

**Policy Committee of the
Chesapeake Bay Local Assistance Board
Friday, April 22, 2005
Richmond, Virginia**

Chesapeake Bay Local Assistance Board Policy Committee Members Present

Mr. Walter J. Sheffield, Committee Chair
Mr. David L. Bulova
Mr. William E. Duncanson
Ms. Beverly D. Harper
Mr. Donald W. Davis, Ex-officio

Staff Present

Joseph H. Maroon, DCR Director
C. Scott Crafton, Acting Director Division of Chesapeake Bay Local Assistance
David C. Dowling, Policy, Planning and Budget Director
Roger Chaffe, Office of the Attorney General
Martha Little, Chief of Environmental Planning
Shawn Smith, Principal Environmental Planner
Jakob Helmboldt, Senior Environmental Planner
Daniel BenIsrael, Senior Environmental Planner
Heather C.A. Mackey, Principal Environmental Planner
Beth Ballard, Senior Environmental Planner
Brad Belo, Senior Environmental Planner
Ryan Link, Senior Environmental Planner
Alice Baird, Senior Environmental Planner
Christine Watlington, Policy and Planning Analyst
Michael R. Fletcher, Director of Development

Local Government Officials Present

City of Hampton
Sally Andrews
Keith Cannady
James Freas

Others Present

Ellen Scarff, Homebuilder's Association of Virginia

Call to Order – Roll Call

Mr. Sheffield called the meeting to order and asked for the calling of the roll. All members were present.

Mr. Sheffield said that if there were no objections to the agenda as presented, he would move ahead.

Introductory Remarks: Purpose of the Policy Committee

Mr. Sheffield said that the policy committee is a very important arm of the Chesapeake Bay Local Assistance Board. He said that the policy committee will play a large role in determining new directions for the board and for the Department.

Mr. Sheffield said that he wanted to take the opportunity to thank staff. He noted that the mission of the Board is very important and that many staff members have made professional choices to dedicate themselves to the issues such as those with which the Board is charged.

Mr. Sheffield also noted the expertise of Board members with regard to Chesapeake Bay issues.

Mr. Sheffield asked staff and guests to introduce themselves.

Discussion of Regulation Amendment Strategy

Mr. Sheffield called upon Mr. Maroon for a discussion of the regulation amendment strategy.

Mr. Maroon said that the agenda for the meeting was structured to begin the process of looking at the regulations, in particular some issues that have already been identified. He noted that the items on the agenda had previously been brought up at board meetings or in other discussions. He said that staff was not ready to discuss the construction of parcels developed prior to the Bay act at this meeting and that additional preparation was necessary.

Mr. Maroon noted that staff is cognizant of the fact that local governments have recently gone through a revision of their Bay Act ordinances. He said it was not the intent to put a new set of mandated changes on the table. He said that the Board could provide localities with alternative ways of doing things they are already doing, and every locality might not have to amend their ordinances again, unless they choose to do so.

Mr. Maroon said that one of the first decisions for the committee and the Board was whether or not the entire set of regulations should be opened up for discussion or just a subset of the regulations.

Mr. Maroon said that David Dowling would further explain the regulatory process.

Overview of Regulatory Process and NOIRA Scoping

Mr. Dowling noted that Mr. Chaffe was present and he could also provide information regarding the Administrative Process Act.

Mr. Dowling said that any changes in the regulations would follow the standard APA regulatory process. He provided members with a flow chart of the Standard regulatory process. The flowchart is available through the Virginia Regulatory Town Hall Internet site.

Mr. Dowling noted that the standard regulatory process works in three stages.

1. Notice of Intended Regulatory Action (NOIRA)
2. Proposed regulation
3. Final regulation

Mr. Dowling said that the entire process could take a year and a half to two years.

He noted that the first process is to construct the NOIRA. Once that has been constructed and received Board approval the process moves ahead.

