

Chesapeake Bay Local Assistance Board  
Monday, December 9, 2002  
James Monroe Building  
101 N. 14<sup>th</sup> Street, Conference Room D  
Richmond, Virginia

Members Present:

Mr. Frank L. Benser  
Mr. Robert J. Bannach  
Mr. Colin D. Cowling  
Mr. Donald W. Davis  
Ms. Sue H. Fitz-Hugh  
Mr. David C. Froggatt, Jr.  
Mr. Stuart Mendelsohn  
Mr. Daniel B. Nice

Members Absent:

Ms. Anna Lee Bamforth

Staff Present:

Acting Executive Director, C. Scott Crafton  
Administrative Assistant, Carolyn J. Elliott  
Chief of Environmental Planning, Martha Little  
Principal Environmental Planner, Shawn Smith  
Principal Environmental Planner, David Kovacs  
Principal Environmental Planner, Doug Wetmore  
Senior Environmental Planner, Robbie B. Rhur

Special Guests:

Mr. L. Clifford Schroeder

Mr. Crafton called the meeting to order at 10:04 a.m. He began by calling for the nomination of officers for chair and vice chair of the Board as is customary during the meeting in December. Mr. Bannach nominated Mr. Frank Benser for Chairman. Mr. Benser accepted the nomination, noting his term would expire in June 2003. Mr. Davis called for the close of the nominations. Mr. Nice seconded. Mr. Crafton called for further discussion. There was none. Mr. Crafton called for the vote. All members voted aye. Mr. Crafton stated that Mr. Benser had been elected by unanimous consent.

Mr. Crafton turned the meeting over to Mr. Benser. Mr. Benser called for nominations for Vice Chair. Mr. Nice nominated Mr. Donald Davis for Vice Chair. Mr. Mendelsohn called for the closure of nominations. Mr. Cowling seconded. Mr. Benser called for further discussion. There was none. Mr. Benser called for the vote. All members voted aye. Mr. Benser stated that Mr. Davis had been elected by unanimous consent.

Mr. Benser recognized each member by name and noted the Planning District Commission that they represented. Mr. Benser also introduced Mr. Roger Chaffe, the

Departments legal counsel. Mr. Benser noted that there was quorum, and that Ms. Bamforth had not yet arrived.

Mr. Benser called for the approval of the September 16, 2002 Board meeting. Mr. Davis motioned. Mr. Nice seconded. Mr. Benser called for further comments. There were none. Mr. Benser called for the vote. All members voted aye. Mr. Benser stated that the minutes were approved by unanimous consent.

Mr. Benser asked Mr. Crafton to present the Director's Report.

Mr. Crafton began by advising that staff continued to work with Tidewater local governments to assist them in their efforts to amend their local Bay Act ordinances in order to be consistent with amendments to the program's regulations. As well, staff has responded to other kinds of requests for assistance in the field, and an increased load of site plans sent in for our review and comments. He noted that staff was completing work on the study of the impediments to local implementation of Better Site Design principles and field evaluation and development of a guideline protocol for determining stream perenniality. He said the next agency newsletter should be sent out on or about December 20, 2002.

Mr. Crafton, noted his pleasure, in introducing and welcoming the two new Board members, Ms. Sue Fitz-Hugh of Richmond, representing the Richmond Regional Planning District localities, and Mr. David Froggatt of Prince George, representing the Crater Regional Planning District localities.

Mr. Crafton went on to share that Ms. Fitz-Hugh is a native Virginian and attended Salem College. She is a former elementary school teacher and has previously served as a Committee Clerk to the Virginia Senate and Secretary of the State Board of Elections. He said that Ms. Fitz-Hugh is actively involved in her community, as chair of several committees.

