

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF ENVIRONMENTAL QUALITY (DEQ)
HB 206 Small Renewable Energy Projects: 2023 Regulatory Advisory Panel (RAP)

2023 RAP Meeting #4

Thursday, September 28, 2023 | 10 am – 3 pm

Meeting Location: DEQ Piedmont Regional Office | 4949-A Cox Road | Glen Allen, VA 23060

Facilitated by: Tanya Denckla Cobb | Michelle Montserrat Oliva
Institute for Engagement & Negotiation (IEN), University of Virginia

Note re Public Attendance: While the 2023 RAP meetings are open to the public, there will not be an opportunity for public comment during the meetings. As required, there will be a public comment period later in the regulations drafting process, which will be announced on [Virginia Regulatory Town Hall](#). For more information, please refer to the Virginia Register of Regulations website that explains the [Regulatory Development Process](#).

AGENDA

9:30 Sign-in

- *Please aim to arrive during the 9:30-10:00 am window for sign-in/access.*
- Participants will need to be buzzed in and receive a Visitor Badge.
- There is no guest wi-fi. Please plan to download or print materials in advance and/or use your own mobile hotspot. Only a limited number of copies will be printed for reference.

10:00 Welcome & Today's Agenda

Co-Facilitators for the RAP Process:

Tanya Denckla Cobb, Director, IEN

Michelle Montserrat Oliva, Associate Consultant, IEN

Our Goal as Facilitators and DEQ/lead convener:

Participation by all stakeholders to help make the **best possible** set of regulations and process.

“Best possible” meaning that in implementation:

- Balances the interests of protecting of prime ag/forest land with renewable energy generation
- Feasible, not overly complicated, understandable
- Addresses the interests of as many of the stakeholders as possible
- Grounded in science and expertise

10:15 DEQ Draft Proposals: Local Government Interaction and Easement Requirements

Session will be continued after lunch.

Jonathan Rak, Regulatory Analyst, DEQ

With Tanya Denckla Cobb and Michelle Oliva

SESSION FORMAT

1. DEQ presents 1 proposal or a group of related proposals
2. RAP Discussion
 - a. Questions for Clarification
 - b. Elements of support or concern
 - c. Recommendations to improve/modify? Any potential implementation challenges?

DEQ HB206 Draft Proposals: Local Government Interaction and Easement Requirements

OUTLINE: DEQ Proposals by Category

Local Control-Related Proposals

A. Locality Notification Page 2
DEQ Proposals A.1 and A.2

B. Expiration of NOI and PBR Page 3
DEQ Proposals B.1 and B.2

C. PBR Conditions and Local Approval Conditions Page 4
DEQ Proposals C.1 and C.2

Conservation Easement-Related

D. Conservation Easements for Mitigation Pages 5-6
DEQ Proposals D.1-D.6

E. Agricultural Conservation Easement Page 7
DEQ Proposal E.1-E.2

F. Forest Conservation Easement Page 7
DEQ Proposal F.1-F.2

11:45 LUNCH BREAK (on your own) – Please be back by 1pm – [Nearby Restaurants](#)

*Time TBC

1:00p DEQ Draft Proposals: Local Government Interaction and Easement Requirements CONTINUED

Jonathan Rak, Regulatory Analyst, DEQ
With Tanya Denckla Cobb and Michelle Oliva

2:45 Wrap-Up/Next Steps - Adjourn at 3 pm

2023 RAP MEETINGS: 10 am-3 pm at the DEQ Piedmont Regional Office	Dates
1: Overview of the Current Situation (Informational)	Fri Jun 23
2: Issues focusing on Soil	Tue Jul 25
3: Issues focusing on Forestry	Fri Sep 8
4: Issues focusing on Local Control	Thu Sep 28
5: Wrap-up meeting	Tue Oct 31

