

**Chesapeake Bay Local Assistance Board
Policy Committee
Chesapeake Bay Local Assistance Department
101 N. 14th Street, Conference Room B
Richmond, Virginia
Friday, January 26, 2007**

Chesapeake Bay Local Assistance Board Policy Committee Members Present

Walter J. Sheffield, Policy Committee Chairman
Donald W. Davis, Chairman, CBLAB
William E. Duncanson
Gregory C Evans
Beverly D. Harper

Ad Hoc Committee Members Present

Mike Rolband, Wetland Studies & Solutions
Rick Thomas, Timmons Group
Scott Williams, Chesterfield County
Darryl Cook, James City County
Bob Kerr, Kerr Environmental Services
John Friedman, Fairfax County
John Galbraith, Virginia Tech
Sandy Williams, Blue Skies Environmental
Kirk Havens, VIMS
Brad Homeindollar, Williamsburg Environmental Group
Matt Meyers, Fairfax County

DCR Staff Present

Russell W. Baxter, Deputy Director
Joan Salvati, Director, Division of Chesapeake Bay Local Assistance
Ryan Brown, Assistant Director of Policy and Planning
David Sacks, Assistant Director, Division of Chesapeake Bay Local Assistance
Shawn Smith, Principal Environmental Planner
Alli Baird, Senior Environmental Specialist

Mr. Sheffield opened the meeting and called for Joan Salvati's staff presentation on the efforts of the Ad Hoc Committee and staff in developing guidance on Nontidal Wetland Delineations.

Ms. Salvati formally introduced Mr. David Sacks, the new Assistant Director of the Division of Chesapeake Bay Local Assistance.

Mr. Sacks responded that he is happy to work with the Department and the Division and is looking forward to working with everyone. He said that he had worked on the Bay Act program during his tenure with the City of Richmond, where he was a planner for 21 years and worked for the PDC prior to that.

Ms. Salvati also stated that Nathan Hughes has been hired as the new Watershed Specialist and that he will be working on the nontidal wetland determination issue and on providing assistance to localities on perennial flow determinations. She said it is anticipated that another Principal Planner will be on Board very soon.

Mr. Sheffield thanked Ms. Salvati for the update and welcomed Mr. Sacks.

Ms. Salvati summarized the efforts of the Ad hoc Committee and explained that following the discussions of the Committee there remained three unresolved issues where the Committee could not reach complete consensus and these were outlined in the "Nontidal Wetlands Issues Paper." She reviewed each of the issues.

The first issue involved elongated, channelized wetlands. She said these can be seen in the following forms: a depressional feature that has wetlands in it; a defined channel that does have an intermittent stream in it; or a ditch that has wetlands within or adjacent to it. She added these have been encountered in the field and could go on for thousands of feet. A literal translation of the regulations would identify these features as connected wetlands that are contiguous, at some point, to a perennial water body. This would mean such features must be protected by the RPA buffer. The Committee members agreed that applying the RPA in this manner would have significant implications for development projects.

One of the unresolved issues, therefore, is to determine whether the regulatory provision must be applied in this manner or if a "cut off" for the limit of the RPA for such features could be identified that would have a rational basis, would be scientifically valid and can be easily applied in the field. She added that nowhere in the Regulations does it specify that intermittent streams should receive the 100 foot buffer; and input has been received that if we were to apply the RPA buffer to the elongated features, it would, in effect, result in buffering intermittent streams, which is not the intent of the regulations.

Mr. Davis commented that the intent of the Policy Committee is to look at the regulations as currently written and give guidance to the localities based on those regulations. The Board also has the right to change the regulations in the future. He said the goal before the Committee is very focused, to look at what the regulations say and what the words ("connected by surface flow and contiguous to tidal wetlands or water bodies with perennial flow") mean.

Ms. Salvati noted that some of the options being presented might precipitate a change in the Regulations.

Mike Rolband noted that in 1990 there was a study group on this topic while he was on the Board and the one thing that was agreed on in 1990 was if it was an intermittent stream, very often there will be little fringes of wetlands around it, and as an intermittent

stream it would not be an RPA component. He further explained that if it was a defined channel, but intermittent, often there are little clumps of wetland vegetation and the decision was that such features would be considered to be intermittent streams and not be an RPA component. The problem with this in the field is that often these channels are more a wetland than a stream, and in Prince William and the Piedmont counties you will see this in field ponds and quagmires. In that situation it acts like a stream but is dominated by wetland vegetation and is characterized as a wetland even though it looks like a stream and in the summer it looks like a wetland, which makes it complicated. He also said that 17 years ago he was on the first committee to study this topic. He said he also thought they concluded that it was not the intent of the Bay Act to regulate intermittent streams if it is flowing like a channel than that might be the answer.

