

Chesapeake Bay Local Assistance Board
Policy Committee
Chesapeake Bay Local Assistance Department
101 N. 14th Street, Conference Room B
Richmond, Virginia
Tuesday, February 18, 2003

Committee Members Present

The Honorable Frank L. Benser
The Honorable Donald W. Davis

Committee Members Absent

The Honorable Anna Lee Bamforth
The Honorable Stuart Mendelsohn

Staff Present

C. Scott Crafton, Acting Executive Director
Martha Little, Chief, Environmental Planning
Doug Wetmore, Principal Environmental Planner
David Kovacs, Principal Environmental Planner
Shawn Smith, Principal Environmental Planner

Mr. Benser called the meeting of the Policy Committee to order at 10:10 a.m. Mr. Benser noted that there had been two items, one had been withdrawn entitled Resource Protection Areas: Onsite NonTidal Wetland Delineation. He noted that the only item for consideration was the Resource Protection Areas: Permitted Development Activities.

Mr. Crafton provided the history of the guidance document noting that it had been before Committee on October 29, 2002, and noting that there were concerns and questions, principally from the building industry. At that time, the Committee agreed to withdraw the document and to discuss the concerns. Mr. Crafton said that he met with the homebuilders and spoke with some other stakeholders, then made revisions. He also said that there were only a few areas of concern and after those were addressed, the document was posted to the web site. Mr. Crafton said he notified stakeholders that the document was posted, asking for any additional comments by the end of January. Mr. Crafton said to date there have been no written comments and only one telephone call from a marine consultant.

Mr. Crafton said the main concern that had been raised earlier dealt with how marina facilities relate to the definition of water dependent facility and the concern of marina operators with CBLAD's traditional advice on that issue. He said the main recommendation of the building industry was to recast the list of examples so it is clear

that it is not an exhaustive list. This would allow people to propose other things without prejudice. He said several other issues that they identified were minor in nature and have been addressed.

Mr. Davis stated that there have been a number of comments and discussions about marina operations even before the Committee discussed this issue.

Mr. Benser asked if anyone from the public wished to speak on this issue. He recognized Mr. John Mathews as the first person on the sign up sheet to speak.

Mr. Mathews thanked the Committee for the opportunity to speak to the Committee. Mr. Mathews explained that he was representing not only Dare Marina and the York Marine Trade Association but also several other marinas. He said they are concerned with the notion that only the water dependent components of marinas are exempt under the terms of the draft guidance. He reviewed an old CBLAD glossary of terms and the dictionary definition of “marina”. He said the dictionary said that a marina is a basin or a dock providing secure moorings for motor boats and yachts and also offering, many times, supplies, repairs and other facilities.

Mr. Mathews said it was clear in the Regulations that marinas were to be considered a water dependent facility first, and second that marinas are not just a dock. He said a marina may include anything from service facilities to ships, ships store, painting, and storage of boats, the storage of trailers, and the sales and brokerage of boats. Mr. Mathews said that to his knowledge this is the first time the Board, as a matter of written policy, has held that only water dependent components are going to be considered water dependent facilities. He said that he was well aware that the Department has consistently, in writing, said that only the water dependent components of marinas are exempt under the Regulations. He said that his threshold question is where did that policy come from. He said that it appeared to him that the policy interpretation has the effect of an amendment to the Regulations and he thought amendments to the Regulations were not done through policy interpretation, but through the APA process.

He said he considered this policy to be a pretty significant change to the Regulations. He stated that in the Regulations a marina is considered a water dependent facility, including other structures. He said there was no question about the objective to improve water quality, the question is how to get there. He said that he was a member of the Land Use Roundtable. He went on to question where the Department came up with what constitutes the water dependent components, and the notion of redevelopment. He said that he is part owner of a marina that is an intense use of land. He said he is unlikely to be able to increase the size of the land area even if he could, or obtain the needed rezoning for the commercial purpose of a marina. He said the effort is impossible and would be a very hard row to hoe.

Mr. Mathews proposed a hypothetical situation that a marina has a 500 square foot storage shed. It happens to be inside the RPA and he would like to relocate that

storage shed. The draft guidance says if he moves it from here to there and is in the same general area of the footprint, that may not be a problem. But if he moves it outside its current footprint, somehow that is not allowed. He asked if the object of this exercise is to prevent and improve water quality, what possible difference could it make if he moved a 500 square foot impervious area from point A to point B and still maintains or puts in new BMPs that improve the water quality.

Mr. Mathews questioned why in the draft guidance it says that if your structure is located in a RPA and you lose that structure to casualty, (fire flood or wind), you may not replace that structure in the RPA or at its current location. He said that statement caused him great concern, because some marinas simply don't have the land area to deal with the notion of precluding them from redeveloping their own property the way it was before the casualty, and such a prohibition is not fair.