The NOIRA is submitted for review to the electronic Town Hall, the Department of Planning and Budget, the Secretary of Natural Resources and the Governor. After review and approval, it is then submitted for publication in the Virginia Register of Regulations, which provides public notice and initiates a 30-day public comment period. During that time a public meeting is routinely held.

Mr. Maroon noted that essentially this is saying to the public that these are the issues the Board wishes to consider. The public may comment on that or suggest additional issues.

This process is built on the Administrative Process Act, the Governor's Executive Order and the Board's public participation procedures. After the 30-day public comment period, a technical advisory committee would be formed.

With consensus on what the proposed regulations should look like, they are submitted for Board approval and Attorney General review to make sure they are legally sound.

After that, the proposed regulation is published in the Virginia Register and on the Town Hall web site. There is a 60-day public comment period during which at least one public hearing will be held.

At the end of that working period, the Board has 150 days to make sure issues are adequately addressed. Then the regulation moves to the final regulation step.

Mr. Dowling noted that everyone involved has a timeline with the exception of the Governor.

Mr. Dowling distributed a sample NOIRA.

He noted that one of the first decisions would be to determine which, if any, sections of the Virginia Administrative Code the Board would like to open for review. The NOIRA would then need to describe the subject matter and the intent.

Mr. Davis said that he was glad to see the Board finally taking this process on. He noted that this is just a starting point and that the Board may decide no changes are necessary. He also noted that the Board could add or subtract from the issues list at any time prior to issuance of the NOIRA.

Mr. Davis noted that it would be helpful to keep this an open process and involve affected groups early on.

Mr. Maroon said that this was important to note and that it was one of the prerogatives of the Board to hear first from constituent groups. He said that many local governments have indicated that they do not wish to open the regulations.

Mr. Sheffield asked if minor changes would be considered amendments to the regulation, for example, if the revisions did not change the text, but changed examples which help with the interpretation of the regulations.

Mr. Dowling said that if the regulations are opened up to any change then that is considered an amendment. He noted that additional explanatory remarks or interpretations could be provided in accompanying guidance.

Mr. Chaffe noted that anytime the wording of the regulations is changed, it must go through the APA process. There are technical amendments for the correction of errors, etc. But substantive changes require the opening of the regulations to the full process.

Discussion of Previously Identified Topics

Mr. Maroon noted that staff had provided a summary of the issues listed in the agenda. A copy of that summary is available from DCR. He said that Mr. Crafton and Ms. Little would review the issues for the committee.

Mr. Maroon noted that staff was prepared to discuss four of the five noted issues.

Mr. Crafton addressed Stream and Wetland Restoration Projects as Water Dependent Activities.

He noted that the issue had been discussed in the previous year and that he had received communications from two different directions. He had been contacted by wetland consultants who were out in the field doing stream projects and by staff at the Chesapeake Bay Foundation.

Concerns were expressed that if DCR was proposing mitigation or if a local government wanted to improve a stream channel that's degraded, if they wanted to make it a stable channel or if they wanted to improve the wetlands system, they would have to go through the exceptions process because the activity was located within the RPA. The constituents noted that both kinds of activities actually improve water resources and water quality.

DCR informed the localities through a guidance letter that these projects would be considered water dependent and that at the appropriate time the issue would be brought before the full Board.

Mr. Crafton reviewed the alternatives of how this might be addressed.

1. Include stream restoration and wetland restoration activities among the list of examples included in the definition of "water dependent facilities."
2. In the RPA performance criteria, include a subsection that allows for these activities.
3. Do not change the regulations, but continue to support the interpretation as guidance.

Mr. Crafton noted that this issue had not been discussed at the retreat. He asked how the Board might wish to proceed.

Mr. Davis said that this was an example of what could come from the Board as guidance and that this issue could be dealt with just as perennial streams guidance was provided by the Board.

Mr. Chaffe concurred and suggested this be written up and publicized as general guidance.