Mr. Crafton shared that Mr. Froggatt is Regional Manager for Resource Management Services, Inc. Mr. Crafton said that Mr. Froggatt graduated from Penn State University and had spent 32 years protecting Virginia's forest resources. Mr. Crafton also said that Mr. Froggatt is the current Chair of the State Forester's Silvicultural Water Quality Task Force and Chair-elect of the Virginia Division of American Foresters, and also serves as Treasurer of the Virginia Forester's Association.

Mr. Crafton advised that the JLARC report was presented by their staff to the full Commission on October 15, 2002, and that he previously sent each of the members a one-page handout with the highlights of the report, which is also available on JLARC's web site and by link from CBLAD's web site. He said that he had tried to obtain copies for each of the members, but the final report had not yet been printed. He said that these should be available by the beginning of the legislative session.

Mr. Crafton noted that the JLARC staff did make some changes to the final report in response to some recommendations that he had made in his comments on the draft report, and the final report will also include, as an appendix, his formal response to the report.

Mr. Crafton went on to report that Secretary Murphy, the Board members who reviewed the draft report, and he considered the report to be generally positive, although it did include some valid criticisms of the program. He said that these were, for the most part, issues that are already being addressed.

Mr. Crafton reported that the report did recognize the importance of the Bay Act program in Virginia's overall water quality protection efforts, and suggested that the agency should not have further funding reductions imposed, and that the grant funds should be restored as soon as revenues allow. He said that significantly, the report expressed reservations about the wisdom of merging CBLAD into DCR, since there would be minimal cost savings, if any, and there would be risks of less program efficiency and effectiveness.

Mr. Crafton advised that at the last meeting of the full Wilder Commission, the Commission voted to recommend to the Governor that CBLAD be merged with DCR. He said that he had not been able to confirm this information, and the last list published on their web site did not mention CBLAD at all. He said that earlier, CBLAD had been on a streamlining list that proposed that the agency be eliminated. He also told the members that the Governor had not publicly indicated what his intentions are regarding CBLAD, although Mr. Crafton was provided a copy of Secretary Murphy's plan and recommendation.

Mr. Crafton went on to advise that the Governor announced his first round of budget reductions on October 15, 2002, and that CBLAD's contribution to those reductions amounted to an 8.4% reduction for this current fiscal year, and a 9.1% reduction for FY2004. He said that these reductions were achieved from the following: (1) salary savings from staff vacancies during this fiscal year; (2) elimination of the staff position for the manager of the Polecat Creek Water Quality Monitoring Project in early January of 2003; (3) elimination of agency discretionary (operations) funding in both fiscal years – less this year, and more next year; and (4) elimination of the small remaining amount of funding for local assistance grants in FY2004.

Mr. Crafton said that the Governor has directed agencies to propose additional reductions in preparation for his budget amendments, to be released to the public on December 20, 2002, and that he proposed that two additional vacant positions be eliminated at the end of this fiscal year – our vacant engineer and GIS staff positions. The salary savings from these positions in this current fiscal year would be lost as well. He said that his understanding is that this proposal has been accepted and that the Governor will not impose further reductions on CBLAD in his budget amendments.

Mr. Crafton said that added to the loss of \$1 million in local assistance grant funding from the 2002 General Assembly budget and the 7% and 8% budget reductions ordered in the last fiscal year, it was fair to say that CBLAD will have lost approximately 60% of the funding they had available July, 2001.

Mr. Crafton advised that Secretary Murphy has submitted his proposal for merging CBLAD into DCR, as directed by the 2002 Appropriations Act, and that this proposal would create a separate Division within DCR to address Bay and Coastal issues and programs.

However, the Secretary has also recommended that any action regarding such a merger be deferred until the 2004 General Assembly session, to provide time for further consideration as both agencies adjust to the massive budget reductions and programmatic associated program changes. Mr. Crafton provided a copy of the Secretary's proposal for each member.

Mr. Crafton said that the Attorney General has issued another opinion supporting the Bay Act regulations. Northumberland County had requested an opinion challenging the fairness of the varying buffer requirements for different land uses, such as development, agriculture, and silvicultural activities. He said that the opinion supported the reasoning behind these varying requirements and the Board's authority to make such distinctions. Mr. Crafton provided a copy of the opinion for each member.

