO DEVALUE ABUTTING PROPERTIES; TO PROTECT ABUTTING PROPERTY FROM WIND EROSION AND SOIL EROSION DUE TO INCREASED RUNOFF, SEDIMENTATION OF RESERVOIRS, AND DRAINAGE SYSTEMS; AND TO LIMIT THE DEPTH OF EXTRACTION SO AS NOT TO INTERFERE WITH THE EXISTING NEARBY WATER TABLE.

ARTICLE VI. ENFORCEMENT.

SECTION 1. PERFORMANCE BOND.

(A) PERFORMANCE BOND.

(1) BEFORE APPROVING AN EROSION SEDIMENT CONTROL PLAN, THE BUILDING OFFICIAL OR HIS OR HER DESIGNEE MAY REQUIRE THE APPLICANT/OWNER TO FILE A SURETY COMPANY PERFORMANCE BOND, DEPOSIT OF MONEY, NEGOTIABLE SECURITIES, OR OTHER METHOD OF SURETY, AS SPECIFIED BY THE BUILDING OFFICIAL OR HIS OR HER DESIGNEE. WHEN ANY LAND DISTURBING ACTIVITY IS TO TAKE PLACE WITHIN ONE HUNDRED FEET (100') OF ANY WATERCOURSE OR COASTAL FEATURE OR WITHIN AN IDENTIFIED FLOOD HAZARD DISTRICT, OR ON SLOPES IN EXCESS OF TEN PERCENT (10%), THE FILING OF A PERFORMANCE BOND SHALL BE REQUIRED. THE AMOUNT OF THE BOND, AS DETERMINED BY THE PUBLIC WORKS DEPARTMENT, OR IN ITS ABSENCE, THE BUILDING OFFICIAL OR HIS OR HER DESIGNEE, SHALL BE SUFFICIENT TO COVER THE COST OF IMPLEMENTING ALL EROSION AND SEDIMENT CONTROL MEASURES AS SHOWN ON THE PLAN.

(2) THE BOND OR NEGOTIABLE SECURITY FILED BY THE APPLICANT SHALL BE SUBJECT TO APPROVAL OF THE FORM, CONTENT, AMOUNT, AND MANNER OF EXECUTION BY THE PUBLIC WORKS DIRECTOR AND THE CITY OR TOWN SOLICITOR.

(3) A PERFORMANCE BOND FOR AN EROSION SEDIMENT CONTROL PLAN FOR A SUBDIVISION MAY BE INCLUDED IN THE PERFORMANCE BOND OF THE SUBDIVISION. THE POSTING OF THE BOND AS PART OF THE SUBDIVISION PERFORMANCE BOND DOES NOT, HOWEVER, RELIEVE THE OWNER OF ANY REQUIREMENTS OF THIS ORDINANCE.

(B) NOTICE OF DEFAULT ON PERFORMANCE SECURED BY BOND.

(1) WHENEVER THE BUILDING OFFICIAL OR HIS OR HER DESIGNEE FINDS THAT A DEFAULT HAS OCCURRED IN THE PERFORMANCE OF ANY TERMS OR CONDITIONS OF THE BOND OR IN THE IMPLEMENTATION OF MEASURES SECURED BY THE BOND, WRITTEN NOTICE SHALL BE MADE TO THE APPLICANT AND TO THE SURETY OF THE BOND BY THE MUNICIPAL SOLICITOR. THE NOTICE SHALL STATE THE NATURE OF DEFAULT, WORK TO BE DONE, THE ESTIMATED COST, AND THE PERIOD OF TIME DEEMED BY THE BUILDING OFFICIAL OR HIS OR HER DESIGNEE TO BE REASONABLY NECESSARY FOR THE COMPLETION OF THE WORK.