Mr. Maroon asked if there were comments since the April 2004 guidance letter. Mr. Crafton said there were none.

Ms. Smith suggested amending an existing RPA guidance document.

Mr. Sheffield called for a formal motion to amend the guidance documents and to make it available to the public.

MOTION: Mr. Davis moved that the Policy Committee recommend to the Chesapeake Bay Local Assistance Board that it review and modify the appropriate RPA guidance document to include streams and wetlands as water dependent activities.

SECOND: Mr. Bulova.

DISCUSSION: Mr. Bulova said that there could be negative implications and suggested that it be noted that the Board is reviewing all guidance.

Mr. Maroon asked if the Board had provided for public comment.

Mr. Crafton noted that as the guidance moved forward it would be helpful to involve stakeholders.

Mr. Davis suggested this be considered as a line item at the June meeting.

VOTE: Motion carried unanimously.

Mr. Crafton addressed Marina Components as Water Dependent Facilities.

Mr. Crafton noted that he had been contacted by a representative from an organization of marina owners. They expressed concern that the regulations refer to marinas as water dependent, but that the non-water-dependent components must be located outside the RPA. Any of these to be placed within the RPA would require an exception.

He noted that a large concern was that existing marinas cannot purchase additional adjacent land to expand.

Mr. Davis noted that he had received calls from existing marinas who felt they could not meet the criteria.

Mr. Crafton noted that department staff has recommended in the past that the Board continue with its historical interpretation of marina facilities. He said the proponents of the change prefer to be able to expand marina facilities, including the non-water-dependent features, to maximize the use of existing property, but without having to submit to the exception review process.

Mr. Crafton said the Board had at least four options to consider:

1. Leave the language and interpretation as is.
2. Allow all aspects of all marinas, existing or new, to be considered water-dependent.

3. Provide greater flexibility for existing marinas, but require new marinas to adhere to the historical interpretation, since they would presumably have more land on which to arrange their facilities. This is similar to the distinction between greater flexibility in the regulations for the pre-Bay Act lots but stricter requirements for newly created parcels.
4. Address this matter through a separate set of exception review criteria relating to non-water dependent marina facilities.

Mr. Bulova asked what typically were the issues of going through an exception process.

Ms. Smith referenced the Dare Marina project in York County. She noted that they wished to put in an impervious cover in the RPA where there previously was no impervious cover.

Mr. Davis noted that they did not get approval.

Ms. Smith said the marina owners were uncomfortable because different localities deal with such issues differently.

Mr. Bulova asked about the major issues the local government debated.

Mr. Davis said that Dare Marina is continuing to pursue the exceptions process. There was discussion as to whether this could be classified as an IDA. He said that he would like the committee to strongly look at alternative #4.

He noted that this issue was unfortunate for smaller older marinas that predate the Bay Act. He said this was very political locally.

Mr. Davis said that he had been contacted by a number of localities about this.

Mr. Sheffield asked which alternative staff preferred.

Mr. Crafton said the staff position is that marinas are only one type of facility, but that there are other kinds of water-dependent facilities along the shore. Staff felt that opening this up for marinas might require consideration for other facilities as well.

Mr. Crafton said that it might be possible to move forward with this issue for the NOIRA.

Mr. Bulova asked how successful the Clean Marina Program had been.

Staff noted that it had not been that successful.

Mr. Bulova said that he thought this program should be linked to flexibility provided for marinas.

Mr. Maroon said that the historic interpretation would be to leave this as is. He noted that there were four viable options with enough interest that this may be one of the issues the Board would like to move forward with.

Mr. Davis suggested that it would be appropriate to have additional discussion at the May 3rd policy committee meeting.

Mr. Sheffield asked if it would be appropriate for the committee to ask staff to draft language pertaining to this matter.

Mr. Maroon said that he thought it would be a bit premature. He concurred with Mr. Davis' suggestion that this be brought up for further discussion in May.