Mr. Crafton closed his comments noting the topics on the day's agenda and asked if there were any questions.

Mr. Cowling had a question regarding the agricultural guidance and also land ownership and their implication. Mr. Crafton asked if these questions could be deferred until after Ron Wood made his presentation. Mr. Cowling agreed.

Mr. Benser thanked Mr. Crafton for his report, and noted that there were no Consent Items. He recognized Ms. Robbie Rhur for staff's presentation of Chesterfield County's program.

Ms. Rhur introduced Ms. Joan Salvati and noted that at the end of her presentation, Ms. Salvati would be presenting Chesterfield County's Swift Creek Reservoir update and would also answer any questions.

Ms. Rhur provided a brief history noting that on December 2, 1993 the Chesapeake Bay Local Assistance Board found Chesterfield County's Phase I program consistent with the Act and Regulations subject to two conditions. She said that these conditions were satisfied and on March 27, 1997, the Board found Chesterfield fully Phase I consistent.

She explained that Chesterfield County has experienced intense growth, particularly in the Swift Creek watershed, and as a result, the county decided to shift its stormwater management program from the traditional on-site detention ponds to a regional watershed management approach. She advised that in Section 9VAC 10-20-120 8.a(2) of the Bay Act Regulations, stormwater management criteria may be met through the use of a locally adopted regional stormwater management program. She went on to say that localities must prove an equitable level of stormwater treatment to that of individual on-site stormwater detention ponds.

Ms. Rhur went to note that in 1997, the Board of Supervisors directed County staff to develop a regional stormwater management program for the Swift Creek watershed, and program is called the Watershed Management Master Plan and Maintenance Program for the Swift Creek Reservoir Watershed. She also noted that the Master Plan was adopted October 25, 2000.

Ms. Rhur said that on March 14, 2001 the Pro-Rata Ordinance was passed, the pro-rata fee is \$5010.00 per impervious acre (adjusted for inflation); this fee is assessed to all properties, not just those that fall above the sixteen percent impervious threshold. She said the goal is to raise \$1.2 million per year needed to implement the program, and the total cost of the program is estimated to range from \$24 to \$36 million over 30 years of project development.

She advised that on November 28, 2001, the process for implementing the full plan was completed when the County Board of Supervisors adopted an ordinance restricting uses in the flood plains designated as BMPs by the plan.

Ms. Rhur explained that CBLAD staff and the County's consultant, worked together to equitably compare two differing methods to calculate pollutant removal for the watershed. According to the Master Plan, regional wet pond BMPs will achieve seventy-one percent pollutant removal, leaving 29 percent to be removed through less traditional means. She said that three additional practices are responsible for removing the remaining 29 percent: fifty foot buffers along non-perennial streams will remove twenty percent pollutants, enhanced floodplain areas remove five percent, and fifteen percent is removed through the created wetland areas for the regional stormwater ponds. She said that this allowed staff to conclude that the practices are satisfactory in meeting the pollutant removal requirements.

Ms. Rhur closed her comments stating that based on the analysis of the program, it appears to provide the same level of water quality protection that would be required by a normal watershed-wide application of CBPA pollutant removal criteria, and therefore, staff recommended that the Watershed Management Master Plan and Maintenance Program for the Swift Creek Reservoir Watershed be found consistent with the Act and Regulations. Ms. Rhur also noted that on October 29, 2002 the Southern Area Review Committee was presented with this staff report and agreed with staff recommendations.

Ms. Rhur asked Ms. Salvati to provide the County's power point presentation for the Swift Creek Reservoir project. Ms. Salvati provided a visual picture of Ms. Rhur's explanation of how the program worked. Ms. Salvati's verbal and visual presentation provided the Board with an idea of how much thought and effort had gone into the County's program.