2023 RAP Meeting Guidance: Participation Guidelines (includes changes from 2022 RAP)

Role of DEQ Representatives

- DEQ is serving in multiple roles: as lead convener, as a decision maker, and as a stakeholder
- DEQ representatives will prepare materials, present, and actively participate in the process, including gathering and synthesizing technical information for the stakeholders
- DEQ will draft the regulations

Role of RAP Members: Review DEQ draft language/rationale and provide input for DEQ to consider that will:

- Help improve the outcome (to benefit from brain trust of this group)
- Identify potential implementation challenges
- When possible, propose draft alternative language/approach
- At minimum provide comments to flag/document any serious concerns
- To do in between meetings: Review materials, bring your organization/constituency up-to-speed and consult them on what to discuss/offer input at following meeting

Primary & Alternate RAP Members

- 1 Primary representative per organization. Represents their organization/constituency. Consults within their organization for input as needed per above (Role of RAP Members)
- Alternate may be designated by the Primary to attend/participate in Primary's absence. Primary to inform DEQ who the alternate will be in advance
- If Primary is present, alternates may attend in-person meetings, but observing only
- **FOIA Reminder:** Outside of RAP in-person public meetings, RAP members may have no virtual or in-person meetings, or email threads with more than 2 people, and may only consult each other 1:1.

Role of Subject Matter Experts (SMEs)

- SMEs from State Agencies/Universities may actively participate to inform the process and provide relevant context/expertise. This may include:
 - Answering questions
 - Stepping in with information/expertise to add, clarify, or otherwise support the discussion
 - Provide expert opinions
 - If called on to do so by DEQ: May draft, advise or review draft language

Seating Protocols: Primary RAP members at the main tables; Additional SME resources, agency staff, alternates, and public in chairs along the walls.

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DRAFT MATERIALS FOR PRE-MEETING REVIEW (as of 9/21/23)

DEQ HB206 Draft Proposals: Local Government Interaction and Easement Requirements

OUTLINE: DEQ Proposals by Category

Local Control-Related Proposals

A. Locality Notification

Page 2

DEQ Proposals A.1 and A.2

B. Expiration of NOI and PBR

Page 3

DEQ Proposals B.1 and B.2

C. PBR Conditions and Local Approval Conditions

Page 4

DEQ Proposals C.1 and C.2

Conservation Easement-Related

D. Conservation Easements for Mitigation

Pages 5-6

DEQ Proposals D.1-D.6

E. Agricultural Conservation Easement

Page 7

DEQ Proposal E.1-E.2

F. Forest Conservation Easement

Page 7

DEQ Proposal F.1-F.2

Local Control-Related Proposals

A. Locality Notification

DEQ Proposal A.1

Informed by 2022 RAP Proposal

The initial Notice of Intent (NOI) shall be submitted by the applicant to DEQ as early in the project development process as practicable, but at least 90 days prior to the start of the public comment period required under [9VAC15-60-90](#). (This proposal was also presented in the slides from RAP Mtg #1)

Rationale: The notice of intent allows the public and state and local government to begin engagement with the applicant and identify issues early in the review process. This helps DEQ meet the 90-day review period once the application is filed.

The need for early notification must be balanced with:

- a) the need of the applicant to negotiate land rights confidentially and
- b) premature disclosure of a project before the parameters of the application are determined by the applicant.

90 days prior to the start of the public comment period balances these factors. Given the timeline of the application process, requiring the NOI at this time should not affect the overall speed of the review process.

DEQ Proposal A.2

Informed by 2022 RAP Proposal

The NOI shall be submitted by the applicant to the chief administrative officer and chief elected official of the locality in which the project is proposed to be located at the same time the NOI is submitted to DEQ.

Rationale: Local governments have expressed the need to coordinate with solar applicants early in the process. This allows local governments to inform the applicant of special zoning requirements or procedures and begin the community engagement process. Local officials do not always monitor the Virginia Register, so this will ensure they receive actual notice when the NOI is submitted.

