

CHESAPEAKE BAY LOCAL ASSISTANCE BOARD  
TECHNICAL ASSISTANCE DOCUMENT

Guidance Policy

Board Determination of Consistency Regarding  
Local Designation of Resource Protection Areas

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## ISSUE

Some localities have proposed to expand various portions of their Resource Protection Areas. Based on the broad guidelines within the **Chesapeake Bay Preservation and Designation and Management Regulations** (VR 173-02-01), what additional land features may localities consider for a buffer or other lands (as defined in §§ 3.2.B.4 and 3.3.B.5)?

## BACKGROUND

The buffer has been one of the most discussed requirements of the Regulations. Throughout the regulatory development process, the Department and Board have considered variable or minimum width buffer areas. In a Fall 1988 memo to the Board, the Department suggested a buffer of "variable distance based on vegetative cover, soil type, slope and other factors." Department staff collected and presented the Board with various material on buffer effectiveness and efficiency. **Proposed regulations in April 1989 said, "[a]s a minimum, the width of the buffer" shall be 100 feet landward of tidal features and waters or 50 feet landward of nontidal features and waters.** The June 28, 1989 Regulations adopted a uniform buffer area "not less than" 100 feet. During the Governor's suspension of the regulatory process in 1989, commenters placed much emphasis on an **applicant's ability to reduce the buffer** with the use of equivalent measures. Based on that influence, buffer performance standard language and criteria was developed and adopted in § 4.3.B to allow for buffer area reductions with certain conditions. Subsequent regulatory amendments have not changed any language dealing with buffer areas.

The "other lands" concept was considered as early as October 1988. Draft regulations from April 1989 proposed RPAs to include "[s]uch other lands as might qualify under the provisions of § 2.A of this Part [Part 111] that local governments deem necessary to protect the quality of state waters." The June 28, 1989 Regulations struck the language "that local governments deem." The Attorney General's Office advised the Board that this language was implied. Subsequent regulatory amendments have not changed any language dealing with "other lands. "

On October 9, 1991, the Attorney General's Office offered advice on the authority of local governments to expand Preservation Areas. On **October 10, 1991, the Board** referred this matter to its Policy Committee. The Committee met on November 8 and November 27, 1991 to discuss this issue. The critical question underlying the discussion was what did the Board intend its Regulations to mean regarding RPA expansion options. The Policy Committee and the Department developed a series of questions to help the Board make this determination. At its December 5, 1991, meeting, the Board **scheduled a special meeting** for January 17, 1992 to discuss specifically the RPA expansion issue. The discussion was continued to the Board's regular meeting on January 30, 1992. Public interest groups have taken a range of views on this issue. **Opinions from very rigid, state-imposed limits to broad local discretion were presented.** At the January 30th meeting, the Board established its guidance policy as to how this issue is interpreted.

LEGISLATIVE AND REGULATORY LANGUAGE

Section 10. 1-2107 of the Act says "the Board shall promulgate regulations which establish criteria for use by local governments to determine the ecological and geographic extent of Chesapeake Bay Preservation Areas." Section 10.1-2109.A requires Tidewater Virginia localities to "use the criteria developed by the Board to determine the extent of the Chesapeake Bay Preservation Areas within their jurisdiction."

Both the Act and Regulations provide the overall purpose for state and local programs. "The purpose of these regulations is to protect and improve the water quality of the Chesapeake Bay, its tributaries, and other state waters by minimizing the effects of human activity upon these waters and . . . the protection of certain lands called Chesapeake Bay Preservation Areas, which if improperly used or developed may result in substantial damage to the water quality of the Chesapeake Bay and its tributaries " (§ 1. 3 of the Regulations and § 10. 1-2 1 00 of the Act).

Both the Act and Regulations give five charges to localities. "[L]ocal programs shall encourage and promote: (i) protection of existing high quality state waters and restoration of all other state waters to a condition or quality that will permit afl reasonable public uses . . . (ii) safeguarding the clean waters of the Commonwealth from pollution; (iii) prevention of any increase in pollution; (iv) reduction of existing pollution; and (v) promotion of water resource conservation . . ." (§ 2. 1 of the Regulations and § 10. 1-2107. B of the Act).

