

January 21, 2005

Mr. Bruce Williams
U.S. Army Corps of Engineers-Norfolk District
803 Front Street
Norfolk, Virginia 23510-1096

Re: Comments on December, 2004 Draft Revisions to a Proposed Requirement
Relative to Low Impact Development

Dear Mr. Williams:

The Northern Virginia Chapter of the National Association of Industrial and Office Properties (NAIOP) appreciates the opportunity to provide further comments on the Proposed Requirements Relative to Low Impact Development ("LID Requirements") drafted by the Norfolk District of the U.S. Army Corps of Engineers. By memo of December 17, 2004, you have asked that such comments be submitted by January 21, 2005.

NAIOP is disappointed that the December revisions do not address our concerns. Fundamentally, the establishment of LID Requirements by the Norfolk District is untimely and unwise. The Norfolk District LID Regulations are premature. There are ongoing efforts of the Virginia Department of Environmental Quality (DEQ), the Department of Conservation and Recreation (DCR), the Corps and other entities to assess and educate the public about low impact development (LID) practices. The work of this interagency, federal, state and local working group should continue, rather than having the federal government jump ahead with mandatory requirements. NAIOP urges the Norfolk District to withdraw its proposed LID Requirements.

We offer the following additional comments on the December 2004 memo concerning the proposed LID Regulations.

The December "Introduction" Improperly Criticizes and Condemns
Conventional Stormwater Management Without Support

The "Introduction" provided with your December 2004 memo includes assertions that conventional stormwater management practices have various adverse impacts on water quality, as a predicate for the imposition of LID Requirements. Given that conventional stormwater management arises from clear and longstanding federal, state and local regulation, NAIOP believes that this kind of wholesale criticism is unwarranted and highly inappropriate. The "Introduction" leaves the impression that the Norfolk District has knowledge and information about stormwater management superior to that assembled by the U. S. Environmental Protection, the Commonwealth of Virginia and the many local governments that vigorously regulate stormwater. If deficiencies in conventional stormwater management are the justification for the LID Requirements, the Norfolk District

has failed to meet its burden to demonstrate that existing stormwater management regulations are not adequate.

LID is Not "Practicable" and the Corps Conclusions on "Practicability" are Not Supported

The December memo is based on an unsupported conclusion that LID is a practicable alternative to conventional stormwater management in most instances. This conclusion seems to be based on the unsupported assertion that conventional stormwater management results in adverse impacts in most instances. The December memo identifies certain exceptions, where submittal of the LID information would not be required because of a blanket determination that LID is not a practicable alternative in such circumstances. NAIOP agrees that LID is not practicable and should not be required as set forth in the December memo. While NAIOP applauds the efforts to explain where LID would or would not be practicable, the Corps cannot apply a piece meal view of practicable alternatives to impose heavy regulatory burdens.

The LID Requirements would impose improper costs and burdens that contradict the Norfolk District's apparent view that LID is a practicable alternative to conventional stormwater management. The Norfolk District has ignored consideration of costs and expenses, an essential element of "practicability" and "feasibility" under federal regulations. If the Corps relies on the concept of "practicability" for authority, then the LID Requirements must be clarified to ensure that the issue of economic viability, and how it relates to product type, is not forgotten. For example, a green roof costing \$20/SF may be practicable for a 20 story office building in Tysons Corner because it costs just \$1.10/rentable SF (or 1.5% of the base building cost) – but not practicable for a 1 story office building in Woodbridge because it costs \$20/rentable SF (or 25 to 50% of the base building cost). Currently, the LID Requirements do not address any of these economic feasibility issues. It makes no sense to require a burdensome and costly LID analysis if the result will be impracticable.

Also related to "practicability" and "feasibility" are the issues of long term maintenance and replacement costs. The proposed LID Requirements impose costly and burdensome initial evaluations, as the LID checklist relies on detailed site analysis and modeling. However, the proposal does not address or consider the long term costs. LID involves alternate stormwater management features, such as infiltration systems, rain gardens, rain barrels, vegetated swales and vegetated filter strips, and other techniques to improve on-site water retention. These features will require long term operation and maintenance, at a different level of cost and effort than traditional stormwater controls. The Corps must evaluate information on the long term costs of LID features if it is considering the practicability of LID.

On an environmental level, the LID Requirements fail to address any of the issues concerning measurements or monitoring for compliance, in the short or long term. LID cannot be a practicable alternative to conventional stormwater management unless the LID practices meet the same or comparable standards for water quality.