Ms. Salvati thanked staff for their assistance and asked if there were any questions.

Mr. Mendelsohn asked the build out time frame for the project. Ms. Salvati explained that it would be a 30 years, even though there were builders who had an interest in seeing the project completed now. Mr. Mendelsohn went on to comment that Northern Virginia is currently having a problem with this issue in that a project being considered of this nature would end up in someone's backyard. Ms. Salvati appeared sympathetic to the situation.

Mr. Davis complimented Ms. Salvati's knowledge and presentation of the County's program, and asked if the program represented both water quality and water quantity. Ms. Salvati acknowledged that the program represented both.

Mr. Davis asked if the impact on wetlands was known at this time. Ms. Salvati responded that the information was unknown, however, the County's plans projections provided a better method to manage the wetlands than going thru the Corps of Engineers.

Mr. Davis asked if the zoning was already in place for the program. Ms. Salvati responded that the plan was based on the County's comprehensive plan, not zoning requirements.

Mr. Benser thanked Ms. Salvati for the presentation of a very innovative approach, and asked for any further comments or questions. There were none.

Mr. Benser then entertained the call for a motion. Mr. Davis motioned to find the Phase I local program amendments adopted by Chesterfield County be found consistent with § 10.1-2109 of the Act and §§9VAC10-20-60.1 and 2 of the Regulations.

**CHESAPEAKE BAY LOCAL ASSISTANCE BOARD**

**December 9, 2002**

**RESOLUTION**

**LOCAL PROGRAM, PHASE I**

**CHESTERFIELD COUNTY # 72**

**Major Modification – Consistent**

WHEREAS § 10.1-2109 of the Chesapeake Bay Preservation Act states that counties, cities, and towns in Tidewater Virginia shall designate Chesapeake Bay Preservation Areas and incorporate protection of the quality of state waters in Chesapeake Bay Preservation Areas into local plans and ordinances; and

WHEREAS § 9VAC10-20-60 of the Chesapeake Bay Preservation Area Designation and Management Regulations states that the elements in subsections 1 (a map delineating Chesapeake Bay Preservation Areas) and 2 (performance criteria applying in Chesapeake Bay Preservation Areas) shall be adopted by local governments; and

WHEREAS Chesterfield County adopted a local program to comply with § 9VAC10-20-60.1 and 2 on October 10, 1990; and

WHEREAS on December 2, 1993, the Chesapeake Bay Local Assistance Board reviewed their adopted program and found it consistent subject to two conditions; and

WHEREAS Chesterfield County provided additional information regarding the conditions and the Chesapeake Bay Local Assistance Board found the County's program consistent with § 10.1-2109 of the Act and §§ 9VAC10-20-60 1 and 2 of the Regulations on March 27, 1997; and

WHEREAS Chesterfield County adopted the Watershed Management Master Plan and Maintenance Program for the Swift Creek Reservoir Watershed on October 25, 2000, for the purpose of creating a regional watershed management program; and

WHEREAS the Chesapeake Bay Local Assistance Board has adopted *Procedural Policies for Local Program Review* which address, among other items, review of modifications to local programs previously found consistent; and



WHEREAS staff reviewed the amendments made to Chesterfield County's adopted program for consistency with the Act and Regulations; and

WHEREAS on October 29, 2002 the Local Program Review Committee for the Southern Area considered and evaluated the information contained in the staff report and concurred with the staff recommendation as outlined in the staff report; and,

WHEREAS after considering and evaluating the information presented on this date, the Board agrees with the recommendation in the staff report and of the Review Committee; now,

THEREFORE BE IT RESOLVED that the Chesapeake Bay Local Assistance Board finds Chesterfield County's amended Phase I program consistent with §10.1-2109 of the Act and §§ 9VAC10-20-60.1 and 2 of the Regulations.

