

**Chesapeake Bay Local Assistance Board  
Policy Committee  
May 8, 2007  
Richmond Virginia**

**Policy Committee Members Present**

Walter J. Sheffield, Committee Chair  
William E. Duncanson  
Beverly D. Harper

Donald W. Davis, Board Chair  
Gregory C. Evans  
Walter J. Sheffield

**Other Board Members Present**

John J. Zeugner

**DCR Staff Present**

Joseph H. Maroon, Director  
Russell W. Baxter, Deputy Director  
David C. Dowling, Policy, Planning and Budget Director  
Joan Salvati, Director, Division of Chesapeake Bay Local Assistance  
David Sacks, Assistant Director, Division of Chesapeake Bay Local Assistance  
Ryan Brown, Policy and Planning Assistant Director  
Shawn Smith, Program Analyst  
Daniel Moore, Principal Environmental Planner  
Michael R. Fletcher, Board and Constituent Services Liaison  
Carrie Hileman, Policy and Planning Intern  
Elizabeth Andrews, Office of the Attorney General  
Nathan Hughes, Watershed Specialist

**Ad Hoc Committee Members Present**

Mike Rolband, Wetland Studies  
Darryl Cook, James City County  
Patrick O'Hare, Homebuilders Association of Virginia  
Rick Thomas, Timmons Group  
John Galbraith, Virginia Tech  
Kirk Havens, Virginia Institute of Marine Science  
Bob Kerr, Kerr Environmental Services

**Call to Order**

Mr. Sheffield called the meeting to order and asked members and guests to introduce themselves.

Ms. Salvati gave the following presentation on activities staff has undertaken since the March 26, 2007, Committee meeting:

- Document amended to reflect committee comments\*
- Additional clarifications from individual comments submitted
- “Surface Flow” indicators field-tested
- Further modifications to address issues raised by Ad-hoc and Policy Committee members

\* A copy of the revised document, “Resource Protection Areas: Nontidal Wetlands” (Revised 4/19/07) is available from DCR.

Ms. Salvati reported on the results of the field testing protocol staff had proposed for the identification of surface flow in the field.

- Indicators on data form provide good indication of “wetland hydrology”
- Does not resolve “elongated” wetlands issue
- Absence of indicators provides a good screening tool documenting there is no surface flow
- Presence of indicators shows there is, or has been, surface flow at some time, but provide no conclusion of frequency, duration of extent.
- There can be substantial variability of surface flow based on a variety of local factors
- Conclusion: Field indicators alone are not a good conclusive source for determining “surface flow” as required for RPA features.

Based on the results of the testing of the field protocol and feedback from the Policy and Ad Hoc committees, the following options were presented for amending the draft Nontidal Wetlands Guidance Document: Option A

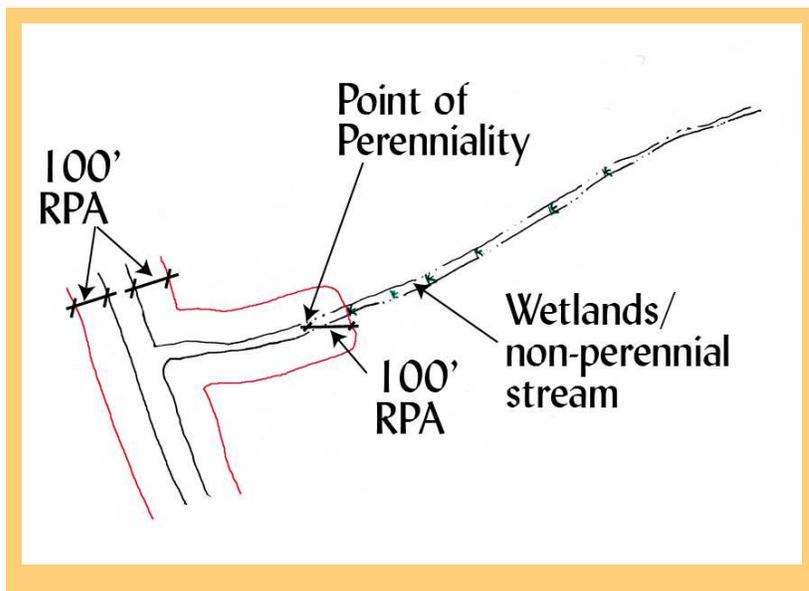
- Guidance Document retains field indicators with the understanding that they can be used as a screening tool and can be used in conjunction with other methods for determining surface flow based on local conditions.
- Incorporates clarification on the elongated wetlands issue: RPA is not required along non-perennial conveyances with wetlands located within the conveyance.