Mr. Mathews suggested that a better job needs to be done in proactively getting these policies out to those who are particularly impacted. He said that he does not check the agency's website on a regular basis, and there must be a better way to get the notification out especially through a mailing list and have those stakeholders in to discuss these issues. He said that there is a way to recognize the intent of the original Regulations. If there is going to be a modification of the definition of water dependent facilities, then that is a modification of the Regulations, and that should be done through the Administrative Process Act, not through a policy statement.

Mr. Benser addressed Mr. Mathew's last statement regarding allowing people to make comments on the Regulation Guidance. He noted that the Board is not required to provide public notice regarding its guidance to localities, or even to provide such guidance at all. Mr. Benser went on to say that the guidance could have been adopted without any comment from anyone and been perfectly within the law in doing that. He said that putting the information on the website and inviting comments has gone beyond what is required. He said that the Board is attempting to get as much input as possible to make the guidance as user-friendly as possible. He said that he did not know how far the Board needed to go beyond making the information available. He said he didn't feel that it was necessary to create an additional mailing list to seek comments, when the Board is not required to seek comments in the first place.

Mr. Benser recognized Ms. Little who stated that she agreed with Mr. Mathews in that the Regulations could not be changed through guidance. She noted that the Regulations had been interpreted and implemented consistently regarding the definition of water dependent facilities since 1989. She said that one thing they could not do is take guidance and try to open that definition; that would require the Regulatory process.

Ms. Smith agreed that the guidance does not have the force of the Regulations. She noted that everything that is stated in this guidance document has been communicated in some form or other for the last decade. She said that nothing is being proposed differently from previous guidance.

She went on to discuss the concern about “redevelopment” not including replacement of structures lost through casualty. She said that this statement dealt with zoning regulations is not replacement of casualty loss. She said that localities have within their ordinances, other provisions addressing replacement of structures lost through casualty. This guidance simply says that for the purpose of the local Bay Act Ordinance, replacement of a structure lost through casualty is not called “redevelopment”. Ms. Smith gave two examples where marina losses had occurred, and staff has never said they could not rebuild the marinas. She said they are marinas and have that right. She noted that it is important to understand the definition of the terms such as redevelopment.

Mr. Davis commented that he believes the interest in the issue of marinas is coming up now because, after a decade, they are finally talking about it. He said that he wasn’t there ten years ago and would like to hear the comments that the public has now. He said that he didn’t feel there was a responsibility to notify these people, but by doing so we will have a better document to approve and better guidance. Mr. Davis stated it is reasonable to talk about the issue of what is a marina and whether it is just the water dependent components that are touching the water or is it some of the other components.

Mr. Benser commented that Mr. Mathews seemed to be addressing what might happen to a marina, with its dock, ships store, club house, etc. within the RPA, if it all gets wiped out and what part of that can you replace in the redevelopment process.

Ms. Smith pointed out casualty loss is addressed in other parts of local land use codes and for this reason is not considered redevelopment per say under the Regulations.

Mr. Crafton agreed with Ms. Smith and added that this was one of the points that the Home Builder’s had concerns about. Staff had modified the draft to be clearer about what redevelopment is. He said that redevelopment from casualty loss is covered under other local government ordinances, not in the Regulations.

Mr. Mathews commented he had worked in York County and worked with many localities, and some localities may not have this provision. He said that, with respect to the replacement of the structure lost by casualty, if it is the Board’s intent to allow that, then the guidance should clarify this. That would go a long way to address the concerns that he has regarding loss by casualty. He said that in many communities, whatever advice comes out of the Chesapeake Bay Local Assistance Department is gospel, and local staff members consider it to have more power than just guidance.

Mr. Mathews urged staff to go back to the threshold, which is the Regulations, and clearly the Regulations say marinas are a water dependent facility. They do not say in parentheses “docks, driveways, pathways”. They say marinas and other boat docking structures. He said that the fact that the staff’s marina definition has been around for ten years is not supported in this document by the Regulations.

Mr. Davis suggested that the Board hear others who had signed up to speak and then the Board could consider more discussion about this.

Mr. Cason Barco, a member of the Yorktown Marine Trades Association and others came forward. Mr. Barco stated that marinas are generally located on small parcels. He said that the state health department requires that bathrooms be located within so many feet of the boats, and all localities require parking for boat slips, the boat store, and the restaurant. He said that in today's climate, it is necessary to have features such as restaurants to attract customers. Otherwise the marina operator would be out of business, not able to compete.

Mr. Michael Hanna, of Dare Marina, said he believes in the Chesapeake Bay Act, and that water quality protection requirements can be met with best management practices without taking out certain components of marinas. He said that he felt they could work together to forge a good working relationship between marinas and the Bay Act. He said that Mr. Mathews and Mr. Barco covered his concerns.