The Director of the Chesapeake Bay Local Assistance Department certifies that this resolution was adopted in open session on December 9, 2002 by the Chesapeake Bay Local Assistance Board.

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C. Scott Crafton  
Acting Executive Director  
Chesapeake Bay Local Assistance Department

Mr. Mendelsohn seconded the motion.

Mr. Benser called for further comments. There were none.

Mr. Benser called for the vote. All members voted aye.

Mr. Benser thanked Ms. Rhur and called for Phase II Local Program Reviews. He asked Mr. Doug Wetmore for staff's presentation for James City County.

Mr. Wetmore introduced Mr. John Horne, Development Manager for James City County and explained that after providing the Board staff's update, Mr. Horne would be available to answer questions.

Mr. Wetmore provided a brief history of the program noting that on September 21, 1998, the Board found James City County's comprehensive plan consistent with five conditions and established a compliance date of December 31, 2000. Then, on September 18, 2000, the Board granted an extension of the deadline to December 31, 2001.

He went on to say that in April 2001, the County submitted comprehensive plan revisions to CBLAD, and that James City County failed to adopt the amendments by the December 31, 2001 deadline. He said because of this, the Board found them inconsistent with the Act and Regulations on March 18, 2002, and the March 18, 2002 Resolution indicated that if James City County did not adopt a consistent comprehensive plan by September 30, 2002, the County would be subject to the compliance provisions as set forth in the Act and the Regulations.

Mr. Wetmore advised that to date, James City County has not adopted comprehensive plan amendments and would not be able to adopt any amendments until July 2003, according to an adoption schedule provided by the County. Therefore, he said, the County is currently inconsistent with of the Act and Regulations.

Mr. Wetmore stated the Board's options, per the official procedures for local program review, and they were as follows: (1) Send the matter to AG's office for compliance action, or (2) Defer the matter until the September 2003 CBLAB meeting

Mr. Wetmore then asked if there were any questions, and reminded the members that Mr. Horne was also available to answer questions.

Mr. Benser asked if Mr. Wetmore knew why it has taken so long. Mr. Wetmore responded that the County was in the process of their five-year comprehensive plan update and did not want to take staff away from this process to work on a separate adoption process, rather they wanted to continue with their current comprehensive plan adoption process which is scheduled for completion in July 2003. He went on to say that the County understood the implications of inconsistency, but declined to change their decision not to pursue a separate adoption process.

Mr. Crafton asked if Mr. Wetmore was aware of any steps the County has taken to implement the provisions or changes even though they have not been formally adopted.

Mr. Wetmore explained that the issue was not related to implementation procedures, and that their Phase I program has been one of the best that he had dealt with. He said the conditions of their inconsistency were mapping and discussion-related rather than "on-the-ground" program implementation issues. He then briefly reviewed the five outstanding conditions and commented that the County had provided CBLAD staff with all the information and amendment language that was needed, but had not formally adopted them yet.

Mr. Benser asked if staff had a recommendation. Mr. Wetmore responded that staff had not prepared a formal recommendation, but had simply provided the available choices for the Board, and that it would be the Board's decision and to consider the consequences of the decision. Mr. Wetmore suggested that their be a discussion of the issues now that Mr. Horne is present to represent the County's position.

Mr. Davis commented that this was a matter where James City County was doing what they were supposed to they simply had not formalized it. Mr. Wetmore responded affirmatively.

Mr. Benser asked Mr. Horne to comment. Mr. Horne thanked staff for their assistance, and provided for the members a copy of their timetable for approval of their comprehensive plan, a copy of the Powhatan Creek Watershed Management Report and a brochure entitled "Protecting Resources in Delicate Environments (PRIDE). Mr. Horne went on to explain the County's position, and stated that the County is actively in the process. He also apologized that



it has taken so long to adopt their plan, however, had met their targeted dates. He said that he fully expected to have the comprehensive plan approved in July 2003.