Option B

- Incorporates clarification on the elongated: wetlands issue: RPA is not required along non-perennial conveyances with wetlands located within the conveyance  
Eliminates Use of Field Data Form and Surface Flow indicators.

Ms. Salvati provided the following clarification as to how staff proposes to address elongated wetland features in the guidance document:

- Where wetlands exist solely along the edges of an intermittent or ephemeral stream and located only within the defined bed and bank of such streams are not required to be included as RPA features
- Such features may be included at local discretion.



Ms. Salvati distributed versions of the non-tidal wetlands guidance reflecting the two options. They are labeled “Draft – Option A, 5/8/2007” and “Draft – Option B, 5/8/2007”

Ms. Salvati also distributed a document, prepared by Nate Hughes entitled “Preliminary Review of Field Data Form – Indicators/Evidence of Surface Flow.” This document describes what he found when using the surface flow indicators in the field. She also distributed a list of changes made to the draft guidance documents resulting from discussion and follow-up from the March Policy Committee meeting.

Mr. Sheffield noted that the changes approved at the March meeting had been incorporated into Options A and B and the choice was now between these two options.

Mr. Davis said at the last meeting there was discussion about other lands as determined by the locality to be included. He asked if the document included guidance in that regard.

Ms. Salvati said that information had been incorporated in the draft.

Ms. Salvati said the Policy Committee’s options would be to:

- Adopt the document as distributed with the March 26 changes
- Review the two options (A and B) offered at this meeting and select or recommend approval by the full Board
- Ask staff to make additional changes based on Information Bulletin 6. She said there has been some discussion regarding that at the Ad Hoc committee, but that there was not a lot of support for that option.
- Not address the issue of nontidal wetlands associated with intermittent streams or require a 100 ft. buffer along those wetlands, but rather establish a 50 ft. or 25 ft. buffer. That would bring clarity to the question of which streams or features should be protected by a buffer, and it would also achieve some added resource protection that is not being seen.

Mr. Davis said that he would like to hear from the Attorney General's office with regard to whether the Board has the authority to impose 50 foot buffers on that type of intermittent stream, or would this require a change in the Regulations.

Ms. Andrews said that she would need to research that question.

Mr. Brown said that he believed such a requirement would necessitate a regulatory change, as there is no existing authority for it. .

Mr. Sheffield again reviewed the four options before the board as outlined above by Ms. Salvati. He asked if the committee was comfortable moving forward with discussing the options outlined.

Mr. Evans said that regarding option one that the committee did not have adequate information to know if concerns expressed after the last meeting were addressed.

Ms. Salvati said that the amended document was forwarded to all Ad Hoc committee members. Responses were received from three. She said it might be helpful to hear from the members of the Ad Hoc Committee present.

Dr. Galbraith said that he and other Ad Hoc Committee members had discussed the document as presented and as amended. He distributed a document to committee members. A copy of that document is available from DCR.

Dr. Galbraith said that it is difficult in a field situation to apply a strict definition of surface flow. Because it needs to be scientifically valid it also requires the other parameters mentioned by Ms. Salvati: frequency, definitions, duration, timing, normality of precipitation and antecedent precipitation events and more. He said that they did not believe this was manageable for agencies and localities.

He said that they tried to develop two different approaches. One is a straightforward scientific approach. It addresses the fact that intermittent stream drainage that connects

nontidal wetlands to either other nontidal wetlands or bodies of water with perennial flow or perennial duration in the case of ponds be considered an RPA feature. He said that was a strict scientific interpretation.