The Norfolk District proposal does not address this aspect of the LID Requirements, and thus fails to demonstrate the "practicability" of LID.

The Interagency Cooperative Process Should be Completed Before Federal Requirements are Established

Before the Corps establishes additional LID regulatory requirements, the Corps, Virginia state agencies and local governments should continue to work to develop DCR regulations and a Technical Manual. In addition, LID should be implemented only when there is a clear integration of the overlapping regulations governing stormwater discharges that can be found in wetlands permit conditions (the Virginia Pollutant Discharge Elimination System (VPDES) program, DCR's Erosion and Sediment Control Program, local site and subdivision review practices, and CBLAB's program) into one systematic approach that can be implemented at the local level plan approval process. Trying to overlay a federal LID requirement before these steps are taken will result in confusion and additional regulatory burden for all of the agencies, as well as the applicants.

The revised "Introduction" provided with your memo of December 17, 2004 suggests that the LID Requirements do not conflict with state and local standards because neither state nor local law "specifically preclude the use of LID practices (design strategies)." This statement responds to a non-issue. NAIOP and others are concerned with the potential for duplication of effort and conflicts in practice between the federal LID Requirements and the stormwater and land use management decisions made by localities (concerning matters such as density, type of development, type of water quality management systems, etc.) Our prior comments did not suggest that state or local law prohibited use of LID practices, although in many instances that is the practical result. Rather, the affirmative stormwater and water quality management controls utilized in Virginia present opportunities for multiple inconsistencies with the LID Requirements, on an as applied basis. Put bluntly, when a locality is satisfied with conventional stormwater management and desires particular land uses and densities, federal LID Requirements will result in multiple conflicts as applied.

The December memo expresses the Norfolk District's desire to be involved in pre-application planning with prospective permit applicants and review or comment on local government review of "preliminary plans." The text states: "This will ensure that project proponents and the locality are aware of our comments early in the review process and that our comments are fully considered as the project design proceeds." While early coordination among regulators is generally helpful, this level of involvement seems unrealistic and inappropriate. As set out more fully below, the Corps of Engineers is not authorized to regulate land uses. The Norfolk District appears to be overstepping its bounds seeking to influence local land use through imposition of these LID Requirements on applicants. NAIOP believes that this potential for interference with local government could be avoided if the LID Regulations were withdrawn and the Corps continued to work on a cooperative and voluntary basis with other levels of government.

Technical Manuals Should be Prepared Before Adopting the LID Regulations.

There should be Technical Manuals prepared that provide for the implementation of LID in the Commonwealth of Virginia in a consistent manner to prevent certain projects from being placed at a competitive disadvantage; and so that regulators and site engineers both have a clear understanding of LID design requirements. This is critical since LID practices are still in its infancy, as evidenced by the difficulty agreeing upon a definition of LID, let alone specific design specifications.

The proposed LID Checklist does not substitute for Technical Manuals. Technical Manuals need to be prepared so that techniques meant for the flatter and sandier soils of the coastal plain are not "forced" to work in clayey soil types, karst conditions, or steep terrain. Technical Manuals can assist in the standards for both simple and complex matters, from the types of impervious surfaces that may be suitable for particular building purposes to the relative efficacy of different systems of stormwater management. The technical disciplines have not reached consensus on many of the appropriate standards and methodologies for LID. If the LID Regulations go forward, there is a serious potential for conflicting technical standards throughout Virginia.

The Proposed LID Requirements are not Consistent with Federal Law and Policy

The Corps Should not be Permitting Stormwater Management. The Corps' authority under the Clean Water Act is limited to permitting discharge of fill into waters of the United States. The Corps lacks authority to impose permit conditions related to stormwater management. The proposed LID Checklist and calculations concern activities that do not occur in jurisdictional waters regulated by the Corps and which are subject to other federal and state authorities.

Stormwater management programs constitute a method to protect water quality from certain types of consequences. The Corps' regulations are clear that water quality concerns are covered exclusively through the Section 401 state water quality certification, which "will be considered conclusive with respect to water quality considerations" unless a site specific objection is raised by the Environmental Protection Agency. 33 C.F.R. § 320.4 (d). If a project is certified pursuant to Section 401 authority, the Corps must accept that certification.