(2) FAILURE OF THE APPLICANT TO ACKNOWLEDGE AND COMPLY WITH THE PROVISIONS AND DEADLINES OUTLINED IN THE NOTICE OF DEFAULT MEANS THE INSTITUTION, BY THE CITY OR TOWN SOLICITOR, WITHOUT FURTHER NOTICE OF PROCEEDINGS WHATSOEVER, OF APPROPRIATE MEASURES TO UTILIZE THE PERFORMANCE BOND, TO CAUSE THE REQUIRED WORK TO BE COMPLETED BY THE CITY OR TOWN, BY CONTRACT OR BY OTHER APPROPRIATE MEANS AS DETERMINED BY THE CITY OR TOWN SOLICITOR.

(C) NOTICE OF DEFAULT ON PERFORMANCE SECURED BY CASH OR NEGOTIABLE SECURITIES DEPOSIT. IF A CASH OR NEGOTIABLE SECURITIES DEPOSIT HAS BEEN POSTED BY THE APPLICANT, NOTICE AND PROCEDURE ARE THE SAME AS PROVIDED FOR IN SUBSECTION (B) OF THIS SECTION.

(D) RELEASE FROM PERFORMANCE BOND CONDITIONS.

THE PERFORMANCE BONDING REQUIREMENT SHALL REMAIN IN FULL FORCE AND EFFECT FOR TWELVE (12) MONTHS FOLLOWING COMPLETION OF THE PROJECT, OR LONGER IF DEEMED NECESSARY BY THE BUILDING OFFICIAL OR HIS OR HER DESIGNEE.

SECTION 2. APPROVAL -- EXPIRATION -- RENEWAL.

(A) EVERY APPROVAL GRANTED IN THIS ORDINANCE SHALL EXPIRE AT THE END OF THE TIME PERIOD ESTABLISHED IN THE CONDITIONS. THE DEVELOPER SHALL FULLY PERFORM AND COMPLETE ALL OF THE WORK REQUIRED WITHIN THE SPECIFIED TIME PERIOD.

(B) IF THE DEVELOPER IS UNABLE TO COMPLETE THE WORK WITHIN THE DESIGNATED TIME PERIOD, HE OR SHE SHALL, AT LEAST THIRTY (30) DAYS PRIOR TO THE EXPIRATION DATE, SUBMIT A WRITTEN REQUEST FOR AN EXTENSION OF TIME TO THE BUILDING OFFICIAL OR HIS OR HER DESIGNEE, STATING THE UNDERLYING REASONS FOR THE REQUESTED TIME EXTENSION. IF THE EXTENSION IS WARRANTED, THE BUILDING OFFICIAL OR HIS OR HER DESIGNEE MAY GRANT AN EXTENSION OF TIME UP TO A MAXIMUM OF ONE YEAR FROM THE DATE OF THE ORIGINAL DEADLINE. SUBSEQUENT EXTENSIONS UNDER THE SAME CONDITIONS MAY BE GRANTED AT THE DISCRETION OF THE BUILDING OFFICIAL.

SECTION 3. MAINTENANCE OF MEASURES.

MAINTENANCE OF ALL EROSION SEDIMENT CONTROL DEVICES UNDER THIS ORDINANCE SHALL BE THE RESPONSIBILITY OF THE OWNER. THE EROSION SEDIMENT CONTROL DEVICES SHALL BE MAINTAINED IN GOOD CONDITION AND WORKING ORDER ON A CONTINUING BASIS. WATERCOURSES ORIGINATING AND LOCATED COMPLETELY ON PRIVATE PROPERTY SHALL BE THE RESPONSIBILITY OF THE OWNER TO THEIR POINT OF OPEN DISCHARGE AT THE PROPERTY LINE OR AT A COMMUNAL WATERCOURSE WITHIN THE PROPERTY.

SECTION 4. LIABILITY OF APPLICANT.

NEITHER APPROVAL OF AN EROSION AND SEDIMENT CONTROL PLAN NOR COMPLIANCE WITH ANY CONDITION OF THIS CHAPTER SHALL RELIEVE THE OWNER/APPLICANT FROM ANY RESPONSIBILITY FOR DAMAGE TO PERSONS OR PROPERTY, NOR IMPOSE ANY LIABILITY UPON THE CITY OR TOWN FOR DAMAGES TO PERSONS OR PROPERTY.

