

Virginia Regulatory Town Hall Agency Background Document

Final Regulation

Agency Name: Chesapeake Bay Local Assistance Board
VAC Number: 9VAC10-20
Regulation Title: Chesapeake Bay Preservation Area Designation and Management Regulations
Action Title: Final Regulation Amendment
Date: Today's Date: 12/21/2001

Summary:

A statement explaining the regulation or amendment in a general way using plain and clear language. The summary shall give notice of the substantive provisions contained in a new regulation that is being promulgated or of all changes to an existing regulation that is being amended.

This regulation was adopted to accomplish a directive set forth in the Chesapeake Bay Preservation Act (§ 10.1-2100 et seq. of the Code of Virginia), as described in the section immediately following, entitled "Basis". Generally, the changes being made are those described in the section following, entitled "Purpose". A more detailed explanation of the originally proposed changes, entitled, "Explanation of Proposed Amendments: Chesapeake Bay Preservation Area Designation and Management Regulations," was filed with the documentation for the "Proposed" stage of the regulatory process. Other changes made by the Board since the original proposal of amendment language is described below in the section entitled "Substance."

Basis:

A statement identifying the source(s) of the state and/or federal legal authority to promulgate the contemplated regulation, including a description of the scope of the authority provided, the extent to which the authorized rulemaking provisions are mandatory or discretionary, and an indication of the relationship between the cited authority and the specific regulation being proposed. Legal citations should include web site addresses if available for locating the text of the cited authority.

Statutory Authority: " 10.1-2103 and 10.1-2107 of the Code of Virginia (Chesapeake Bay Preservation Act, Attachment 2, hereinafter referred to as "the Act").

Basis: Section 10.1-2103 of the Act sets forth the powers and duties of the Board. Subsection 4 authorizes the Board to promulgate regulations pursuant to the Administrative Process Act, and

subsection 5 authorizes the Board to develop, promulgate and keep current the criteria required by ' 10.1-2107 of the Act. Section 10.1-2107 of the Act states that "In order to implement the provisions of this chapter and to assist counties, cities and towns in regulating the use and development of land and in protecting the quality of state waters, the Board shall promulgate regulations which establish criteria for use by local governments to determine the ecological and geographic extent of Chesapeake Bay Preservation Areas. The Board shall also promulgate regulations which establish criteria for use by local governments in granting, denying, or modifying requests to rezone, subdivide, or to use and develop land in these areas."

Purpose:

A specific rather than conclusory statement setting forth the reasoning by which the agency has determined that the proposed regulation is essential to protect the health, safety or welfare of citizens or for the efficient and economical performance of an important governmental function, including a discussion of the problems the regulation's provisions are intended to solve.

Essential Nature of Regulation: Water is one of the basic components of life on the earth. Maintaining high quality state waters in general, and of the Chesapeake Bay and its tributaries in particular, is essential to protect the health of the Bay and its living resources, as well as the citizens of Virginia who come into contact with these waters. Restoring good water quality to the Bay and its tributaries is also essential to the welfare of Virginia citizens in that Bay water quality affects the economic productivity generated by sport and commercial fishing, recreational boating, swimming, hunting of waterfowl, and tourism in general. These regulations are also important for the efficient and economical performance of important government functions: carrying out (1) Virginia's commitments under the 1987 Chesapeake Bay Agreement and subsequent amendments of that Agreement, signed by the Governors of Virginia, Maryland and Pennsylvania, the Mayor of Washington, D.C., and the Administrator of the U.S. Environmental Protection Agency; and (2) the responsibilities set forth in the 1988 Chesapeake Bay Preservation Act (§ 10.1-2100 *et seq.*, Code of Virginia).

Purpose: The purpose of the proposed regulation is to amend the existing regulation to accomplish the following:

1. Achieve greater clarity in all regulatory language to minimize confusion and misinterpretation.
2. Eliminate any conflicts and unnecessary redundancies between the requirements in the regulations and those in other related state and federal laws and regulations, while still providing for maximum water quality protection. Specific issues under consideration where conflicts or redundancies are perceived to exist are as follows:
 - a. Stormwater management criteria;

- b. Erosion and Sediment Control criteria;
 - c. Septic system criteria;
 - d. Agricultural criteria;
 - e. Silvicultural criteria; and
3. Improve vegetative buffer area criteria to provide greater clarity as well as consistency with the riparian forest buffer policy developed by the Executive Council of the Regional Chesapeake Bay Program.
 4. Improve agricultural conservation criteria to correct the inability to meet the existing conservation plan approval deadline, reduce administrative overhead and result in more water quality protection practices on the land.
 5. Add criteria regarding a board/department process to review local program implementation for consistency with the regulations.
 6. Accomplish numerous technical amendments necessitated by changes in terminology and numbering protocols.