Stormwater is non-point source pollution under the Clean Water Act, which does not require any permit except when collected and discharged to waters of the United States, where it may become subject to the Section 402 National Pollutant Discharge Elimination System (NPDES) stormwater permit requirement. The NPDES stormwater permit program (in Virginia, VPDES) has specific terms and scope of coverage that do not include the LID requirements proposed by the District. Where an entity holds and complies with a valid Section 402 stormwater permit or is exempt from the Clean Water Act permit requirement as non-point

source pollution, the Corps lacks authority to address stormwater management in a Section 404 permit.

Independent of other legal conflicts between the proposed requirement and other permit requirements, the proposed LID Requirement represents a duplication of effort and potential conflict between stormwater management programs and the Corps program. Corps' regulations wisely counsel against such duplication, in many places. "The Corps seeks to avoid unnecessary regulatory controls." 33 C.F.R. § 320.1(3). "The Corps believes that state and federal regulatory programs should complement each other rather than duplicate one another." 33 C.F.R. § 320.1(5).

Stormwater management programs are implemented by local governments as part of their zoning, subdivision and site plan ordinances – as well as public facilities manuals. Corps regulations are clear that: "The primary responsibility for determining zoning and land use matters rests with state, local and tribal governments. The district engineer will normally accept decisions by such governments on those matters unless there are significant issues of overriding national importance." 33 C.F.R. § 320.4(j). Second guessing land planning determinations for stormwater management is contrary to this regulation. At this stage of its development, it is clear that LID is not a significant issue of overriding national importance.

The Proposed LID Requirements Are Not Supported by Regulatory Standards for Minimizing Impacts. The Corps apparently believes that it has authority to impose the LID Requirements as part of reviewing a permit application to "ensure that developments are designed to minimize their impact on waters and wetlands." This articulated reason does not escape the legal issues identified above. Avoidance and minimization of impacts should focus on the impacts of the regulated activity, that is, the filling for which the applicant needs the permit. Virtually all of the information required on the proposed LID Site Design Checklist concerns impacts to uplands, because the focus is the water retention capacity of uplands. Only indirectly do the LID Requirements (if incorporated into permit terms) relate to water quality. And, as noted above, management of water quality related to stormwater is not subject to Corps of Engineer permit authority. The Corps would be imposing a significant cost and regulatory burden on permit applicants that it has not shown is related to reducing impacts from the fill that it can permit.

The LID Requirements Would be Unfairly Applied. The December 17, 2004 memo indicates that the LID Requirement would be applied only to "commercial and institutional developments." It is inherently suspect to distinguish among types of permit applicants without any apparent reason, raising concerns over whether the requirement meets standards of due process. If local land use planning and stormwater management is sufficient for other permittees, why should only some permittees bear the burden of the Corps' LID Requirement?

Long Term Compliance and Enforcement Has Been Ignored. The LID Requirements do not address how Section 404 permit terms would relate to the

long term operations of this alternative to conventional stormwater management. The Section 404 permit is generally issued to a developer, initial property owner or construction company. For the majority of "commercial and institutional developments" proposed to be subject to the LID Requirements, long term maintenance and operation of the property generally passes to subsequent owners. There are significant practical issues concerning how future LID practices imposed by the Corps would be managed. It is difficult to expect that the Corps will be able to enforce terms concerning maintenance of LID land management terms, such as infiltration systems, rain gardens, rain barrels, vegetated swales and vegetated filter strips, and other techniques to improve on-site water retention, in such circumstances.

Conventional stormwater management practices are monitored and enforced by local governments, through their permit programs and oversight of land use practices. The LID Requirements would not only involve detailed and complicated methodologies on the ground, but also circumvent the existing local processes for compliance and enforcement. The ongoing compliance issues are among the reasons why it is preferable for LID requirements to be set by local jurisdictions, rather than the Corps of Engineers. Such an approach would be consistent with the structure of the Corps' permit regulations that clearly keep the federal government out of the business of detailed land management.

Conclusion

The LID stakeholders process and interagency efforts have been commendable. There remains much work to be done, in educating all levels of the public and private sector, to the benefits and appropriate use of LID. NAIOP supports these efforts, but maintains that sound policy and legal restrictions require that the implementation of LID be done at the local and State government levels, not through the Corps permit program.

NAIOP and its members stand ready to work with the Norfolk District and the working group to improve understanding of LID practices. We look forward to the day when all of the involved entities can reach consensus on LID. Until that time, however, NAIOP recommends that the Norfolk District withdraw its LID proposed requirement.

Sincerely,



Martha D. Marks
President

cc: Mr. W. Tayloe Murphy, Jr., VDNR
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