ARTICLE VII.

SECTION 1. INSPECTIONS.

(A) *PERIODIC INSPECTIONS.*

THE PROVISIONS OF THIS ORDINANCE SHALL BE ADMINISTERED AND ENFORCED BY THE BUILDING OFFICIAL OR HIS OR HER DESIGNEE. ALL WORK SHALL BE SUBJECT TO PERIODIC INSPECTIONS BY THE BUILDING OFFICIAL, OR HIS OR HER DESIGNEE. ALL WORK SHALL BE PERFORMED IN ACCORDANCE WITH AN INSPECTION AND CONSTRUCTION CONTROL SCHEDULE APPROVED BY THE BUILDING OFFICIAL OR HIS OR HER DESIGNEE, WHO SHALL MAINTAIN A PERMANENT FILE ON ALL OF HIS OR HER INSPECTIONS. UPON COMPLETION OF THE WORK, THE DEVELOPER OR OWNER SHALL NOTIFY THE BUILDING OFFICIAL OR HIS OR HER DESIGNEE THAT ALL GRADING, DRAINAGE, EROSION AND SEDIMENT CONTROL MEASURES AND DEVICES, AND VEGETATION AND GROUND COVER PLANTING HAS BEEN COMPLETED IN CONFORMANCE WITH THE APPROVAL, ALL ATTACHED PLANS, SPECIFICATIONS, CONDITIONS, AND OTHER APPLICABLE PROVISIONS OF THIS ORDINANCE.

(B) *FINAL INSPECTION.*

(1) UPON NOTIFICATION OF THE COMPLETION BY THE OWNER, THE BUILDING OFFICIAL OR HIS OR HER DESIGNEE SHALL MAKE A FINAL INSPECTION OF THE SITE IN QUESTION, AND SHALL PREPARE A FINAL SUMMARY INSPECTION REPORT OF ITS FINDINGS WHICH SHALL BE RETAINED IN THE DEPARTMENT OF INSPECTIONS, AND IN THE DEPARTMENT OF PUBLIC WORKS' PERMANENT INSPECTIONS FILE.

(2) THE APPLICANT/OWNER MAY REQUEST THE RELEASE OF HIS OR HER PERFORMANCE BOND FROM THE BUILDING OFFICIAL OR HIS OR HER DESIGNEE TWELVE (12) MONTHS AFTER THE FINAL

SITE INSPECTION HAS BEEN COMPLETED AND APPROVED. IN THE INSTANCE WHERE THE PERFORMANCE BOND HAS BEEN POSTED WITH THE RECORDING OF A FINAL SUBDIVISION, THE BOND SHALL BE RELEASED AFTER THE BUILDING OFFICIAL OR HIS OR HER DESIGNEE HAS BEEN NOTIFIED BY THE CITY OR TOWN PLANNING DIRECTOR OF SUCCESSFUL COMPLETION OF ALL PLAT IMPROVEMENTS BY THE APPLICANT/OWNER.

ARTICLE VIII. NOTIFICATION.

SECTION 1. NONCOMPLIANCE.

IF, AT ANY STAGE, THE WORK IN PROGRESS AND/OR COMPLETED UNDER THE TERMS OF AN APPROVED EROSION AND SEDIMENT CONTROL PLAN DOES NOT CONFORM TO THE PLAN, A WRITTEN NOTICE FROM THE BUILDING OFFICIAL OR HIS OR HER DESIGNEE TO COMPLY SHALL BE TRANSMITTED BY CERTIFIED MAIL TO THE OWNER. THE NOTICE SHALL STATE THE NATURE OF THE TEMPORARY AND PERMANENT CORRECTIONS REQUIRED, AND THE TIME LIMIT WITHIN WHICH CORRECTIONS SHALL BE COMPLETED AS ESTABLISHED IN SECTION 2(B) OF THIS ARTICLE. FAILURE TO COMPLY WITH THE REQUIRED CORRECTIONS WITHIN THE SPECIFIED TIME LIMIT IS CONSIDERED A VIOLATION OF THIS ORDINANCE, IN WHICH CASE THE PERFORMANCE BOND OR CASH OR NEGOTIABLE SECURITIES DEPOSIT IS SUBJECT TO NOTICE OF DEFAULT, IN ACCORDANCE WITH SECTIONS 1(B) AND 1(C) OF ARTICLE VI.