Ms. Salvati said with respect to those types of features, there are three options: 1) the policy committee could consider recommending to the full Board that we simply take the literal translation and ensure that the RPA is placed around those elongated features; 2) the Board task the Ad Hoc Committee and staff to try to figure out a rational cutoff or establish a new limit so that the RPA boundary would not extend all the way up these features; or 3) to go back to the original Information Bulletin 6 and revise it to take care of the internal inconsistencies and perhaps work on the definition of surface flow.

Ms. Salvati reviewed the second unresolved issue, interrupted wetlands. She explained one situation is where a road separates a wetland, completely disconnecting the two parts, with no flow between them. A second situation would involve the same type of separation (creating two separate systems), with a culvert under the road enabling water flow literally between the two systems. In the latter example, both of these segments should be considered part of the RPA feature and therefore subject to the 100-foot buffer. Ms. Salvati summarized that there was disagreement among the ad hoc committee regarding subjecting separated wetlands that did not have the hydrologic connection to the RPA buffer, and that a reasonable solution would be to exempt from the buffer requirement those RPA non-tidal wetlands that were bisected pre Bay Act and include those bisected post-Bay Act.

Committee members agreed that there should be some type of distinction between pre and post Bay Act situations.

Ms. Smith referenced section 9 VAC 10-20-80 B 5 and explained, that for a post Bay Act man-made interruption, the RPA should have been designated when they came in for the plan review of the action that caused the interruption and the RPA boundary would have been established at that time and should remain what it was prior to the interruption.

Ms. Salvati recommended against leaving resolution of this issue up to local discretion, as it would result in inconsistent approaches being used by localities.

Ms. Salvati reviewed the third unresolved issue: how best to define "surface flow." She explained that many of the members of the ad hoc committee expressed that the way Information Bulletin 6 and the current draft guidance addresses surface flow isn't necessarily supported specifically by the Regulations. The options to address this issue are: 1) to keep the existing definition, perhaps there is a comfort level with that

definition; 2) revise the definition to be consistent with whatever the Corps is using with respect to surface flow, or 3) the Policy Committee could ask staff and the Ad Hoc Committee to try to come up with a new definition of surface flow.

Mr. Rolband noted that keeping the original definition is not a good alternative because it refers to the 1989 manual that Congress suspended the use of it in 1991. Others agreed.

Ms. Salvati summarized that staff is requesting the Policy Committee to provide direction and feedback with respect to the three unresolved issues and the options that have been laid out and any other options that the Policy Committee may have. She requested agreement in concept with the scenarios that have been laid out and agreed to by the Ad Hoc Committee in the draft guidance and any thoughts the committee may have with respect to path forward on the unresolved issues. She explained that staff would revise the draft guidance document based on the input received today both from the policy committee and any other recommendations or comments from the Ad hoc Committee members and, if warranted, reconvene the Ad Hoc Committee to finalize any unresolved issues and from those results, provide the Policy Committee a revised document to forward on to the full Board.

Mr. Sheffield summarized that there were three issues that needed to be resolved: channelized and/or elongated and narrow wetlands, interrupted or disconnected wetlands, and the definition of surface flow. Mr. Sheffield asked that attention begin with the issue of channelized and/or elongated and narrow wetlands.

Mr. Evans asked the Ad Hoc Committee to explain the major points as to why they could not come to consensus and several Ad hoc Committee members offered comments.

Darryl Cook noted that in James City County there are long stretches of intermittent streams that have wetlands associated with them and that he would be concerned that buffering intermittent streams would be inconsistent with the intent of the regulations.

Bob Kerr, agreed with Mr. Cook. He expressed concern about where to stop the RPA boundary in cases where the stream runs for thousands of feet. He explained that such features very often end at a broad wetland that acts like a sponge once it fills up, it may seep water all the time, not because of the perennial stream influencing how wet this is. The way such features are considered now, is that surface flow means water "at the surface" that is moving. Some wetland areas are areas of standing water. In such instances, it is obvious where the connected wetland ends and where this narrower trickling wetland starts. If the Board changes the definition of what surface flow is by using the Corps' surface saturation criterion, all elongated wetland features would then be considered RPAs. There are examples of where this approach would have major ramifications on policy, everyone should be aware of this. Some affected parties may suggest that they would like the legislature to take a look at this issue because its implications could potentially be great.

