

**CHESAPEAKE BAY LOCAL ASSISTANCE BOARD'S
POLICY COMMITTEE MEETING - JULY 16, 2003
JAMES MONROE BLDG.
101 N. 14TH STREET, 17TH FLOOR CONFERENCE ROOM
RICHMOND, VIRGINIA 23219
MINUTES**

MEMBERS PRESENT:

Donald W. Davis
Colin D. Cowling
Stuart Mendelsohn

STAFF PRESENT:

C. Scott Crafton, Executive Director
Catherine Harold, Chief of Engineering
Shawn Smith, Principal Planner
Ali Baird, Special Projects Planner
Alex Adams, Environmental Scientist Planner
Brad Belo, Environmental Specialist

Mr. Davis called the meeting to order at 10:10 a.m. He called the roll, noting that there was quorum. He then introduced all the members.

Mr. Davis asked Mr. Crafton to provide opening remarks. Mr. Crafton said that the items for discussion were the two documents that staff and the Ad Hoc Committee, formed by Secretary Murphy, regarding the Determination of Water Bodies with Perennial Flow, the Administrative Procedures for the Designation and Refinement of Chesapeake Bay Preservation Area Boundaries, and the definition of contiguous and adjacent.

Mr. Crafton explained that the group consisted of environmental and natural resources stake holders, members of the building industry, local governments and that Mr. Donald Davis had represented the Board. He noted that Mr. Russ Baxter facilitated the process. Mr. Crafton introduced Mr. Baxter.

Mr. Crafton went on to say that the second issue under consideration was the Buffer Manual and that a number of people were interested in the manual and would be provided an opportunity to comment. He said that the Committee would be updated regarding comments that had already been received.

Mr. Baxter thanked everyone on behalf of Secretary Murphy for the invitation to be at the meeting. He said regarding the four issues that would be discussed, he wished to thank the committee and staff for providing a positive process. He noted even if there are issues that needed to be worked out, because of the good faith, and technical expertise of the individuals involved, he believed that the documents represented to be a good

product that would be helpful not only to the Department but to local governments. He expressed an interest in hearing any comments that would be offered.

Mr. Baxter went on to note that if other issues came up in the future that the Secretary's Office was more than willing to provide assistance as was done in this instance. He again thanked staff, the members of the Ad Hoc Committee who were present and Mr. Crafton.

Mr. Davis recognized Ms. Catherine Harold to provide information about the Committee consensus on Water Bodies with Perennial Flow, mapping requirements and definitions.

Ms. Harold provided a brief reference to the Regulations prior to March 1, 2002, which had language indicating that RPAs were areas that needed protection at or near the shoreline.

She said the new Regulations uses language to describe Resource Protection Areas as "lands adjacent to water bodies with perennial flow. She said that these lands have an intrinsic water quality value due to the ecological and biological processes they perform.

Ms. Harold went on to provide information regarding the Secretary's Ad-hoc Committee noting that they had held two meetings and created two Guidance Documents: "Determinations of Water Bodies with Perennial Flow, and Administrative Procedures for the Designation and Refinement of Chesapeake Bay Preservation Area Boundaries.

She said the Committee was charged with addressing four issues. One issue was the need to establish a method or protocol to determine whether water bodies had perennial flow. For purposes of generally depicting the location of CBPAs, 2 methods are offered in the Regulations. One was that these water bodies were depicted as perennial on the USGS maps, or the use of a scientifically valid system of in-field indicators of perennial flow.

Ms. Harold went on to explain that as part of the plan of development review process or the review of WQIA, localities are required to ensure or confirm the following: (1) A reliable site-specific evaluation is conducted to determine whether water bodies on or adjacent to the development site have perennial flow, and (2) RPA boundaries are adjusted as necessary on the site based on this evaluation.

Ms. Harold said that the Regulations did not have a definition of "Perennial Flow" and that the Committee decided that the definition should be a body of water that flows in a natural or man-made channel year-round during a year of normal precipitation. This includes, but is not limited to streams, estuaries, and tidal embayments and may include drainage ditches or channels constructed in wetlands or from former natural drainage ways that convey perennial flow. Lakes and ponds, through which a perennial stream

flows, are a part of the perennial stream. Generally, the water table is located above the streambed for most of the year and groundwater is the primary source for stream flow.

Ms. Harold explained that the Committee agreed that a stream channel is likely to be perennial when any of the following criteria are met. (1) biological Indicators are present, such as fish, crayfish, amphibians, mussels/clams, large multi-year tadpoles or benthic macroinvertebrates, that require water for entire life cycles.