Substance:

A statement detailing any changes, other than strictly editorial changes, that the proposed regulation will implement, along with citations to the appropriate sections of the regulation, including cross-referenced citations when the proposed regulation is intended to replace an existing regulation.

Substance: The following is a brief overview of key provisions:

1. Language has been amended at several places to clarify the intended meaning of vegetative buffer criteria, both for purposes of designation of Resource Protection Areas and for purposes of determining appropriate uses and encroachments within the buffer. These changes were proposed in response to numerous questions from local governments regarding clarifications or interpretations of the buffer requirements.
2. Language has been added setting forth the Board's policy regarding the sufficient extent of designation of local Resource Management Areas.
3. Three general performance criteria have been clarified, replacing ambiguous terms consistently with more concrete terms of art.

4. Septic system performance criteria have been amended to add some flexibility and compliance options for local governments and, ultimately, landowners.
5. The stormwater management performance criteria have been amended to reference the water quality provisions of the DCR stormwater management regulations, for the purpose of consistency. The several agencies of the Natural Resources Secretariat worked for several years to develop a set of stormwater management standards that all of the agencies could agree to use in their separate programs. This process involved oversight from the General Assembly and several advisory committees composed of representatives of all affected interest groups. The goal has been to eliminate any conflicts and confusion generated by having different standards and criteria in each agency. The reconciled water quality standard adopted by DCR was the result of a consensus reached by all interested parties and agencies after considerable public comment. All of the agencies have agreed that the Virginia Stormwater Management Regulations, under the authority of the Department of Conservation and Recreation, should be the location of these new standards and that the other agencies will stipulate their stormwater management requirements by reference to the DCR regulations.

Also, flood control and stormwater management facilities have been added as a new use by right in Resource Protection Areas, provided necessary permits can be obtained from the relevant state and federal agencies and other specified conditions are met.

6. The unattainable deadline for completion and approval of all required agricultural conservation plans has been rescinded. As well, the mandatory conservation plan requirement has been replaced with a conservation assessment process, recognizing that many farmers are already implementing conservation practices and do not need plans developed for these measures. One new agricultural criterion has been added, requiring soil tests for the development of needed nutrient management plans, based on these assessments.
7. Language and requirements regarding nonconformities, exemptions, and exceptions have been clarified.
8. For clarity and to improve understanding, the language that currently constitutes Part V of the regulations, addressing criteria for local comprehensive plans, subdivision ordinances, and zoning ordinances, has been subdivided into separate parts and additional criteria and guidance has been provided regarding local land use ordinances.
9. Language governing local program adoption and implementation has been amended to more accurately reflect the Board's current three-phase process, and the original adoption deadlines have been rescinded, since the last of the 84 localities in Tidewater Virginia has adopted its local program.

10. Language has been added to clarify that local governments may use civil penalties to enforce requirements of their local Bay Act programs.
11. New language has been added in Part VIII (Enforcement) describing the Board's process for reviewing the consistency of local program implementation with the requirements in the regulations.

Substantial changes made since the original proposed regulation amendments:

1. Clarification of the requirements pertaining to "redevelopment projects", including restoration of the original definition of the term in 9 VAC 10-20-40 and other changes in 9 VAC 10-20-130 1 and 1 c;
2. The definition of Resource Protection Area (pp. 5-6) has been further amended to eliminate the reference to "shoreline" and match that in 9 VAC 10-20-80 pertaining to RPA designations;
3. Insertion of a new definition of "silvicultural activities" in 9 VAC 10-20-40;
4. Clarification of how the presence of "water bodies with perennial flow" affect the designation of Resource Protection Areas by elimination of the definition of "tributary stream" and the proposed amendment to define "shoreline" in 9 VAC 10-20-40 and other related changes in 9 VAC 10-20-80, and further clarification of how these designations are to be refined in 9 VAC 10-20-105;
5. Addition of another option for local governments to offer septic system owners to satisfy the 5-year pump-out requirement in 9 VAC 10-20-120 7 a (2);
6. Changes pertaining to the stormwater management criteria in 9 VAC 10-20-120 8;
7. Further clarification of what kinds of stormwater management BMPs may be allowed to be built within RPAs and under what condition in 9 VAC 10-20-130 1 e;
8. Additional language or further changes pertaining to vegetated buffer requirements, 9 VAC 10-20-130 3 a; 9 VAC 10-20-130 4 a; 9 VAC 10-20-130 4 b; and 9 VAC 10-20-130 5 a;
9. Further clarification to address concerns expressed by Soil and Water Conservation Districts and local governments about the process used to enforce the regulations on agricultural lands in 9 VAC 10-20-130 5 b;
10. Clarification of criteria for granting Exceptions in 9 VAC 10-20-150;
11. Further clarification of criteria pertaining to local comprehensive plans in 9 VAC 10-20-171; and

12. Reorganization of and further changes to sections pertaining to local land use ordinances and regulations in 9 VAC 10-20-181 and, 191 (9 VAC 10-20-201 has now been deleted).

Issues:

The primary advantages and disadvantages for the public of implementing the new regulatory provisions should be identified, and the advantages and disadvantages to the agency or the Commonwealth shall be identified.

Issues: The list of general issues described in the “Purpose” section is the result of several sequential reviews of the regulations conducted by the Board. The Board desires to accomplish a comprehensive amendment of the regulations to clarify the meaning of various provisions, provide greater implementation flexibility, and reduce costs for both local governments and members of the public who must comply with the state/local requirements. The advantages to the public are as follows:

1. The additional clarity provided by the amendments should prevent confusion about what is intended and result in more straightforward implementation of the regulations, achieving greater water quality protection;
2. The conformity of the stormwater management requirements of this regulations with the stormwater management requirements of two other state agencies, DCR in particular, will eliminate the potential for regulatory conflicts.
3. The added compliance options provided through some of the changes should provide greater implementation flexibility, lowering both administrative and implementation costs in some cases
4. Proposed procedural changes (e.g., agricultural conservation plan requirements) will result in greater implementation efficiencies, allowing the agency to accomplish greater water quality protection using available resources.

Disadvantages to the public are as follows:

1. Local resources will need to be expended to modify local ordinances to incorporate these changes.
2. The public is generally aware of what this program requires and how it works. Any changes will disrupt that understanding and cause a need for additional information and education to restore the level of equilibrium currently existing.

Advantages to the agency are as follows:

1. Advantages #1, #2, and #4, listed above for the public, also benefit the agency.
2. With the clarifications of intent provided in these amendments, the agency should have reduced expenditures of staff time and effort attending to recurring interpretations and enforcement issues.

Disadvantages to the agency are as follows:

1. Staff resources will have to be expended to revisit all local Bay Act ordinances to ensure they are correctly amended to reflect these amendments.
2. Staff resources will have to be expended to update the agency's "Local Assistance Manual" and other guidance documents, as necessary to reflect these amendments.

Alternatives:

A specific rather than conclusory statement describing the process by which the agency has considered less burdensome and less intrusive alternatives for achieving the essential purpose, the alternatives considered, and the reasoning by which the agency has rejected such alternatives.

Alternatives: The Board could leave the current regulation in place without change. However, this would result in continued confusion regarding certain definitions and requirements and continued conflict or unnecessary redundancies with some provisions of certain related state and federal laws and regulations.

Public Comment:

A summary of public comment received during the NOIRA comment period, along with any agency discussion.

This amendment process was begun prior to the requirement by Executive Order that the agency summarize public comments and agency discussion and provide them as input to the public participation process. The agency received 204 distinct comments during the NOIRA process, either written through the mail, presented orally at two public information meetings, or both. These comments addressed many parts of the regulations, including definitions, designation criteria, performance criteria, and programmatic and ordinance issues, as well as addressing general concerns such as fairness and equity, flexibility and equivalency, incentives, local program oversight and enforcement, implementation procedures, program participation and effectiveness, and regulatory conflicts. Rather than attempting to

summarize all these comments herein, the agency will make its summary of comments document available to anyone who requests a copy. Those interested may request a copy of the document, "CBLAB NOIRA Process Public Comments (Summer-Fall 1996)" from the Regulatory Coordinator, Chesapeake Bay Local Assistance Department, 805 East Broad Street, Suite 701, Richmond, Virginia 23219-1924.