Mr. Sheffield noted that this could be handled administratively, without a motion.

Mr. Duncanson provided some aerial photographs which illustrated the point that marinas have no place to expand except within the RPA. Copies of these photos will be provided to the full Board at the next meeting.

Mr. Crafton addressed the definition of "Water Body with Perennial Flow" and Associated Issues. He noted that there were regulation amendments in March 2002. Local governments were given until March 2003 to update their ordinance.

He noted that concerns were expressed during the 2003 legislative session. Localities did not believe they had enough clarity as to what was expected.

There was discussion of introducing legislation to delay regulations. Instead, the Board agreed to delay the local ordinance revision deadline until December 2003 in order to develop guidance.

He noted that the concern is that the definition is an operative definition.

With that as background, Mr. Crafton reminded the Board that they earlier agreed that any further amendments in the near future would be in the nature of options that would not require local governments to amend their ordinances.

Staff had suggested that, even if this is considered a required change, it might be treated as a minor ordinance amendment.

Mr. Crafton said that in March the Board had discussed the process a local government would use to approve protocols to fit their locality better. He said that there was discussion as to whether the Board should revisit the process for that requirement and to make it clearer. There was also the question of whether this should go into the regulations.

Mr. Crafton presented the following alternatives:

1. Regarding the definition:
 - a. Include the new definition, now contained in guidance documents, into the regulations (9 VAC 10-20-40)
 - b. Incorporate the definition by reference to the guidance document
2. Regarding the protocols:
 - a. Include the new protocols into the regulations (9 VAC 10-20-105)
 - b. Incorporate the protocols by reference to the guidance document
3. Regarding ditches:
 - a. Provide further clarifications in the regulations pertaining to the status of man-made ditches
 - b. Make no further changes in the regulations
4. Regarding the Department's and Board's process to approve local modifications of the protocols:
 - a. Set forth the process in the regulations
 - b. Make no change in the regulations, relying on internal Board policy regarding the matter.

Mr. Bulova asked how many local ordinances include a definition of a water body as perennial flow.

Ms. Smith said about 20 percent. She said that the definitions vary from a stream that flows year round to others.

Mr. Bulova asked what protocols were used.

Ms. Smith said that it varies. She noted that the Eastern Shore had difficulty with either protocol.

Mr. Bulova said that it would be important to be flexible regarding when local governments would be required to go through a revision process.

Mr. Crafton said that the concern is that if the definition is in the state regulations, but not in the local ordinance, then localities may lose the issue, if challenged, based on a technicality.

Mr. Chaffe said that the Board should look for consistency and standardization.

Mr. Sheffield said that this issue must be dealt with. He noted that if there was a desire to move the Bay program west of the fall line, that it first must be as clear a possible in Tidewater.

Mr. Crafton said that the larger issue is where the protocols fit and where they do not.

Mr. Sheffield asked how other states dealt with these issues.

Mr. Belo said that in North Carolina the determinations are handled by professional state staff dedicated primarily to running the program. He was not familiar with the Maryland process.

Ms. Little said that some localities would prefer to see certified staff making these determinations.

Mr. Davis referenced the certification required for responsible land disturbers who must pass a test in order to become certified.

Mr. Maroon summarized by saying that it appears the Board may wish to have additional input and discussion as to whether or not the issue of perennial stream determination becomes a regulatory matter. He said that the issue of the protocols could be included in the overall discussion of perennial flow.

Mr. Bulova asked for some more clarification regarding agricultural ditches. He noted that a buffer area was not required for perennial flow if the adjacent land has a Best Management Practice (BMP).

Ms. Little addressed the Clarification of Intensely Developed Area Criteria.

She noted that there is a renewed interest among some localities in designating IDAs in residential areas. She noted that in the past, IDAs have been predominantly developed with commercial or multiple uses.