These organisms include, but are not limited to Ephemeroptera (mayflies), Plecoptera (stoneflies) or Trichoptera (caddisflies).

Ms. Harold provided the following list of methods for determining perennial flow: (1) field indicator protocols; (2) ground water monitoring; (3) surface water monitoring; (4) drainage area based sampling; and (5) documented observation.

Ms. Harold briefly explained that the field indicator protocols involve evaluations of stream geomorphology, hydrology and biology. In the case of the North Carolina protocol, the North Carolina Division of Water Quality's version 2, Jan.'00 and draft interim policy dated January 16, 2003 indicated that if the score is 30 points or higher, then the stream is assumed to be perennial.

However, using the Fairfax County Method/Protocol dated May, 2003, a score of 25 points or higher indicates that a stream is perennial.

Ms. Harold said that field verification is recommended when the score is within 3 points (+_) of 30 (NC method) or 25 (Fairfax method).

Ms. Harold said the draft guidance encourages localities to retest/refine the scoring and thresholds for their jurisdictions or regions due to expected physiographic differences. These modifications should be reviewed and approved by CBLAD. She also said that it is okay for site-specific determinations, only for definitive maps where all streams are evaluated.

Ms. Harold provided a list of field protocol elements for geomorphology, and provided several in field pictures of examples of the hydrology elements.

Ms. Harold provided a list of field protocol elements for the biology aspect as well as an explanation for the use of a Piezometer. She said that stream flows could be determined by monitoring existing or new weir or flume, and calculating discharge using weir equations. She said that this method took both time and money. She noted that flow meters, collapsible flumes are generally unacceptable.

Ms. Harold went on to explain that the Ad Hoc Committee acknowledged that for smaller localities that have fewer streams, surface water monitoring or photographs taken during different seasons could be used. Also, drainage area based sampling could be conducted. She said that even though this method is not as absolute or precise, it is less

costly and will provide useful information even though some perennial streams may be missed.

There was discussion about a recent pilot study in Fairfax County, and Mr. Davis asked if Ms. Harold remembered the approximate percentage of land that had been added to the Resource Protected Area.

Ms. Salvati responded that she seemed to remember 30% of the streams became perennial.

Mr. Mendeolsohn commented that it wasn't quite doubling the total but it was a significant increase. He also said that the County is in the process of actively mapping every stream.

Ms. Harold continued her discussion about documented observations using photodocumentation that would be appropriate under some circumstances. She said that photo's needed to be accompanied with recent seasonal climate data, a date stamp for certification, at least two photo's clearly showing the channel upstream and downstream (at 200 foot increments) and identifiable landmarks that could be verified, and these photo's would be marked on the map. She advised not to go out sooner than 48 hours after a rainfall.

Ms. Harold further explained documented observations and the use of the Palmer Drought Index noting that a score of 4.0 or more is extremely wet and 4.0 or less being extremely dry or extreme drought. She also noted that the index is standardized for each area seen on the map of the United States.

She went on to discuss the Administrative Procedures Guidance Document, which addresses mapping, location and extent of RPA features. She said it recognizes that the maps are intended to be general and for planning purposes and not a detailed boundary map, unless the locality chose to make it one. She said that when a locality chooses to use just a general map, the guidance suggests that the locality have procedures to ensure that water bodies with perennial flow are identified and buffered. The guidance suggests when you might want to take a closer look at the science. She said the general maps are not required to be updated every time there is a modification. The guidance encourages localities to have a working map that is accessible to the public and routinely updated or refinements are made.

She went on to discuss the site-specific Ches Bay Maps saying they would be based on advanced surveys. Definitive maps would only depict the upstream extent of perennial flow, and not necessarily other RPA features. Enlargement or additions of features on the general map are considered to be a refinement of the boundaries and not a zoning map amendment, so they should not require approval from either the local governing body or the Chesapeake Bay Local Assistance Board. However, modifications to the definitive maps will need Board approval. She said that this would be considered a major modification by the locality.

Ms. Harold said that the guidance makes reference to the section of the Regulations pertaining to mapping and the Plan of Development Review process, where the locality is required to show whether water bodies do have perennial flow and they are required to make the necessary adjustments to the RPA boundaries. She noted that all the provisions of the Chesapeake Bay Preservation Act apply to all of the newly established RPA areas.