In addition, the agency received comments from 480 individuals or organizations, most of whom provided multiple comments, pursuant to the Notice of Public Comment pertaining to the proposed regulation amendments published in the October 9, 2000 edition of the Virginia Register of Regulations. Furthermore, the agency received comments from 31 individuals or organizations, most of whom provided multiple comments, pursuant to the General Notice published in the July 30, 2001 edition of the Virginia Register of Regulations, pertaining to substantial changes in the proposed regulation amendments. These public comment documents can be seen on the agency's web site at www.cblad.state.va.us and have been submitted to the Registrar of Regulations as part of the documentation for final regulation submission.

Clarity of the Regulation:

A statement indicating that the agency, through examination of the regulation and relevant public comments, has determined that the regulation is clearly written and easily understandable by the individuals and entities affected.

The Chesapeake Bay Local Assistance Board, upon examination of this regulation and relevant public comments and upon subjecting the regulation to review, discussion and recommendations by an advisory committee composed of representatives of principal stakeholders, considers the regulation, as amended, to be clearly written and easily understandable by the individuals and entities affected.

Periodic Review:

A schedule setting forth when, no later than three years after the proposed regulation is expected to be effective, the agency will initiate a review and re-evaluation of the regulation to determine if it should be continued, amended, or terminated, and the specific and measurable goals the proposed regulation is intended to achieve.

The Chesapeake Bay Local Assistance Board and Department will initiate a review and reevaluation of this regulation no later than six (6) months prior to the third anniversary of the effective date of this proposed amendment (estimated to be approximately August 16, 2004). The purpose of the review and reevaluation will be to determine if the regulation should be continued, amended, or terminated.

The Board and Department have two potential mechanisms available that may be used to measure success regarding this regulation. The first is a ten-year long water quality monitoring project being conducted in a developing watershed in Caroline County, Virginia. By that point in time the data from the study may reveal whether or not the performance criteria in the regulation are effective in protecting the quality of that stream (as a surrogate for other Tidewater Virginia waters) from the impacts of land development. The goal of this project is to demonstrate that through implementation of the local Bay Act program in a developing watershed, the water quality of the stream system will be protected and will not decline, thus accomplishing the purpose for which the regulations were adopted.

The second potential measurement mechanism is the Board's local program implementation review process. This process is conducted to determine the level of program implementation success and effectiveness among Tidewater localities, with the ideal goal that all local Bay Act programs would be correctly and effectively implemented. The process consists of reports and grant deliverables provided by the local governments; field visits, questionnaires and interviews conducted by implementation review staff of the agency; site plan reviews, field visits and other technical assistance provided by agency staff at the request of local governments; and citizen complaints and agency enforcement actions related to local program implementation. The goal of these measures is to assure that Tidewater local governments are effectively implementing the regulations.

Fiscal Impacts:

A statement identifying anticipated regulatory impacts that includes (a) the projected cost to the state to implement and enforce the proposed regulation, including (i) fund source / fund detail, (ii) budget activity with a cross-reference to program and subprogram, and (iii) a delineation of one-time versus on-going expenditures; (b) the projected cost of the regulation on localities; (c) a description of the individuals, businesses or other entities that are likely to be affected by the regulation; and (d) the agency's best estimate of the number of such entities that will be affected.

The cost to CBLAD to comply with these procedures is estimated to include the following:

(1) publication of the NOPC in local newspapers and the *Virginia Register of Regulations* for the original proposed amendments and an additional General Notice pertaining to further substantive changes in the regulations; (2) printing and distributing the NOPC and General Notice to interested parties; (3) printing and distributing copies each amended version of the regulations to interested parties; (4) conducting public meetings only for the original NOPC to solicit comments regarding the proposed regulations; (5) providing commenters summaries of public comments and agency responses; (6) necessary modifications to the *Local Assistance Manual*, the agency's document which provides guidance and interpretations regarding the regulations; and, (7) staff and Board review of local program changes to assure compliance with the regulations.