B. Expiration of NOI and PBR

DEQ Proposal B.1

The NOI shall expire if no application has been submitted to DEQ within 48 months (4 years) from the NOI submittal date unless DEQ receives a written request for extension prior to the NOI expiration date. A NOI extension may be granted for an additional 36 months (3 years) at which time the NOI shall expire.

Rationale: DEQ and other state agencies use the pending NOIs to predict workload and make policy decisions based on the expected number and size of solar projects. Projects that have no chance of moving forward may remain in the queue years after they are no longer viable. This expiration will simply require filing a new NOI if an applicant wants to proceed.

DEQ Proposal B.2

A) The PBR authorization to construct and operate shall become invalid if:

- (1) a program of continuous construction or modification is not begun within 60 months (5 years) from the date the PBR or modification is issued, or
- (2) a program of construction or modification is discontinued for a period of 24 months (2 years) or more, except for a department-approved period between phases of a phased construction project.

B) The DEQ may grant an extension on a case-by-case basis.

C) The applicant for any project for which the PBR authorization has expired shall submit a new NOI, application documents, and appropriate fees to reactivate authorization.

Rationale: Most permit approvals expire if construction does not proceed or the use is not established after a certain time period. The applicant should be given a reasonable opportunity to complete construction, if approved, but this right should not last indefinitely. This requirement is consistent with protecting an applicant's vested rights. Five years allows ample time to complete the approvals and resolve any appeals.

C. PBR Conditions and Local Approval Conditions

DEQ Proposal C.1

Mitigation required in a local land use approval or locality siting agreement may satisfy the mitigation obligations required for the PBR if:

- A) The local requirement conforms to the regulations established by DEQ; and
- B) The local requirement is incorporated as a specific condition of the PBR approval.

Rationale: Under Virginia’s delegation of land use approval, DEQ and local governments may make independent decisions about the solar project consistent with their enabling legislation.

DEQ regulations provide that the local land use decision occurs first. If a locality requires a zoning condition which also satisfies a DEQ requirement, DEQ should recognize that condition. However, it is possible in the future that a zoning condition may be amended or withdrawn by the locality. Therefore, if DEQ relies on a zoning condition for compliance, the condition should be restated in the PBR approval.

Hopefully the DEQ proposed conditions for mitigation of impacts on forests and prime agricultural soils will address some of the issues considered for the local land use approval. To avoid inconsistent or duplicative requirements, the local government may align its mitigation requirements with DEQ regulations. Upon adoption, DEQ will continue its outreach activities to inform local governments about the regulations.

DEQ Proposal C.2

Local governments may not restrict where mitigation required by the PBR regulations can occur.

Rationale: Local government may prohibit or impose its own conditions on development of solar facilities. However, local government cannot modify the terms of PBR requirements through its zoning powers. Further restricting the boundaries where required mitigation may occur could become an undue burden on solar development.

Conservation Easements-Related

D. Conservation Easements for Mitigation

General Rules

DEQ Proposal D.1

Division of property. Separate conveyance of a portion of the property or division of the property is prohibited. Exceptions may be made for properties greater than 150 acres depending on conservation attributes and in accordance with the Virginia Outdoors Foundation (VOF) guidelines for the maximum number of divisions permitted.

Rationale: To protect prime agricultural soils and forest land, properties should remain as a whole to the extent possible, and divisions or creation of new parcels should be minimized. Dividing land into smaller parcels has the greatest negative impact on keeping properties intact which increases the likelihood of maintaining agricultural and forest activities.

DEQ Proposal D.2

Grading, blasting, filling, or earth removal. Grading, blasting, filling, or earth removal shall be prohibited except for:

1. creating or maintaining farm or hunting ponds.
2. erosion and sediment control.
3. as required in the construction of permitted buildings, structures, roads, driveways, trails, and utilities.