She went on to note that localities are required to delineate RPA/RMA boundaries on plats and site plans. A notation needs to be made on plats that have RPAs, requiring retention of an undisturbed and vegetated 100 foot buffer. The buildable area should be identified on site plans for each lot during the plan of development review process based upon performance criteria and set backs requirements. Ms. Harold advised that there is also guidance on grandfathering of previously platted or developed properties that fall within the newly-designated RPAs. These are afforded administrative relief under Nonconforming Uses and Structure Guidance.

She said that the summary of the Screening Process describe a list of questions that the localities could ask an applicant regarding features that are located within 100 yards of or are on the property; is there a river, stream, creek, pond, lake, ditch, concentrated flow, spring with ground water discharge, wetlands. She noted that other sources that might indicate a closer look should be taken are solid/dotted line on the USGS map of the property or within 500 feet; NWI mapped wetlands on the property or within 100 yards; FEMA 100-year floodplain on property; or NRCS Soil Survey depicting streams or hydric soils on the site or within 100 yards.

Ms. Harold said the last items the ad hoc committee looked at were the terms “Contiguous” and “Connected”. She said that “Contiguous” applies to a nontidal wetland that is “touching” or water body with perennial flow. “Connected” means by surface flow, meaning the area is either inundated by water or the ground is saturated to the surface.

Ms. Harold provided four scenarios to demonstrate the definitions.

Mr. Davis asked if there were any questions. Mr. Cowling asked if there had been any member of the ad hoc committee representing agriculture. Mr. Baxter responded that there was no one from the agricultural community.

Mr. Cowling commented that the Fairfax definition included various species to infer perennality and noted that many of the same biological species are present around impounded water, including poultry and hog waste ponds, which under severe penalty of law could not be perennial. He suggested that the species section of the Fairfax definition should be deleted, resulting in a more locally adaptable definition.

Mr. Cowling also expressed concern that the implication that roadside ditches draining the highway could be perennial which would apply RPA rules and make it difficult to accomplish routine maintenance.

Mr. Baxter stated that this issue would definitely be taken into consideration. Mr. Mendelsohn asked if the issue had been reviewed. Mr. Baxter stated that it had not been discussed. Mr. Crafton said that at the very least this should be reviewed, and Mr. Davis agreed, pointing out that the way it was written could be interpreted that there should be buffers around all ditches. Mr. Mendelsohn expressed concerned about being able to accomplish stream restoration.

Mr. Cowling added his concerns as the guidance related to the farming community. His concerns were directed at ditches and the appearance that the guidance would require a 100 foot buffer around them. Mr. Cowling explained how farmers manage their property, what could be expected from the soils and the ground water table on the Eastern Shore, and how inappropriate it is to have guidance that would force farmers to maintain a 100 foot buffer on their property around ditches. Mr. Cowling also quoted a sentence in the Regulations where it is indicated that vegetation in the 100-foot buffer must be preserved if present and re-established where it does not exist. He went on to say that he believed a member of the farm community should be asked to provide input into the guidance that is in the best interest of the farmer.

Mr. Baxter agreed that the issue needed to be addressed and said he would ask someone from the Farm Bureau to review the guidance.

Mr. Davis called for public comment and recognized Mr. Patrick O'Hare. Mr. Hare said that he was a member of the ad hoc committee and participated on behalf of the Home Builders Association. He advised at both meetings that he attended, Mr. Cowling's concerns had been addressed by a member from the Chesapeake area, and at both meetings issues were discussed about the maintenance of ditches, and whether a 100-foot buffer was required for a roadside ditch. However, for some reason the issue was not focused on and therefore it was not addressed in the guidance. He said that the gentleman who brought the issue up in the Ad Hoc Committee meetings believed it to be a real issue. He went on to agree with Mr. Cowling that where the water table is high and much land is in cultivation, the water may stay in ditches and, under the definition, would be considered perennial and all the rules would apply to it.

He went on to say that he had submitted comments on behalf of the Home Builders Association and many of them were adopted. One that was not adopted is a recommendation that the Board, not the Department, approve any deviations from the approved protocols. He said the program is about more than administrative expedience. He was a part of the original program, as the Board's Attorney General counsel, noting that in the beginning it was difficult to get the programs up and running and most localities were kicking and screaming over the unfunded mandate. He said that time has changed and localities have come to like the program, but not necessarily for its original purpose. He said that localities are now using the program to limit growth, because that is their political philosophy within the community. He said the program was never intended for that purpose, and he is concerned that people who want to adjust the protocols will use it for that purpose and use it to implement their political agenda, when

the whole purpose is supposed to be water quality protection. He said one way to ensure that the protocols are amended appropriately would be that the proposed modifications be brought to the Board and not to the Department. He directed everyone's attention to a comment on the first page, second paragraph that says the methods presented in the guidance reflect various options that are approved by the Chesapeake Bay Local Assistance Department. He suggested that there would be much more clout if the options were approved by the Board.