The total cost of these procedures is estimated to be approximately **\$121,793**. The actual or estimated costs are dependent on the number of public meetings and the level of interest expressed by the public.

At this time, we anticipate that four public meetings will be held, one each in Northern Virginia (Prince William County or Fredericksburg), Richmond, Tidewater (Chesapeake or Virginia Beach) and the Eastern Shore.

The estimated costs are itemized as follows:

1. Publication of the NOPC in newspapers and the Virginia Register

a. Original NOPC published October 9, 2000: **\$ 2,000**

This figure is based on previous costs for publishing and the anticipated length of the NOPC. This included publication in the major newspapers which serve Tidewater Virginia: The Richmond Times-Dispatch (est. \$400), the Richmond Free Press (\$200), the Virginia Pilot (\$400), and either the Washington Post (\$1,000) or a distribution of smaller regional newspapers (equivalent total cost). There was no cost for publishing in the *Virginia Register of Regulations*.

b. Follow-up General Notice soliciting additional public comment on substantive changes, published July 30, 2001: **\$2,000**

This estimate was based on the same data as provided above.

2. Printing and distributing the NOPC to interested parties:

a. Original NOPC published October 9, 2000: **\$900**

The NOPC was assumed to be several pages in length for the purposes of printing and postage. All copying was done in-house an approximate cost of \$0.02 per copy. First class postage (\$0.32) was assumed to be adequate for the estimated size of the NOPC. CBLAD mailed the NOPC to its entire mailing list of approximately 2,000 persons, asking them to notify the agency if they want a copy of the proposed amendments or other information.

b. Follow-up General Notice soliciting additional public comment on substantive changes published July 30, 2001: **\$125**

This estimate was lower than the original one due to the fact that the agency was able to distribute the General Notice via email to a large number of those on the regulatory mailing list, reducing copying and postage costs. The General Notice was also available for reading, downloading and printing from the agency web site at www.cblad.state.va.us.

3. Printing and distributing copies of the regulation to interested parties:

a. Original version of the amendments published October 9, 2000: **\$670**

We assumed approximately 10 percent (200 individuals) of those on our mailing list would want to obtain a copy of the proposed regulations and support documents. We assumed that these documents would also be printed by a commercial vendor. Based on the size of these documents, we anticipated the total copying costs would be approximately \$190 and the postage for each package would cost approximately \$2.40 (total mailing cost of \$480).

b. Follow-up version of amendments with substantive changes made available on July 30, 2001: **\$175**

This estimate was lower than the original one due to the fact that the agency was able to distribute copies of the regulations via email to a large number of those on the regulatory mailing list, reducing copying and postage costs. The revised draft amendments were also available for reading, downloading and printing from the agency web site at www.cblad.state.va.us.

4. Conducting public meetings to solicit comments regarding the proposed regulation: **\$ 6,203**

We planned to prepare 200 copies of the proposed regulation and support documents as handouts for each of four public meetings. The cost estimate (copying, collating and stapling) provided by a local printer was \$745.

At the time the regulation amendments were proposed, the exact location of each meeting had yet to be determined. In the past, CBLAD has been able to secure meeting rooms in public (state or county-owned) facilities at no cost to the Department. We anticipated the same arrangements for these meetings. The other factors included in the cost of public meetings was associated with CBLAD staff salaries and travel costs. The staffing needs for these meetings was assumed to be four CBLAD staff: the Executive Director, the Regulatory Coordinator, the Chief of Local Planning Assistance, and one other support staff member. In addition, we expected the Board Chairperson, Vice-Chairperson, and two or three additional Board members to attend each meeting, depending upon where it is held. The breakdown of these cost estimates is provided below. Please note that the staff costs include the full cost to CBLAD (salary and benefits) for the number of hours indicated for each meeting. Board costs reflect the per diem rate they are allowed for attending meetings. The meeting cost also includes travel time, meeting set-up and breakdown time. Furthermore, for the Eastern Shore meeting, the cost includes lodging and meals, as provided in the State Travel Regulations.

Meeting location: Richmond (4 hours*): \$ 798

Staff costs \$ 548

Board Per Diem (5 members @ \$50/meeting) 250

Travel*	0
Lodging	0
Meals	0

* Local proximity eliminates the need for additional time for travel or mileage.