Dr. Galbraith said that they developed an amended definition that would require a regulatory change. He said this was for the benefit of the Policy Committee to consider, not one of the options already presented.

Dr. Galbraith said that they developed a scientific based approach as well as a management-based approach. He said the only change in the document from the original says that the new document reads, "The regulations establish the resource protection area as a shoreward component of the Chesapeake Bay Preservation Areas. RPAs are composed of tidal wetlands, nontidal wetlands with unbroken connection to the Chesapeake Bay through other wetlands or concentrated surface flow." The remainder of the definition reads as it has before.

Dr. Galbraith said that the scientific approach says that as long as you continue upstream from the Chesapeake Bay and have an unbroken connection of either an intermittent stream, a perennial stream or a wetland that you are still part of the RPA.

Ms. Salvati said the language provided by staff was essentially from the regulations and asked if Dr. Galbraith would suggest that the new definition would require a regulatory amendment.

Dr. Galbraith said it would need a change because the confusing part remains with the small part that says non-tidal wetlands connected by surface flow. That part was edited to be a strict scientific approach, realizing that intermittent streams and perennial streams are documented.

Dr. Galbraith said he included a new definition to define ephemeral flow, as it is different from intermittent flow. He said that USGA defines ephemeral flow as flow within a channel, so as soon as you have flow outside the channel it becomes intermittent flow.

He said the document that provides field evidence that surface flow has occurred can be applied outside the channel to prove intermittency. However, putting that in context, he said he added definitions that made it clear that there would be exceptions. He said that ephemeral flow would be excluded from coverage under the RPA.

Dr. Galbraith said that overflow from precipitation events in excess of 100-year events could be tempered down to as small as 10-year events. Essentially abnormally large events would be excluded.

Dr. Galbraith said that man-made ditches that cross non-hydric soils were to be excluded.

Mr. Sheffield asked if there were questions from policy committee members.

Dr. Galbraith said that one other amendment made was in the scientific approach to treat nontidal wetlands as if they were intermittent bodies of water.

Mr. Evans asked if the definition of the scientific approach meant that Dr. Galbraith intended to say there were no other valid approaches or that there was no consensus.

Dr. Galbraith said the basis for the scientific approach was that they did not feel they, as scientific advisors, could endorse the document presented as being scientifically valid and they felt the need to provide alternatives. Those alternatives were the scientific approach and the management approach that Dr. Havens would present.

Ms. Salvati asked how the management approach differed from the draft document. She asked if there was a point where there were some refinements or were there substantive changes.

Mr. Kirk Havens said that it would be more of a refinement of the draft document. He said there are exchanges to certain exemptions particularly in the elongated wetlands concept.

He said the concept that the best indicator that you have for surface flow to a wetland is that it is a wetland and that just because there are different types of vegetation on top of that sponge it is still a connection and a water clarification feature.

Mr. Havens said that looking at the document, the changes would be minimal.

Ms. Salvati said that it was then conceivable that if the Policy Committee chose either Option A or Option B they may wish to incorporate some of the changes as outlined in the management approach.

Mr. Havens said that the important consideration to convey to the Policy Committee is that the members of the Ad Hoc Committee want to help the Board make an informed decision.

Mr. Maroon asked Mr. Havens to explain the major differences between the document distributed and the staff proposal.

Mr. Havens said that the major difference pertains to Figure One, which basically says that nontidal wetlands must be mapped as RPAs since they are connected by surface flow. The assumption is that they are connected.

Mr. Havens said the only other issue associated would be in utilizing Appendix A, the Field Data Sheet, recognizing that the observation of a wetland is actually the primary indicator.

Mr. Rolband echoed the comments by Dr. Galbraith and Mr. Havens. He said that by definition, if it is a wetland and if it is contiguous to any type of wetland or perennial stream at some point in time in a given year you will have saturation of the surface and a rainfall event will occur and there will be runoff. Therefore there is surface flow, and it is connected.