Mr. Davis asked Mr. Kerr where he would delineate the 100 foot RPA in these situations and what would he define as surface flow.

Mr. Kerr responded that a “break point” for the RPA feature could be where there is distinct change in the whole plant community and the type of wetland. In response to the surface flow issue he suggested the ground water would have to be within two inches of the surface for a defined percentage of the growing season although that would be different in every jurisdiction. He added that the Corps has considered it to be 5 to 12.5 per cent of the growing season.

Rick Thomas commented that he believed Mr. Kerr had summarized for him very well the points and issues.

There was further discussion regarding the applicability of the using the Corps’ guideline for surface flow.

Mr. Rolband stated that if you interpret the Regulations correctly the way the Attorney General’s office has advised the Board, it would cause economic problems in some parts of the state. A suggestion at the time to change the Regulations never happened. He said he believed the best way would be to change the regulations if you want to say that it is not an RPA.

Mr. Kerr noted that other lands provisions of the regulations allows jurisdictions to add RPA features at their discretion, and this approach may be a way for the elongated features to be protected.

There was further discussion about providing local discretion in the regulations, issues of using the Corps’ definition of surface flow, and the economic impact of applying the RPA buffer to these features, and to be able to arrive at a definition of surface flow that could be universally used by multiple agencies.

There was additional discussion regarding the water quality benefit provided by these and other wetlands and how they function. Mr. Galbraith provided a detailed explanation on the pollutant removal processes of these systems.

Mr. Sheffield asked everyone in attendance to speak and offer any additional comments.

Mr. Duncanson noted the headwater wetlands are the most important of all for catching pollutants and that it would be problematic to not have those areas as protected as RPA’s. He expressed the importance of being consistent with all the current other regulations.

Brad Homeindollar, from Williamsburg Environmental Group expressed concern of the practicality of requiring a property owner with a headwater system who is several thousand feet from the perennial source to have to work all the way down to the perennial source to find out where the line begins and ends on his property. That could be cumbersome for a single land owner.

John Friedman of Fairfax County commented that the term “contiguous” in the regulations is clear, but the term “connected by surface flow” is not. He suggested the VDOT regulations separate surface flow from flowing channel and using this approach

may help from going too far off the intermittent stream. He added half a mile or mile upstream would not be considered adjacent in this context.

Ms. Salvati noted that a summary had been made of the comments that have been received on this issue and stated that the general theme of the comments was that the contiguous wetlands that should be considered RPA features were those that were the closest in proximity to the tidal wetlands and perennial water bodies. She elaborated that even though the literal interpretation of the Regulations requires that all the elongated features should be RPA features, the sense of many of the Ad Hoc committee members was to encapsulate those features that were closer to a main tributary, a main water body, or a main tidal wetland system. Some of the options offered were to establish a measured distance away from the perennial stream; to include as RPA all that area within the hundred-year flood plain; or to include that part of the wetland feature that is feeding the downstream tributary, the estuary, the tidal system, the water body if it is directly feeding and therefore conveying pollutants which need to be filtered.

Mr. Davis commented that he has heard it said that buffering the headwaters of the stream itself are buffering the buffer because the wetland is doing what it is supposed to do - it's capturing those pollutants, but buffering the buffer is not reasonable.

Mr. Galbraith responded by saying that as sufficient as a wetland system is, they do have a capacity and if overloaded with sediments and other pollutants, it is thrown out of equilibrium by increasing the amount of sediment, pollutants or water entering the wetlands and they lose their effectiveness as filters.

Sandy Williams commented that she wanted to stay close to what the regulations currently say and their intent. She added that the regulations needed to reflect the new research and understanding, and to recognize that not all parts of Virginia are the same.

Ms. Harper stated that she would definitely like to see consistency and that, what works in Fairfax County may not fit on the Eastern Shore. She added we may be overstepping the bounds of the intent of the Regulations. The land that is being taken away from the Eastern Shore is pretty substantial.

Mr. Davis reiterated the concern that there may be a need to amend the Regulations and the potential impact on economic activity.

Mr. Evans commented that he preferred a more scientific conclusion. He said we need to change the regulation and it will be a challenge to do that recognizing the differences in geology and topography.

Matt Meyers of Fairfax County stated that the biggest issue is where the cut off is coming from. Local jurisdictions do not go out to determine whether wetlands are waters of the US or the Commonwealth. Rather, they rely on what the Corps certifies.