**Buffer areas** are discussed in several places in the Regulations. Section 1.4 defines a buffer area as an "area of natural or established vegetation managed to protect other components of a Resource Protection Area and state waters from significant degradation due to land disturbances." Because buffer areas are part of a Resource Protection Area (RPA), the RPA definition is important as well. Both §§ 1.4 and 3.2.A define an RPA as "sensitive lands at or near the shoreline that have an intrinsic water quality value due to the ecological and biological processes they perform or are sensitive to impacts which may cause significant degradation to the quality of state waters.", Section 4.3 talks of a buffer area "effective in retarding runoff, preventing erosion, and filtering nonpoint source pollution from runoff." Section 4.3 also establishes buffer effectiveness criteria.

**Other lands** are mentioned in two places in the Regulations: under both Resource Protection Areas and Resource Management Areas (§§ 3.2.B.4 and 3.3.B.5, respectively). The RPA definition is stated earlier in this document. Resource Management Areas (RMAs) must be "land types that, if improperly used or developed, have a potential for causing significant water quality degradation or for diminishing the functional value of the Resource Protection Area" (§ 3.3.A). In addition, RMAs must be "large enough to provide significant water quality protection through the employment of the criteria in Part IV" (§ 3.3.C).

ANALYSIS

Nonpoint source (NPS) pollution is a cumulative phenomenon. Pollution loads are significant because so much land is involved. NPS pollution is also an incremental phenomenon. Lands nearest to water resources are not necessarily the lands that contribute the most pollution. However, their proximity makes impact immediate.

Early discussions about inclusion of different land types within Resource Protection Areas (RPAs) considered primary coastal sand dunes, bluffs and floodplains. The Board's ultimate rejection of mandating inclusion of these land types in RPAs was not a denial of their appropriateness as RPA features. Rather, the Board lacked sufficient evidence to require their

inclusion for *all* of Tidewater. For example, floodplains were originally RPA land types but then moved to the RMA category, in part because of difficulty determining an appropriate definition for use throughout Tidewater Virginia. A beachfront floodplain is highly dependent on storm surge levels while a riverine floodplain may depend on upstream conditions. Staff investigated many local definitions; some had drainage area limitations, others had none. The Board instead chose to adopt a broad, federally-recognized definition so as to not preclude existing local definitions.

To allow local customization, the Board also provided for the inclusion of "other lands under the provisions of subsection A of § 3.2 of this part necessary to protect the quality of state waters" (§ 3.2.B.4). In addition, the buffer language of § 3.2.B.5 sets a minimum width of 100 feet, but suggests ("not less than") the opportunity for an expansion.

Section 3.1 of the Regulations provides overall "direction for local government designation of the ecological and geographical extent of Chesapeake Bay Preservation Areas." Therefore, Part III of the Regulations establishes *designation* criteria; Part IV the *Performance* criteria. That distinction is critical to this discussion. Without a designation, the performance criteria are immaterial.

Accordingly, any discussion of the buffer area in § 4.3.B of the Regulations is intended to provide buffer performance and equivalency standards, not serve as a necessary condition for buffer designation. However, the Board and the Department note that an area capable of "retarding runoff, preventing erosion, and filtering nonpoint source pollution from runoff" (from § 4.3.B) would likely meet any other test suggested elsewhere in the Regulations. The assignment of a specific sediment and nutrient removal rate, 75% and 40% respectively, to a buffer area was intended to provide equivalency standards, not a designation criteria.