Mr. Rolband said that from a decision making point it was his hope that the Board would select Option B with some revisions. He noted that he had submitted some comments to staff. He said that it was important to make a decision that was economically viable yet balanced with the environmental impacts.

Mr. Rolband said that the big change that was needed with Option B was that it did not account for the wetland ditch or wetland swale. He said that the last part of Option B that clarified intermittent streams could be expanded to include the wetland ditch issue as well as the time of year problem.

Mr. Sheffield clarified that staff will take these comments as well as those submitted in writing and review in preparation for the June 18 meeting. He asked if there were questions for Mr. Rolband.

Mr. Baxter asked that if the difference between Options A & B was the more expansive guidance as to how to undertake some sort of field screening for the surface flow issue. He asked if it was not necessary to go into that detail in the document and noted there was not a substantive difference between the two options other than A being more prescriptive in how some of the site evaluations might be undertaken.

Mr. Rolband said the problem with Option A is that the surface flow indicators are not reliable. They are already indicators of a wetland.

Mr. Sheffield called for comments from others in attendance.

Rick Thomas of Timmons Group said that while this was the first time he had seen Option B, it does appear to address the elongated wetland issue and that he agreed with the approach.

Daryll Cook with James City County said that the elongated wetlands issue is the biggest struggle faced by his county. He said the County did expand the RPA beyond what he believed to be the original intent. He said that the guidance as staff proposed to amend it would go a long way toward addressing that issue for his county.

Mr. Cook said that James City County is in the process of trying to adopt intermittent stream buffer requirements.

Bob Kerr of Kerr Environmental said that he also had not had the opportunity to thoroughly review the options. He said that he agreed that the data form in Option A

could be problematic in that it is merely used as data collection. He noted that depending on the time of year the data would differ.

Mr. Kerr said that on Option B, on the last page with the example for wetlands along intermittent or ephemeral channels, the title is about wetlands associated with intermittent and ephemeral streams. He said that it was not just about wetlands along intermittent streams but that it could be along other conveyance or just a narrow wetland.

Mr. Kerr said that in Tidewater, when you follow the long linear feature there may well be a wetland in 10 acres or 200 acres. He said those are the wetlands that folks in Tidewater have not been considering an RPA feature. He said that the document might need to show an example where there is a wetland at the upstream end and say that the presence of that wetland does not alter the decision made downstream.

Mr. Sheffield asked that the record show that Mr. Kerr was referring to Figure 8 on Draft Option B.

Ms. Salvati clarified that Mr. Kerr was saying he would like to see another scenario addressed that includes the upstream wetland. She asked if it was Mr. Kerr's opinion that there is no surface flow between the upstream and downstream wetlands.

Mr. Kerr said that any wetland that is saturated in the wintertime and then gets a substantial rainfall will have surface flow. He said that, in his opinion that was a different type of wetland and that they would not be connected by surface flow.

He said that they might be connected at some point during the year, but that he did not believe that connection to be substantial enough to warrant coming under RPA protection.

Mr. Kerr said that all wetlands do not have intermittent or perennial surface water. He said there are lots of wetlands in the Coastal Plain that only have water within 12 inches of the surface except in rain events.

Mr. Kerr said the problem is that there has not been a consistent definition of surface flow.

Mr. Evans asked Mr. Kerr to explain what he meant by the term narrow wetlands.

Mr. Kerr said the reference was under the narrative for Figure 8.

Mr. Rolband referenced Mr. Cook's statement about the problem with the 100 ft. buffer. He said that in Fairfax County the Board allowed the 100-year flood plain to be incorporated under the other land provision without requiring the 100 ft. buffer so there is a precedent not to have a 100 ft. buffer.

Ms. Smith said that under the other lands section of the RPA description in the regulations, one could include the stream as well as land adjacent to the stream.

Mr. Rolband said that this is a management decision. He said a strict interpretation of surface flow would encompass every stream and wetland in the Commonwealth. He said that Option B was a good balance of the goal to balance the environmental and economic interest.