Rationale: Protection of agricultural soils and forests requires restrictions on disturbing the land. Exceptions are necessary for the permitted agriculture or silviculture related activities.

DEQ Proposal D.3

Comprehensive Plan Compliance. The limitations or obligations created by the easement must conform in all respects to the comprehensive plan at the time the easement is granted for the area in which the property is located.

Rationale: Compliance with the local government's comprehensive plan is required by [Va. Code §10.1-1010.E](#).

DEQ Proposal D.4

All easements will include:

- 1) Right of Inspection.
- 2) Enforcement.
- 3) Permission for landowner to use the property except as specifically restricted in the easement.
- 4) Procedure for Notice and Approval of changes in use.
- 5) Requirements for conversion, diversion, and extinguishment.
- 6) Subordination of deeds of trust.

Rationale: These requirements of open space easements under Virginia law are appropriate for mitigation easements.

DEQ Proposal D.5

The holder of a mitigation easement must be:

- 1) a charitable corporation, charitable association, or charitable trust complying with the Virginia Conservation Easement Act and accredited by the Land Trust Accreditation Commission or its designated subsidiary entity. *OR*
- 2) any state agency having authority to acquire land for a public use, or any county or municipality, any park authority, any public recreational facilities authority, any soil and water conservation district, any community development authority formed pursuant to Article 6 (§ 15.2-5152 et seq.) of Chapter 51 of Title 15.2, or the Virginia Recreational Facilities Authority.

Rationale: These requirements of open space easements under Virginia law are appropriate for mitigation easements. Accreditation by the Land Trust Accreditation Commission will ensure charitable organizations are capable of performing the duties of an easement holder.

E. Specific Rules for Agriculture Easements

DEQ Proposal E.1

Buildings and structures. No buildings or structures are permitted except:

- 1) Farm buildings or structures.
- 2) Dwelling units.
- 3) Buildings for the processing and sale of farm or forest products or for certain animal-related uses.
- 4) Solar facilities scaled to provide on-site power.
- 5) Wind turbines.
- 6) Small-scale miscellaneous buildings or structures.

The collective footprint of buildings, structures, parking lots, roads and other impervious surfaces will be limited to no more than 5% of the land area.

Rationale: Although the primary purpose of the easement is to protect agricultural soils, a secondary purpose is to maintain agricultural activities. The exceptions above are necessary to allow farming. The proposed restrictions are derived in part from the VOF Template February 7, 2018 Working Farm/Intensive Agriculture deed template. DEQ expects the proposed agriculture mitigation easement form will be similar to this template. Precedent for the 5% maximum footprint percentage comes from the Erosion and Sediment Control Law [Virginia Code § 62.1-44.15:51](#).

F. Specific Rules for Forest Easements

DEQ Proposal F.1

Buildings and structures. No buildings or structures are permitted except hunting cabins or recreational structures. The collective footprint of buildings, structures, parking lots, roads and other impervious surfaces will be limited to no more than 1% of the land area.

Rationale: Generally, conservation of forests is restricted to the growing and harvesting of trees, however, economically sustainable forest management requires complementary accessory uses including hunting, fishing, and recreation.

DEQ Proposal F.2

Silvicultural activities are permitted but shall conform with:

- 1) A written forest stewardship management plan prepared by either a private consulting forester or a VDOF forester. Once under easement, all forest management activities on the property must conform to the management plan, which is tailored to meet the landowner's goals and can be updated at any time as goals, forest conditions or timber markets change.
- 2) A written pre-harvest plan before any timber harvesting can take place.
- 3) Best management practices to be implemented with any timber harvesting.

Rationale: Silvicultural activity is defined in [Virginia Code Section 10.1-1181.1](#). The proposed restrictions on silvicultural activities are derived from the [Virginia Department of Forestry Working Forest](#)

[Conservation Easement Program](#). DEQ expects the proposed forest mitigation easement form will be similar to easements used by this program.