His final comment regarding the ditching issue, particularly in the Tidewater area, revealed that a number of individuals are requesting continual help on the ditching issue. He said that local governments are using storm water ditches or agricultural ditches to control the way a development can be conducted regarding density and the location of roads, and there is a need to take another look.

Mr. Crafton asked if he understood correctly that localities are using the Bay Act specifically to do these things. Mr. O'Hare responded yes. Mr. O'Hare commented that he had not received information to review regarding Ms. Harold's drawings of the four scenerios explaining Contiguous and Connected. Mr. Crafton stated that he was correct and the reason that this information has not gone to the Ad Hoc Committee was due to a turnover in staff and the Departments inability to complete that document with the others. Mr. O'Hare said that was fine.

Mr. Davis asked what kind of time table members were looking at to get the information out. Mr. Crafton said the information would be coming out in the fall. Mr. Davis asked if he understood that the presentation was for information only. Mr. Baxter responded that was correct and that there would be a few more changes.

Mr. Davis called for the next speaker, Mr. Chuck Lincoln. He said that others had expressed his concerns about the two documents that Ms. Harold had presented but he did have comments regarding the buffer document. Mr. Davis responded that he would have an opportunity to express those later.

Mr. Davis recognized Ms. Joan Salvati from Chesterfield County. Ms. Salvati advised that she had also served on the Ad Hoc Committee and complimented Mr. Baxter for his ability to lead the group. She said that her comments were directed at the field indicator protocols. She said that she and staff had an opportunity to take the worksheet into the field. What came out of that was that the confirmation that this is a very new science in evaluating streams, and there is an awful lot of professional judgment that needs to be exercised. The field sheets are not quantitative but qualitative. There are a lot of precise observations, but the scoring is indicated by the use of the terms such as: absent, weak, strong and perhaps a moderate. She said that based on these facts, she could not suggest strongly enough that these protocols be tested in any locality where they are to be used. She said that whoever uses this protocol must be trained. She said that given the fact that the science evolves, she strongly recommends that the Board monitor the implementation of the protocols.

Mr. Davis asked Ms. Salvati what problems she thought a small locality would have that didn't have the expertise Chesterfield County had. Ms. Salvati responded that technical skill could be an issue and would hope that there would be a certification program. She said it does not need to be formal, but there is a need for training. She said that Chesterfield has a list of qualified experts who do field determinations and delineate RPA boundaries. She said that if she was a small locality, she would have a list of recognized, trained experts in stream methodology.

Mr. Baxter commented that Ms. Salvati's findings were one of the reasons that a single method was not chosen for determining perenniality.

Mr. Davis recognized Ms. Claudia Cotton, representing the Tidewater Builders, who stated that she echoed Mr. O'Hare's comments. She said that she was deeply concerned about the ditches, because the truth was that creatures that inhabit perennial streams also inhabit roadside ditches.

Mr. Davis recognized Mr. Phil Abraham, Virginia Home Builders Association, who expressed his concern regarding the Buffer Manual, and the fact that staff did not seek representation. He said that he believed that the problems with the buffer document have arisen because of lack of representation. He went on to state that he believed that the Board should be the approving authority and fully agreed with Mr. O'Hare's comments that the Board should be the approving authority. He stated that he was deeply concerned over issues in the buffer document that were not supported by the Regulations.

Mr. Mendelsohn thanked him for the obvious confidence that was held in Board.

Mr. Davis recognized Mr. Joe Lerch, Chesapeake Bay Foundation who expressed appreciation for the good work by Mr. Baxter and staff.

Mr. Davis recognized Mr. Mike Toalson, Virginia Home Builders Association, who commented that although these issues involve evolving science, local governments are still using the Act, and will use guidance, to apply to land already approved. He expressed deep concern about the significant impacts on development. He suggested that there needs to be care given to assuring that localities are not provided with the right to abuse the authority granted to them. He went on to compliment Mr. Baxter and others present on their work to provide fair information.

Mr. Crafton commented that there are properties that have been grandfathered. Mr. Crafton recognized that there could be issues if the properties had been zoned and not platted.

Mr. Toalson commented that the new information suggests that grandfathering applies even to lands that have already been zoned, and that having these lots platted is not the major concern. He said that another concern was the amount of acreage that had been zoned and the associated development densities approved, and that he was not talking about single lots, but hundreds of acres.