Mr. Pat Milmo, an attorney and investor in several marinas came forward. He said that marinas need to be operated in such a way that an individual can make money. He said the way the Regulations are being interpreted have seriously hampered their ability to operate a business in a profitable way, in particular for marinas on small pieces of property. He said the issue regarding indoor storage or outdoor dry storage of boats should be the same. He said that they wanted to relocate their parking lot and again had to find out what they could and couldn't do. He went on to say that boat owners wanted certain amenities at marinas, and marina operators are being hamstrung by these interpretations.

Mr. Hanna returned to comment about a situation in Virginia Beach near Rudy Inlet, which is not subject to the Bay Act, regarding parking not being a water dependent activity. He said he has spent seven years and \$100,000 for consultants, attorneys and experts before they put a shovel in the ground for six boat slips. He said that this situation got totally out of hand. He went on to say that in Yorktown they purchased a parcel located next to a marina and have been led to believe that they cannot store boat trailers there, another issue of whether storing boat trailers is a water dependent activity.

Ms. Little said it is important to hear these kinds of concerns, but it would have been more helpful if this discussion had taken place during the Regulatory process. She said the Regulations are already approved and have not changed regarding this matter. The Department has consistently interpreted the regulations the same way. She cautioned against reinterpreting Regulations thirteen years later and changing the precedents without going through the Regulatory process. She said it is important to remember that these concerns can be addressed through the exception process.

Mr. Benser said that what he is hearing is that the situations are not new with this set of guidelines, and people have been dealing with such situations for some time.

Mr. Davis commented that the exception process is administered substantially different from locality to locality, and unless the Board provides guidance to those localities, regardless of what the guidance says, localities will continue to interpret differently. He said that he has a problem with the definition from the CBLAB glossary which Mr. Mathews referenced. He said he believes the Board needs to look more closely at what this guidance says and not continue to accept what has been said in the past.

Ms. Smith noted that she put the glossary together many years ago as general guidance, and it has no Regulatory authority.

Mr. Davis said that he understood this point, but he believes the Board guidance should be more consistent in the use of reference sources for terms not defined in the Regulations.

Mr. Crafton said that in their telephone discussion, Mr. Mathews indicated that although some marine operators have been able to obtain additional land for expansion that is not always the case. Typically, if they want to expand, they are having to use the land they have. The wall they are running into is this interpretation that has been historically provided for the last twelve years. He said these are the kinds of dilemmas for which the exception process was created. He said he would be the first to admit that it functions differently in different localities, and in some it is more difficult to get an exception than in others. He said to the degree that local officials use agency guidance, it has certainly never been the Board's or the Department's intention that local governments stop using common sense and good judgment. He said that staff has always encouraged localities to ask for our assistance, and in many cases these situations can be resolved.

Mr. Wetmore said that many of the issues being discussed will be there whether this guidance is adopted or not. He said these issues can be addressed by providing more training to localities.

Mr. Benser said the problem that he is hearing is that the Regulations refer to marinas generally, but the guidance document refers to the specific permitted uses that can be located within the RPA, including the water dependent portion of the marinas. He said that he could see where people would say that the Board is changing the definition from the Regulations with the guidance by tightening or restricting what can be put in an RPA beyond what the Regulations say. He said the Regulations appear to view a marina as a whole, not just the water dependent portions of a marina.

Mr. Wetmore noted that there are other facilities that go through the same process. For example, parking facilities associated with water intake pipes are not truly water dependent.

Mr. Benser said that he understood that but, the Regulations specifically refer to marinas as the example, and they do not say just a portion of a marina. He said they refer to a marina as something that is water dependent and, therefore, is allowed by right in the

RPA. He said the guidance does not say that, but rather refers to only the water dependent portions of marinas.

Mr. Wetmore, Ms. Smith and Ms. Little said that has been the interpretation through the years.

Mr. Davis said that we discussed BZAs considering whether to grant exceptions, but the draft guidance does reference that.

Mr. Mathews said he believes there is a way to develop language that would be acceptable to everyone. Mr. Mathews said that there is a problem with the interpretation and has been for about twelve years. He said that marinas are permitted to develop in Maryland but not in Virginia. He urged the Board to take a hard look at the definition of water dependent facility.

Mr. Michael Rolband said that he had commented on this guidance policy in December. He said that it may be the time to change with the times, and it may take a Regulatory change. He said that there four types of activities; stream restoration, wetland restoration, stormwater system outfalls and casualty losses that should not require a water quality impact assessment. These are good things for water quality and should be exempt.

Ms. Little commented that the Regulations have already been adopted and staff was simply trying to provide guidance.

Mr. Benser asked if there was a motion regarding the draft guidance.

Mr. Davis motioned to table the guidance for further discussion.

Mr. Benser seconded the motion.

Mr. Benser called for the vote. All members voted aye.

Mr. Benser adjourned the meeting.