Ms. Little said that perhaps the best way to deal with the issue of nonconforming residential lots would be through an alternative program and language.

She noted that the Department believes that designating IDAs in areas characterized by detached, single-family homes is not consistent with the historic designations of the IDAs and may result in unintended consequences for local Bay Act program implementation.

She presented the following alternatives.

1. Revise IDA designation language to clarify that IDAs are limited to industrial, commercial and multi-family residential developed areas. Further, revise the IDA designation language to require proposed IDAs to meet both the impervious cover threshold and the water and sewer requirements, but eliminate references to housing density. Require the submission of an IDA Management Program that addresses stormwater management and buffer restoration and has been approved by the Board as a Phase I modification to the local government's program.

2. No change to the regulations.
3. Address residential lots through a separate regulatory provision.

Mr. Bulova said that this appeared to be a reasonable approach and noted that he looked forward to seeing further details.

Mr. Maroon said that staff would be better prepared to discuss the third alternative at the next meeting.

Mr. Crafton noted that staff had intended to have more details regarding this issue. Staff has met with representatives from Norfolk and Hampton. Staff is attempting to determine if this is the best method to deal with the issue. He said staff would be prepared for further discussion in May.

Mr. Sheffield asked Mr. Duncanson to comment.

Mr. Duncanson noted that anytime the subject of the Bay Act is opened up in a public meeting, it opens the entire Act for discussion.

Mr. Maroon noted that the other item for discussion was Construction on Parcels Developed Prior to the Bay Act.” He noted that staff was not prepared to discuss this issue in depth but that they would be at the May meeting of the committee.

Discussion of Other Potential Topics

Mr. Bulova noted that there is a bit of redundancy between the Chesapeake Bay Regulations and Stormwater Management Regulations. He noted that Mr. Maroon considers this to be a stormwater management issue. He said that he would like to have the issue on the table for further discussion.

Mr. Duncanson noted an example in Richmond County. There was a 50-foot buffer of trees. When the property owner applied for a permit to build his home, he was told that he had to reestablish the buffer at that same rate. The owner noted that the local planting requirement was about four times as dense as the natural border of the undisturbed vegetation.

Ms. Harper noted that she was glad the committee was addressing the issue of ditches. She noted that this was a major issue of concern on the Eastern Shore.

Mr. Sheffield noted that he remains concerned that much of the pollution in the Bay relates to activities west of the fall line. He asked how other states dealt with this issue.

Mr. Maroon noted that Mr. Sheffield’s comments related to the application of the Bay Act. He said that there was much activity west of the fall line with other programs. He

noted that the General Assembly at the recent session had authorized \$92 million for point and nonpoint source pollution.

DCR has about \$30 million to spend statewide. About 60% will spent in the Bay watershed with the remaining 40% in non Bay areas. He noted that this was the largest amount ever approved for nonpoint source pollution.

Mr. Maroon noted that the General Assembly very clearly placed the emphasis for the funds on agriculture.

Ms. Harper noted that on the Eastern Shore there was concern with regard to the septic systems. Some homeowners who install a conventional system receive a waiver on their reserve area. She suggested it may be more appropriate to offer a waiver for secondary treatment systems instead of encouraging conventional systems.

Ms. Smith noted that the Eastern Shore has a different set of issues due to topography.

Ms. Baldwin noted that systems have to meet the requirements of the Health Department. She noted that pre-Bay Act lots were not required to have a reserve.

Public Comment

There was no public comment.

Other Business

The NARC will meet on May 3 at 9:30 a.m. The SARC will meet at 2:30 p.m. A meeting of the policy committee will take place between those two meetings.

The full Board will meet on June 20, 2005 at the Fredericksburg City Council Chambers.

Mr. Sheffield thanked the staff for their preparation for this meeting.

There being no further business, the meeting was adjourned.

Respectfully submitted,

Walter J. Sheffield
Committee Chair

Joseph H. Maroon
DCR Director