Pat O'Hare with the Homebuilders Association of Virginia offered an amendment to Option B. He said that, on page 3 at the end of the third paragraph, the reference to other lands could be misleading. He said that this omitted the other part of the qualification to utilize the "other lands," category of the RPA description in the regulations, that it has to be considered by locality necessary to protect the quality of state waters. He said that when the phrase "other lands" is included that clause should be included from the Regulations.

Mr. Joe Lerch of the Chesapeake Bay Foundation said that CBF would support the scientific approach. He said this approach would provide the greatest water quality protection. However given the regulatory limitations, he said that Option B, along with some of the amendments, offered the best solution to move forward.

Mr. Sheffield turned to members of the Policy Committee for additional comments or questions.

Dr. Galbraith said that the scientific approach was a strict interpretation of the best way to protect the water quality in the Bay.

Mr. Sheffield said that the purpose was to try to come up with one document. He said that it would either go from the committee to the Board in raw form or the committee could hold the document until the next Policy Committee meeting and then send it to the full Board.

Ms. Salvati said another option would be for staff to take some of the comments provided and provide another draft within the next week and a half. She said that there seemed to be substantial support for Option B. She said another document with the changes at a staff level and that might provide for a viable document for the June meeting.

Mr. Rolband asked if the document would be sent to the Ad Hoc committee for comments.

Mr. Sheffield agreed that would be a good option.

Mr. Davis said that it would be helpful to set a date to give the staff proper time to make the changes and to provide the draft back to the Policy Committee members to consider sending this to the full Board.

He said this has been an 18-month process, but that the information is needed at the local level. He said the questions that need to be addressed are 1) what does the Regulation say? and 2) what was the intent of the original law passed. The law said there should be an economic and environmental balance.

Mr. Davis said that the document is not where it should be, but that Option B was very close.

Mr. Evans asked if Option B would require a regulatory change?

Ms. Andrews said she would need to take a closer look at the final document. She noted that she had just received the document at the beginning of the meeting.

Mr. Dowling agreed that it would depend on the final document. He said that it would be helpful to have the Attorney General as well as DCR policy staff to review.

Mr. Evans asked Dr. Galbraith how close Option B was to the scientific approach.

Dr. Galbraith said that he had not had time enough to review Option B to compare with the scientific approach, but that he would need to study further before giving an endorsement.

Dr. Galbraith said that he wanted to compare the management and scientific approaches. He said that he thought the management approach would meet the economic interests of the Commonwealth and at some level would meet the water quality protection intent of the Chesapeake Bay Act. He said that by no means does either option fully cover all of the concerns for the Bay Act.

Mr. Maroon said that he would like to ask the scientific advisors to provide a comparison between the management approach and Option B. He said there might be value to see clearly what the two options provide.

Mr. Davis asked if the general difference between the two was where to define the RPA.

Dr. Galbraith said that in the management option wetlands were considered to be perennial bodies of water and proof positive of surface flow connection so that the definition of surface flow is not required. He said it accepts contiguity of wetlands as proof that a hydrologic connection exists.

Mr. Rolband said that in his opinion the management approach was similar in terms of end product with Option B.

MOTION: Mr. Davis moved that the Policy Committee refer the Option B based document to reflect the meeting's input to DCR staff for a revised document for further consideration of the Policy Committee with the refined draft to be distributed to the Policy Committee and the Ad Hoc Committee members by June 1, with a deadline for comments of June 11. Further the document will be provided to DCR Policy Staff and the Attorney General for review.

SECOND: Mr. Duncanson

DISCUSSION: None

VOTE: Motion carried unanimously

MOTION: Mr. Davis moved that the Policy Committee meet on the morning of June 18 at 9:00 a.m. prior to the Board meeting and that the regular Board meeting time be changed to 11:00 a.m.

SECOND: Mr. Evans

DISCUSSION: None

VOTE: Motion carried unanimously

### **Adjourn**

Mr. Sheffield thanked members and staff for their attendance.

There being no further business, the meeting was adjourned.

Respectfully submitted,

Walter J. Sheffield  
Chair

Joseph H. Maroon  
Director