SECTION 2. PENALTIES.

(A) REVOCATION OR SUSPENSION OF APPROVAL.

THE APPROVAL OF AN EROSION AND SEDIMENT CONTROL PLAN UNDER THIS CHAPTER MAY BE REVOKED OR SUSPENDED BY THE BUILDING OFFICIAL AND ALL WORK ON THE PROJECT HALTED FOR AN INDEFINITE TIME PERIOD BY THE BUILDING OFFICIAL AFTER WRITTEN NOTIFICATION IS TRANSMITTED BY THE BUILDING OFFICIAL TO THE DEVELOPER FOR ONE OR MORE OF THE FOLLOWING REASONS:

- (1) VIOLATION OF ANY CONDITION OF THE APPROVED PLAN, OR SPECIFICATIONS PERTAINING TO IT;
- (2) VIOLATION OF ANY PROVISION OF THIS ORDINANCE OR ANY OTHER APPLICABLE LAW, ORDINANCE, RULE, OR REGULATION RELATED TO THE WORK OR SITE OF WORK; AND
- (3) THE EXISTENCE OF ANY CONDITION OR THE PERFORMANCE OF ANY ACT CONSTITUTING OR CREATING A NUISANCE, HAZARD, OR ENDANGERMENT TO HUMAN LIFE OR THE PROPERTY OF OTHERS, OR CONTRARY TO THE SPIRIT OR INTENT OF THIS ORDINANCE.

(B) OTHER PENALTIES.

IN ADDITION, WHENEVER THERE IS A FAILURE TO COMPLY WITH THE PROVISIONS OF THIS ORDINANCE, THE CITY OR TOWN HAS THE RIGHT TO NOTIFY THE APPLICANT/OWNER THAT HE OR SHE HAS FIVE (5) DAYS FROM THE RECEIPT OF NOTICE TO TEMPORARILY CORRECT THE VIOLATIONS AND THIRTY (30) DAYS FROM RECEIPT OF NOTICE TO PERMANENTLY CORRECT THE VIOLATIONS. SHOULD THE APPLICANT OWNER FAIL TO TAKE THE TEMPORARY CORRECTIVE MEASURES WITHIN THE FIVE (5) DAY PERIOD AND THE PERMANENT CORRECTIVE MEASURES WITHIN THE THIRTY (30) DAY PERIOD, THE CITY OR TOWN THEN HAS THE RIGHT TO TAKE WHATEVER ACTIONS IT DEEMS NECESSARY TO CORRECT THE VIOLATIONS AND TO ASSERT A LIEN ON THE SUBJECT PROPERTY IN AN AMOUNT EQUAL TO THE COSTS OF REMEDIAL ACTIONS. THE LIEN SHALL BE ENFORCED IN THE MANNER PROVIDED OR AUTHORIZED BY LAW FOR THE ENFORCEMENT OF COMMON LAW LIENS ON PERSONAL PROPERTY. THE LIEN SHALL BE RECORDED WITH THE RECORDS OF LAND EVIDENCE OF THE MUNICIPALITY, AND THE LIEN DOES INCUR LEGAL INTEREST FROM THE DATE OF RECORDING. THE IMPOSITION OF ANY PENALTY SHALL NOT EXEMPT THE OFFENDER FROM COMPLIANCE WITH THE PROVISIONS OF THIS ORDINANCE, INCLUDING REVOCATION OF THE PERFORMANCE BOND OR

ASSESSMENT OF A LIEN ON THE PROPERTY BY THE CITY OR TOWN.