Mr. Galbraith commented about the concern that intermittent streams would be included in the RPA. It does not imply that they would be following intermittent streams forever upstream but would be following wetlands and the definition of wetlands regardless of

shape, regardless of width. He added that if wetlands are contiguous to a perennial water body than surface flow is not part of the issue - it is when the wetland is not contiguous to the perennial flow that the issue begins to occur and so in response to Mr. Kerr if there is a disconnection between a wetland and a perennial flowing water body then it is not covered under the RPA as it is now written. If there are wetlands that are not contiguous to water bodies with perennial flow they are not protected.

He explained further that the Corps of Engineers is currently going through a series of regional updates to the 1987 manual and that through this effort the Corps will be improving all their definitions and should eliminate the questionable calls on what is wetland and what is not. The Corps will be regionalizing their updates by looking at the differences in the physiographic resources and making it specific to different regions and perhaps this could be done if the regulations were modified. It could be done on a physiographic basis in Virginia as well.

Mr. Sheffield asked when the Corps expected to complete the update of the definition because that could be very helpful. Mr. Kerr responded that the Piedmont region will be next and they are ahead of schedule. He said he would contact the EPA and advise.

Following further discussion on the options for addressing these wetland situations, Mr. Baxter suggested that staff could develop alternative guidance language to address both approaches to the issue for review by the Ad hoc Committee and the Policy Committee.

MOTION: Mr. Davis moved that the Policy Committee request staff to provide specific verbiage reflecting the pros and cons of Proposal A and Proposal B and that the information be presented to the Policy Committee after consultation with the Ad Hoc Committee.

SECOND: Mr. Evans.

DISCUSSION: It was suggested the revised documents be provided to Ad Hoc Committee members, and give them two weeks to respond with comments.

VOTE: Motion carried unanimously

Mr. Davis reviewed the second Issue: Interrupted and Disconnected Wetlands and summarized the four options 1. exempt from the RPA nontidal wetlands bisected before the Bay Act, 2. treat those created after the Bay act differently, 3. develop guidance allowing local discretion, and 4. some combination of the above. He added he did not care for guidance that allows for local discretion, and suggested specific alternative language be included in the meeting on February 13th and that it would be helpful to have more information about the impact between of the first two options.

Ms. Salvati commented that she believed staff could come up with very specific verbiage and provide that to the Ad Hoc Committee.

Mr. Baxter questioned about the ability to identify when a wetland was bifurcated in order to determine if it occurred pre Bay Act or not. Ms. Salvati responded it should not be difficult since most localities have current and historic aerial photography that you could compare.

Mr. Davis added that this approach is no different than a pre-Bay Act structure or post Bay Act structure, a principal accessory or right away improvements. He said he did not think it is a big issue.

Ms. Salvati commented that they were very close to having the precise verbiage but if that is refined and got it to the Ad Hoc Committee it could be presented at the meeting on February 13th and that would be acceptable.

MOTION: Mr. Davis moved that the Policy Committee ask staff to develop language for inclusion in the draft guidance differentiating between wetlands interrupted pre-Bay Act and post-Bay Act.

SECOND: Mr. Evans

DISCUSSION: None

VOTE: Motion carried unanimously

Mr. Sheffield went on to call for attention to the third and final issue and that is the definition of surface flow. He stated that there are three possibilities 1. keep the original definition, 2. revise the definition to more closely match the Corps guidance, and 3. develop a new definition.

Mr. Sheffield called for Ms. Salvati's opinion. She stated that she preferred the idea of coming up with a better definition of surface flow. She said this is very much linked to the first issue.

Mr. Davis suggested that at the February 13th meeting that staff provide various definitions from the Corps, DEQ, DCR so that they can be evaluated. He commented that the Board came up with their own guidance definition for perennial streams that did not necessarily mirror the Corps and that may happen again with the surface flow definition.

MOTION: Mr. Davis moved that the Policy Committee ask staff to provide various definitions based on Federal, state, or local agencies that deal with the definition for surface flow and some discussion regarding that definition.

SECOND: Mr. Evans

DISCUSSION: None

REVISED: 3/19/2007 9:55:16 AM

VOTE: Motion carried unanimously

Mr. Sheffield called for discussion regarding other possible topics for the Policy Committee.

Ms. Smith described four issues: 1) shoreline erosion along lakes and the nexus between the Bay Act program and VMRC, VIMS programs, 2) how the Board is going to address allowing stormwater management BMPs in the RPA, 3) what to do about ditches and whether they should be considered water bodies with perennial flow, and 4) the accessory structure issue.