Mr. Mendelsohn confirmed that James City County is currently doing those things that are in the comprehensive plan that is scheduled to be approved in July 2003.

Mr. Benser thanked Mr. Horne for his presentation, and suggested that the matter be tabled until the matter could be discussed with counsel.

Mr. Nice commented that the County was already doing what they were supposed to do and motioned to defer the matter. Mr. Crafton asked that consideration be given to the fact that if the decision was to send the issue to the Attorney General's Office, it would take at least 30 days, and cause everyone to spend money on the matter, and by the time it went to trial the whole matter would have been resolved by the County's adoption in July.

Mr. Bannach stated that he would like to see a letter assuring the Board that the comprehensive plan would be adopted. Mr. Cowling reminded everyone that a comprehensive plan is not a legal document and asked whether the zoning regulations that meet the requirements.

Ms. Fitz-Hugh commented that as a new member she was hearing that the locality was meeting the requirements, but they don't want to take staff time to write a document. Mr. Benser responded that one of the requirements of the Act was that they have an approved comprehensive plan and that it is done within a specified time frame.

Ms. Fitz-Hugh asked if there was a way to word an extension in such a way that it would not set a precedent.

Ms. Little pointed out the very specific requirements of Phase II, and further that all the other localities were required to meet those requirements, and that the Board could consider deferring the issue until their September meeting, and if the comprehensive plan had not been adopted that there was a clear understanding that the issue was to go directly to the Attorney General's Office.

Ms. Fitz-Hugh asked again if wording could be found to provide that this issue would not take precedent.

Mr. Horne fielded a number of questions and comments from the Board members and after some discussion, Mr. Crafton summarized by saying that the County had a clear expectations and an adoption schedule and are already implementing the policies contained in the outstanding Phase II conditions.

Mr. Mendelsohn stated that the facts that Mr. Crafton stated about the County should be included in the motion.

Mr. Benser asked if Mr. Nice was willing to include in his motion those items having been discussed. Mr. Nice agreed and motioned to defer the issue to the September 2003 meeting with the understanding that failure by the County to adopt their comprehensive plan by the September 2003 Board meeting would result in the County's program be sent to the Attorney General's Office for a compliance action.

Mr. Benser called for further discussion. There was none. Mr. Benser called for the vote. All members voted aye. Mr. Benser stated that the matter had been deferred until the Board's September 2003 meeting.

Mr. Benser noted that there were presentations to make and asked Mr. Crafton to read Mr. Schroeder's Resolution. After it was read, Mr. Nice motioned to adopt the Resolution. Mr. Davis seconded the motion. Mr. Benser called for the vote. All members voted aye.

Mr. Schroeder noted that under Governor Allen's administration a study was conducted and it was found that the Chesapeake Bay Local Assistance Department and Board was the best. He said that he still believed they were the best.

Mr. Crafton went on to read aloud Ms. Rice's Resolution. Mr. Cowling motioned to adopt the Resolution. Mr. Mendelsohn seconded. Mr. Benser called for the vote. All members voted aye. Ms. Rice was not present at the meeting.

Mr. Benser called for the Review of Board Sponsored Activities, and recognized Mr. Ron Wood for staff's presentation for the Regulatory Guidance, Agricultural Assessments.

Mr. Wood reference the letter he had sent to the members on November 25, 2002, advising them that the Policy Committee reviewed the guidance and adopted a motion to recommend its approval at the December 9, 2002 Board meeting. He noted that there were two provisions to its approval, One was Mr. Wood would review the availability of local Virginia Cooperative Extension agents in all Tidewater Soil & Water Conservation Districts (SWCD) and 2 that he would amend the Conclusions section of the guidance to include verbiage concerning proper documentation of Soil and Water Quality Assessment/Plan approval by an individual SWCD Board member.

Mr. Wood stated that he had completed both requests, and asked that the Board approve the guidance.

Mr. Benser called for a motion. Mr. Davis motioned to approve the Regulatory Guidance, Agricultural Assessments.