**So**, if Part III contains the designation criteria, a closer examination of § 3.2 should provide certain guidelines for both minimum and extended designations. Section 3.2.A says

*Resource Protection Areas shall consist of sensitive lands at or near the shoreline that have an intrinsic water quality value due to the ecological and biological processes they perform or are sensitive to impacts which may cause significant degradation to the quality of state waters. In their natural condition, these lands provide for the removal, reduction, or assimilation of sediments, nutrients, and potentially harmful or toxic substances in runoff entering the Bay and its tributaries, and minimize the adverse effects of human activities on state waters and aquatic resources.*

The **first** sentence is prescriptive; the second, descriptive. While **natural conditions** of such features as tidal and nontidal wetlands almost always **fit** the description of the second sentence, the 100-foot buffer area feature may not necessarily meet all or any of those functions. The effectiveness of a buffer to perform those functions, at any given time, is highly dependent on vegetative cover, soil type, slope, antecedent conditions and other factors. To serve its intended function effectively, the buffer may have to be adjusted.

Section 3.2.B.5 requires a "buffer area **not less than 100 feet** in width located adjacent to and landward of the [other RPAI components . . . and along both sides of any tributary stream" (emphasis added). This language was proposed by staff and accepted by the Board without question in September 1989. The intent is to allow localities to expand the buffer area **provided** a link to the purpose of the RPA and the Regulations can be shown.

In addition, § 3.2.B.4 appears to **require** inclusion of other lands *necessary to protect the quality of state waters*. Again, the linkage is to the purpose of the RPA and the Regulations.

In both the case of an expanded buffer or "other lands" designation, a reflection on the overall purpose of the Act and Regulations is prudent. Localities are charged with protecting and improving water quality. The Act sends a message that maintaining the status quo is not enough. The flexibility in the regulations, especially within the designation criteria, provides additional latitude for localities cognizant of those objectives.

#### INTERPRETATION OF RPA DESIGNATION REGULATIONS

1. The Board intends the Regulations to provide local governments with discretion to designate RPAs more expansive than the features prescribed in the Regulations.
2. Regarding the definition of RPA as "sensitive lands at or near the *shoreline*. . .", the Board intends the term "shoreline" to apply to tidal waters and all tributary streams (tidal and nontidal) as defined in the Regulations.
3. The Board intends the Regulations to provide local governments with discretion to designate a buffer area with a width greater than 100 feet, in accordance with the definition of "buffer area" in § 1.4 of the Regulations.
4. The Board intends that local governments may designate land features listed for consideration in the RMA designation as either expanded RPA buffer, in accordance with the definition of "buffer area" in § 1.4 of the Regulations, or as RPA "other lands" if they satisfy requirements of 3.2.A of the Regulations. That is:
  - a. Combining the definition and descriptions of buffer areas in §§ 1.4, 3.2.A and 4.3.B of the Regulations, **lands included in an expanded buffer should:**
    - (1) be an area of natural or established vegetation (§ 1.4 - definition);
    - (2) be considered to have an intrinsic water quality value due to the ecological and biological processes they perform (§ 3.2.A) *in Protecting other components of a Resource Protection Area and state waters from significant degradation due to land disturbance* (§ 1.4 - definition -- emphasis added):
      - (a) these lands provide for the removal, reduction, or assimilation of sediments, nutrients, and potentially harmful or toxic substances in runoff entering the Bay and its tributaries, and minimize the adverse effects of human activities on state waters and aquatic resources (§ 3.2.A);
      - (b) more specifically, they are considered effective in retarding runoff, preventing erosion, and filtering nonpoint source pollution from runoff (§ 4.3.B).
  - b. Relying on the description of RPA land types in § 3.2.A of the Regulations, **lands designated as RPA "other lands" should** be considered to have an

intrinsic water quality value due to the ecological and biological processes they perform.  
Either

- (1) these lands provide for the removal, reduction, or assimilation of sediments, nutrients, and potentially harmful or toxic substances in runoff entering the Bay and its tributaries, and minimize the adverse effects of human activities on state waters and aquatic resources;

or

- (2) they are considered sensitive to impacts which may cause significant degradation to the quality of state waters.

5. The Board intends that local governments should determine whether these tests are satisfied, later documenting the decision process to the Board for its determination of consistency with the Regulations.
6. If a local government determines that it has "other lands" that satisfy the above requirements of 3.2.A of the Regulations noted above, the Board intends the local government to have discretion whether or not to include such "other lands" in its RPA designation.