(C) IN ADDITION TO ANY OTHER PENALTIES PROVIDED IN THIS SECTION, A CITY OR TOWN IS AUTHORIZED AND EMPOWERED TO PROVIDE BY LOCAL ORDINANCE FOR PENALTIES AND/OR FINES OF NOT MORE THAN TWO HUNDRED FIFTY DOLLARS (\$ 250) FOR FAILURE TO SUBMIT PLANS ON OR BEFORE THE DATE ON WHICH THE PLAN MUST BE SUBMITTED, AS STATED IN THE DETERMINATION OF APPLICABILITY. EACH DAY THAT THE PLAN IS NOT SUBMITTED CONSTITUTES A SEPARATE OFFENSE.

ARTICLE IX.

SECTION I. DEFINITION OF SELECTED TERMS.

(A) *APPLICANT: ANY PERSONS, CORPORATION, OR PUBLIC OR PRIVATE ORGANIZATION PROPOSING A DEVELOPMENT WHICH WOULD INVOLVE DISTURBANCE TO THE NATURAL TERRAIN AS DEFINED IN THIS ORDINANCE.*

(B) *COASTAL FEATURE: COASTAL BEACHES AND DUNES, BARRIER BEACHES, COASTAL WETLANDS, COASTAL CLIFFS, BLUFFS, AND BANKS, ROCKY SHORES, AND MANMADE SHORELINES AS DEFINED IN "THE STATE OF RHODE ISLAND COASTAL RESOURCES MANAGEMENT PROGRAM" AS AMENDED JUNE 28, 1983.*

(C) *CUT: AN EXCAVATION. THE DIFFERENCE BETWEEN A POINT ON THE ORIGINAL GROUND AND A DESIGNATED POINT OF LOWER ELEVATION ON THE FINAL GRADE. ALSO, THE MATERIAL REMOVED IN EXCAVATION.*

(D) *DEVELOPMENT PROJECT: ANY CONSTRUCTION, RECONSTRUCTION, DEMOLITION, OR REMOVAL OF STRUCTURES, ROADWAYS, PARKING, OR OTHER PAVED AREAS, UTILITIES, OR OTHER SIMILAR FACILITIES, INCLUDING ANY ACTION REQUIRING A BUILDING PERMIT BY THE CITY OR TOWN.*

(E) *EROSION: THE REMOVAL OF MINERAL AND/OR ORGANIC MATTER BY THE ACTION OF WIND, WATER, AND/OR GRAVITY.*

(F) *EXCAVATE: ANY ACT BY WHICH EARTH, SAND, GRAVEL, OR ANY OTHER SIMILAR MATERIAL IS DUG INTO, CUT, REMOVED, DISPLACED, RELOCATED, OR BULLDOZED, AND INCLUDES THE RESULTING CONDITIONS.*

(G) *FILL: ANY ACT BY WHICH EARTH, SAND, OR OTHER MATERIAL IS PLACED OR MOVED TO A NEW LOCATION ABOVE GROUND. THE FILL IS ALSO THE DIFFERENCE IN ELEVATION BETWEEN A POINT OF EXISTING UNDISTURBED GROUND AND A DESIGNATED POINT OF HIGHER ELEVATION OF THE FINAL GRADE.*

(H) *LAND DISTURBING ACTIVITY: ANY PHYSICAL LAND DEVELOPMENT ACTIVITY WHICH INCLUDES SUCH ACTIONS AS CLEARANCE OF VEGETATION, MOVING OR FILLING OF LAND, REMOVAL OR EXCAVATION OF SOIL OR MINERAL RESOURCES, OR SIMILAR ACTIVITIES.*

(I) *RUNOFF: THE SURFACE WATER DISCHARGE OR RATE OF DISCHARGE OF A GIVEN WATERSHED AFTER A FALL OF RAIN OR SNOW, AND INCLUDING SEEPAGE FLOWS THAT DO NOT ENTER THE SOIL BUT RUN OFF THE SURFACE OF THE LAND. ALSO, THAT PORTION OF WATER THAT IS NOT ABSORBED BY THE SOIL, BUT RUNS OFF THE LAND SURFACE.*