Mr. Davis noted that there is still an active list that has seven items that he wanted to add to Shawn's list. Ms. Salvati commented that a number of the items on the list have fallen off. One of them is accessory structures and Shawn has actually drafted a document that provides clarification. Mr. Davis noted that all the items on the list were pertinent.

Mr. Sheffield called for public comment.

No member of the public offered additional comments.

Mr. Davis thanked the members of the Ad Hoc and Policy Committee. He noted that the most enjoyable part of being a part of the committees was that everyone did not agree. Because of that there has been a lot of good information that has come out of the committees. Mr. Sheffield commented that he also appreciated everyone's openness and candor.

Mr. Sheffield noted that the next meeting was tentatively scheduled for February 13, 2007.

There being no further business the meeting was adjourned at 4:15 p.m.


Attachment #1

The following Presentation occurred during the meeting discussion

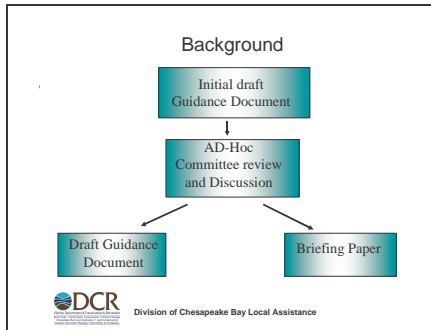
Draft Guidance
Resource Protection Area
Nontidal Wetland Delineation

A Report to the
Chesapeake Bay Local Assistance Board
Policy Committee

January 26, 2007




Division of Chesapeake Bay Local Assistance



Draft Guidance Document
"Resource Protection Areas:
Onsite Nontidal Wetland Delineation"


- ❖ Designating RPA Nontidal Wetlands Connected by Surface flow and contiguous to a Tidal Wetland – Guidance clarifies which nontidal wetlands should be included as RPA features.
- ❖ Interrupted Nontidal Wetlands - Guidance clarifies that wetlands interrupted by man-made obstructions and still connected by surface flow should be included as RPA features
- ❖ Wetlands associated with lakes, ponds and other impoundments - Guidance clarifies which ones should be included as RPA features
- ❖ On-site Designation of RPA Nontidal wetlands - Guidance explains importance of field verification for determining RPA nontidal wetlands



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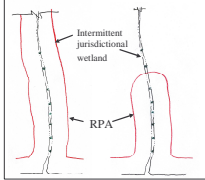
Outstanding Issues

- ❖ Channelized and/or Elongated and Narrow Wetlands
- ❖ Interrupted and Disconnected Wetlands
- ❖ Definition of "Surface Flow" (Guidance Document Issue)




Division of Chesapeake Bay Local Assistance

Channelized and Elongated Wetlands

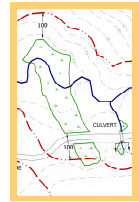


- ❖ Many of these are intermittent streams
- ❖ Strict interpretation includes them as RPA features requiring a buffer
- ❖ Intent was not to include intermittent streams in RPA




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Interrupted and Disconnected Wetlands

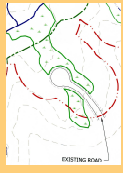


- ❖ Wetlands bisected by roads, levees, etc.
- ❖ May need to treat pre-Bay Act interruptions different from post Bay Act interruptions
- ❖ Such wetlands may not meet the "contiguous" requirement




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Interrupted and Disconnected Wetlands Options




1. Guidance to exempt from RPA nontidal wetlands bisected pre-Bay Act.
2. Require inclusion in RPA of nontidal wetlands bisected by post Bay Act man-made activity
3. Develop guidance that allows for local discretion.
4. Some combination of the above



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Definition of "Surface Flow"

- ❖ Draft Guidance equates surface flow with "ground saturation or inundation" as described in 1987 Corps Wetlands Delineation Manual
- ❖ Ad-Hoc Committee members expressed concern that this definition is not supported by the Regulations
- ❖ Options include:
 - Keeping original definition
 - Revising definition to more closely match Corps guidance
 - Develop new definition



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Actions Requested of Policy Committee

- ❖ Direction on options for outstanding issues
- ❖ Agreement in Concept of Draft Guidance Document
- ❖ Thoughts on Next Steps




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Next Steps

- ❖ Revise draft Guidance Document based on direction received
- ❖ Reconvene Ad-Hoc committee for comments on revised draft Guidance Document
- ❖ Review final Draft guidance document with Board




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