Mr. Mendelsohn commented that he was concerned about there being significantly more land impacted and as importantly, the issue of property rights. He went on to suggest that the Board be sensitive to these issues.

Mr. Davis suggested that the Board consider keeping an Ad Hoc Committee together at all times. Mr. Crafton agreed and suggested an Ad Hoc Stakeholder Committee as well.

Mr. Cowling commented that he agreed with Mr. Mendelsohn and speaking of property rights, the 4th Amendment to the Constitution was always in the back of his mind. He said that it appeared that the Amendment was being pushed to the limit.

Mr. Davis recognized Mr. Darryl Cook, James City County, who also served on the committee. Mr. Cook commented that Mr. Baxter did a great job. He went on to say that his comments would be the same as those of Ms. Salvati. He shared that when his County adopted the North Carolina protocol, the field determination threshold score was lower by several points. He said he could not suggest strongly enough that localities determine what threshold is appropriate for their jurisdiction. He also expressed caution about using just the scores 25 or 30.

Mr. Davis recognized Mr. Steve Hubble who agreed with Ms. Salvati that training is an absolute must.

Mr. Davis recognized Mr. David Kovacs who reminded everyone that the Virginia constitution requires the protection of Virginia waters, and protecting it is not an easy task.

Mr. Davis recognized Mr. Mike Toalson, Home Builders Association, who expressed concern that the agency is changing the rules in the middle of the game. He went on to say that providing guidance to people can have the same impact as providing regulations. Mr. Toalson also expressed concern that localities may make judgments that are not appropriate, based on this guidance.

Mr. Davis closed the public comment period.

Mr. Davis thanked Mr. Baxter and praised him for the good work, and in turn, Mr. Baxter thanked Department staff.

Mr. Crafton commented that he would be in touch with the Virginia Farm Bureau for comments. Mr. Baxter agreed.

Mr. Mendelsohn commented that the document needs more clarification regarding the ditching issues and is not ready for approval. Mr. Davis agreed. Mr. Mendelsohn did not want to delay approval past the September 15, 2003 Board meeting.

Mr. Davis called for discussion on Draft Riparian Buffers Guidance Manual and recognized Mr. Scott Crafton for opening comments.

Mr. Crafton stated that the Buffer Manual issue had turned into an embarrassing situation. He said that the manual was presented to the Board under the assumption that there was greater consensus and no significant issues. He said because of his work load, he did not review it personally earlier and at the time it was presented to the Board they had not had an opportunity to review it.

He said he has since reviewed the document and shares some of the same concerns that have been expressed by many commenters. He also learned that the local government advisory committee for this project apparently wanted the Department to produce a document that was strong. He pledged that the document would not say any more than the Regulations.

Mr. Crafton went on to say that the plan is to revise the document, and he has been told that staff could expect approval of their request for an extension until the end of the year of the grant under which the document has been developed.

He said that he hoped to be able to bring the Manual to Policy Committee in August.

Mr. Davis called for public comments.

Mr. O'Hare commented that he had submitted his comments on behalf of the Virginia Home Builders. He said that it was refreshing to hear how the manual had been developed. Unfortunately, it was government turned upside down. He went on to state that the only thing localities wanted to be able to say was that CBLAD said so, but that improper guidance should not be provided to these people, even if they do desire it.

Mr. Toalson commented that he accepted in good faith Mr. Crafton's comments about taking responsibility, however, he respectfully requested that the Home Builders Association be provided with the opportunity to review the document before the August meeting of the Policy Committee.

Having established that everyone present had submitted comments in writing, Mr. Davis asked if there were any further public comments. There were none.

Mr. Mendelsohn asked when the comments to the buffer document would be completed. Ms. Baird advised hopefully the end of this week or the next week.

Mr. Cowling commented that he appreciated that more time was being given to the preparation of the Manual, and Mr. Davis commented that he was concerned that localities would be including the misinformation in their ordinances.

Mr. Davis and Mr. Crafton discussed canceling the August 4th meeting of the Board and rescheduling a Policy Committee meeting for Tuesday, August 26, 2003 at 10:00 in the agency conference room. It was so decided.

Mr. Davis reminded everyone that the Northern and Southern Area Review Committees would meet on August 12, 2003 at their respective times. Mr. Davis suggested that new committee members would be assigned at that time.

Mr. Davis called for a motion to adjourn the meeting. Mr. Cowling motioned, Mr. Mendelsoh, seconded. The meeting was adjourned at 12.20p.m.