(J) *SEDIMENT: SOLID MATERIAL, BOTH MINERAL AND/OR ORGANIC, THAT IS IN SUSPENSION, IS BEING TRANSPORTED, OR HAS BEEN MOVED FROM ITS SITE OR ORIGIN BY WIND, WATER, AND/OR GRAVITY AS A PRODUCT OF EROSION.*

(K) *SOIL EROSION AND SEDIMENT CONTROL PLAN: THE APPROVED DOCUMENT REQUIRED BEFORE ANY PERSON MAY CAUSE A DISTURBANCE TO THE NATURAL TERRAIN WITHIN THE CITY OR TOWN AS REGULATED BY THIS ORDINANCE. ALSO, REFERRED TO AS EROSION AND SEDIMENT CONTROL PLAN, APPROVED PLAN.*

(L) WATERCOURSE: THE TERM WATERCOURSE MEANS ANY TIDEWATER OR COASTAL WETLAND AT ITS MEAN HIGH WATER LEVEL, AND ANY FRESHWATER WETLAND AT ITS SEASONAL HIGH WATER LEVEL, INCLUDING, BUT NOT LIMITED TO, ANY RIVER, STREAM, BROOK, POND, LAKE, SWAMP, MARSH BOG, FEN, WET MEADOW, OR ANY OTHER STANDING OR FLOWING BODY OF WATER. THE EDGE OF THE WATERCOURSE SHALL BE USED FOR DELINEATION PURPOSES.

APPENDIX B – VIRGINIA PESTICIDE CONTROL ACT PENALTY PROVISIONS

VA. CODE ANN. § 3.1-249.70 (2003)

A. EXCEPT AS OTHERWISE PROVIDED, ANY PERSON WHO KNOWINGLY VIOLATES ANY PROVISIONS OF THIS CHAPTER OR REGULATIONS PROMULGATED HEREUNDER SHALL BE GUILTY OF A CLASS 1 MISDEMEANOR AND SHALL BE SUBJECT TO AN ADDITIONAL FINE OF UP TO \$ 500,000 IF DEATH OR SERIOUS PHYSICAL HARM TO ANY PERSON IS CAUSED BY THE VIOLATION.

B. THE COMMISSIONER MAY BRING AN ACTION TO ENJOIN THE VIOLATION OR THREATENED VIOLATION OF ANY PROVISION OF THIS CHAPTER, OR ANY REGULATION MADE PURSUANT THERETO, IN THE CIRCUIT COURT OF THE COUNTY OR CITY IN WHICH THE VIOLATION OCCURS OR IS ABOUT TO OCCUR, OR IN THE CIRCUIT COURT OF THE CITY OF RICHMOND IF THE VIOLATION MAY AFFECT MORE THAN ONE COUNTY OR CITY. THE COMMISSIONER MAY REQUEST EITHER THE ATTORNEY FOR THE COMMONWEALTH OR THE ATTORNEY GENERAL TO BRING ACTION UNDER THIS SECTION, WHEN APPROPRIATE.

C. ANY PERSON VIOLATING A PROVISION OF THIS CHAPTER OR REGULATIONS ADOPTED THEREUNDER MAY BE ASSESSED A CIVIL PENALTY BY THE BOARD. IN DETERMINING THE AMOUNT OF ANY CIVIL PENALTY, THE BOARD SHALL GIVE DUE CONSIDERATION TO (I) THE HISTORY OF PREVIOUS VIOLATIONS OF THE LICENSEE OR PERSON, (II) THE SERIOUSNESS OF THE VIOLATION INCLUDING ANY IRREPARABLE HARM TO THE ENVIRONMENT AND ANY HAZARDS TO THE HEALTH AND SAFETY OF THE PUBLIC, AND (III) THE DEMONSTRATED GOOD FAITH OF THE LICENSEE OR PERSON CHARGED IN ATTEMPTING TO ACHIEVE COMPLIANCE WITH THE CHAPTER AFTER NOTIFICATION OF THE VIOLATION.