Meeting location: Northern Virginia (8 hours): \$ 1,382

Staff costs	\$ 1,094
Board Per Diem (5 members @ \$50/meeting)	250
Travel (200 miles round trip @ .19/mile)	38
Lodging	0
Meals	0

Meeting location: Chesapeake (8 hours): \$ 1,382

Staff costs	\$ 1,094
Board Per Diem (5 members @ \$50/meeting)	250
Travel (200 miles round trip @ .19/mile)	38
Lodging	0
Meals	0

Meeting location: Eastern Shore (12 hours): \$ 2,641

Staff costs	\$ 1,642
Board Per Diem (5 members @ \$50/meeting)	250
Travel (300 miles round trip @ .19/mile)	57
Chesapeake Bay Bridge Tunnel Tolls *	100
Lodging (4 Staff + 4 Board* = 8 x \$55)	440
Meals (4 Staff + 4 Board = 8 x \$19 (dinner/breakfast)*	152

* One of these Board members lives on the Eastern Shore, so lodging and meals would only apply to the other four members attending.

NOTE: No additional public meetings or hearings were held during the additional 30-day public comment period commencing on July 30, 2001.

5. Printing and distributing to commenters a list of the public comments and agency responses: \$ **800**

Based on past experience, we anticipated receiving comments from approximately 150-200 individuals or organizations, either in written form or provided verbally at the public meetings. We anticipated that the documentation of these comments and the agency responses would comprise approximately 75-80

pages, or 40 pages printed on both sides. The copying of these documents would be done in-house at the rate of approximately .02 per page. Therefore, the total copying cost was estimated at approximately \$320. Postage was estimated to be approximately \$2.40 per set, totaling \$480.

6. Necessary modifications to the *Local Assistance Manual*: **\$ 15,680**

The *Local Assistance Manual* has been provided to anyone upon request at a cost of \$18 unbound, or \$30 with a D-Ring Binder. The needed modifications will involve various members of the agency's program staff from both the Division of Environmental Engineering and the Division of Local Planning Assistance with procurement assistance from one member of the Administrative Division. The tasks will involve editing existing copy and graphics, writing new copy, creating new graphics, reviewing the changes, setting up the copy with Desktop Publishing software, and procuring printing services. As well, copies of the changes would need to be mailed to the approximately 1,000 current owners of the *Local Assistance Manual* as a free update. In addition, sets of these changes must be printed to be mailed with CBLAD's existing inventory of *Manuals* (approximately 20 copies). We estimated that the changes would involve approximately 50 pages, printed on both sides. Printing, collating, hole-punching costs are estimated to be \$750. Postage for mailing these updates to current owners was estimated at approximately \$2.40 per package, for a total mailing cost of approximately \$2,400. Future printing costs would be absorbed into the regular costs of reprinting the *Manual* for distribution upon request.

Staff costs for the *Manual* revisions are averaged, as follows, for a total of: \$ 12,530

Program Division Managers @ \$32.10/hour each x 5 weeks total = \$ 6,420

Program Staff Members @ \$24.58/hour each x 6 weeks total = \$ 5,900

Fiscal Staff Member @ \$26.28/hour x 1 day = \$ 210

7. Review of local program changes to assure compliance with the regulations:
\$ 93,240

As local programs are amended to reflect the changes in the state regulations, the local governments will be submitting the changes to CBLAD for review. Various members of the Division of Local Planning Assistance perform this review function as part of their liaison responsibilities. Each review results in a report and recommendation to one of two Committees of the Board which meet monthly to consider various local program elements (designations, comprehensive plan amendments, ordinance amendments, etc.) submitted by localities implementing the program. These Board Committees then make recommendations to the full Board whether the local program changes are consistent, provisionally consistent (with conditions), or inconsistent with the regulations. The full Board considers these recommendations as a routine part of the agenda of each quarterly meeting.

We estimated that, on average, that the following costs will be involved in the re-review of *each* of the 84 adopted local programs in Tidewater Virginia.

Staff review, report writing, and committee time @ \$23.00/hour x 40 total hours = \$ 920

Planning Division Chief oversight @ \$26.00/hour x 4 total hours = \$ 104

Executive Director oversight @ \$43.00/hour x 2 total hours = \$ 86

(There will be no additional cost of Board time, since these meetings are held regularly)

Estimated total review cost of each program @ \$ 1,110 x 84 programs = \$ 93,240