D. THE BOARD MAY ASSESS A PENALTY OF NOT MORE THAN \$ 1,000 FOR A VIOLATION THAT IS LESS THAN SERIOUS, NOT MORE THAN \$ 5,000 FOR A SERIOUS VIOLATION, AND NOT MORE THAN \$ 20,000 FOR A REPEAT OR KNOWING VIOLATION. THE BOARD MAY ASSESS AN ADDITIONAL PENALTY OF UP TO \$ 100,000 FOR ANY VIOLATION WHICH CAUSES SERIOUS DAMAGE TO THE ENVIRONMENT, SERIOUS INJURY TO PROPERTY, OR SERIOUS INJURY TO OR DEATH OF ANY PERSON.

E. CIVIL PENALTIES ASSESSED UNDER THIS SECTION SHALL BE PAID INTO A SPECIAL FUND IN THE STATE TREASURY TO THE CREDIT OF THE DEPARTMENT TO BE USED IN CARRYING OUT THE PURPOSES OF THIS CHAPTER. THE COMMISSIONER SHALL PRESCRIBE PROCEDURES FOR PAYMENT OF PENALTIES WHICH ARE NOT CONTESTED BY LICENSEES OR PERSONS. THE PROCEDURES SHALL INCLUDE PROVISIONS FOR A LICENSEE OR PERSON TO CONSENT TO ABATEMENT OF THE ALLEGED VIOLATION AND PAY A PENALTY OR NEGOTIATED SUM IN LIEU OF SUCH PENALTY WITHOUT ADMISSION OF CIVIL LIABILITY ARISING FROM SUCH ALLEGED VIOLATION.

F. THE PERSON OR BUSINESS TO WHOM A CIVIL PENALTY IS ISSUED SHALL HAVE FIFTEEN DAYS TO REQUEST AN INFORMAL FACT-FINDING CONFERENCE, HELD PURSUANT TO § 2.2-4019, TO CHALLENGE THE FACT OR AMOUNT OF THE CIVIL PENALTY. IF THE CIVIL PENALTY IS UPHELD, THE PERSON OR BUSINESS AGAINST WHOM THE CIVIL PENALTY HAS BEEN UPHELD SHALL HAVE FIFTEEN DAYS TO PAY THE PROPOSED PENALTY IN FULL, OR IF THE PERSON OR BUSINESS WISHES TO CONTEST EITHER THE AMOUNT OF THE PENALTY OR THE FACT OF THE VIOLATION, FORWARD THE

PROPOSED AMOUNT TO THE COMMISSION'S OFFICE FOR PLACEMENT IN AN INTEREST-BEARING TRUST ACCOUNT IN THE STATE TREASURER'S OFFICE. IF THROUGH ADMINISTRATIVE OR JUDICIAL REVIEW OF THE PROPOSED PENALTY, IT IS DETERMINED THAT NO VIOLATION OCCURRED, OR THAT THE AMOUNT OF PENALTY SHOULD BE REDUCED, THE COMMISSIONER SHALL WITHIN THIRTY DAYS OF THAT DETERMINATION REMIT THE APPROPRIATE AMOUNT TO THE PERSON OR BUSINESS WITH INTEREST ACCRUED THEREON. IF THE VIOLATION IS UPHELD, THE AMOUNT COLLECTED SHALL BE PAID INTO A SPECIAL FUND IN THE STATE TREASURY TO THE CREDIT OF THE DEPARTMENT AS PROVIDED IN § 3.1-249.34.

FINAL ORDERS OF THE BOARD MAY BE RECORDED, ENFORCED AND SATISFIED AS ORDERS OR DECREES OF A CIRCUIT COURT UPON CERTIFICATION OF SUCH ORDERS BY THE SECRETARY OF THE BOARD. SUCH ORDERS MAY BE APPEALED IN ACCORDANCE WITH THE PROVISIONS OF THE ADMINISTRATIVE PROCESS ACT (§ 2.2-4000 ET SEQ.).