**CHESAPEAKE BAY LOCAL ASSISTANCE BOARD**  
**December 9, 2002**  
**RESOLUTION**  
**APPROVING REGULATORY GUIDANCE DOCUMENTS**

WHEREAS § 10.1-2103.6 of the Chesapeake Bay Preservation Act states that the Chesapeake Bay Local Assistance Board shall provide technical assistance and advice or other aid for the development, adoption and implementation of local comprehensive plans, zoning ordinances, subdivision ordinances, and other land use and development and water quality protection measures utilizing criteria established by the Board to carry out the provisions of this chapter; and

WHEREAS the Chesapeake Bay Preservation Area Designation and Management Regulations were amended by the Board on December 10, 2001, with the revised Regulations effective on March 1, 2002; and

WHEREAS the staff of the Chesapeake Bay Local Assistance Department drafted regulatory guidance documents to provide additional guidance to local governments and other interested parties relating to the revised Regulations; and

WHEREAS on October 29, 2002 the Policy Committee of the Chesapeake Bay Local Assistance Board reviewed the following draft regulatory guidance documents: *Agriculture: Soil and Water Quality Conservation Assessment/Plans*; and

WHEREAS the Policy Committee recommended minor changes to these regulatory guidance documents and recommended their approval to the Board; now

THEREFORE BE IT RESOLVED that the Chesapeake Bay Local Assistance Board hereby approves the above regulatory guidance documents.

The Director of the Chesapeake Bay Local Assistance Department certifies that this resolution was adopted in open session on December 9, 2002 by the Chesapeake Bay Local Assistance Board.

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C. Scott Crafton  
Acting Executive Director  
Chesapeake Bay Local Assistance Department

Mr. Bannach seconded the motion.

Mr. Benser called for further discussion.

Mr. Cowling stated that he wished to bring up the questions he had earlier and the previous determination by the attorney general's office regarding agricultural buffers, and the experiences that have been found regarding best management practices. He said that if you are not farming the property now, it cannot be farmed, and he was concerned about the economic consequence. He said that his other reservation was finding the landowner responsible for compliance when a property is being leased, and it is a known fact that very often the landowner is not in the state and may not have ever seen the property. He said that he could not support either of these inclusions into the guidance.

Mr. Wood stated that Virginia had already established that the property owner is the party responsible for the property, therefore, the property owner had to be found.

Mr. Crafton and Mr. Benser agreed that under land use guidance, the property owner is the responsible party. Mr. Chaffe asked that the questions be put in writing and he would provide answers. Mr. Cowling stated that he definitely wanted to hear the legal opinion.

Mr. Nice asked who would be made responsible. Discussion ensued about the writing of lease agreements so that the property owner would not be held responsible for the activities of the lessor. Mr. Crafton reminded everyone present that the document was to be used as guidance only.

Mr. Benser called for the vote. All members voted aye except Mr. Cowling who voted nay.

Mr. Davis then stated that he did not want the issue of responsibility to drop there and asked that the questions Mr. Cowling raised be addressed in writing to the Attorney General's Office.

Mr. Benser called for New Business and recognized Mr. David Kovacs for staff's presentation for the Public Participation Guidelines Section 9 VAC 10-10. Mr. Kovacs explained the reason to have public participation guidelines and that this guidance was being handled under an exempt process. Mr. Kovacs addressed the changes that had made on Page 2 and 5, noting that they were housekeeping items and asked the Board to approve the Resolution.

Mr. Benser advised that the changes that had been made were mandated by state code.

Mr. Benser called for the motion. Ms. Fitz-Hugh motioned to approve the following Public Participation Guidelines Resolution.

**CHESAPEAKE BAY LOCAL ASSISTANCE BOARD**  
**December 9, 2002**  
**RESOLUTION**  
**FINAL ACTION – EXEMPT**  
**9 VAC 10-10**  
**CBLAD Public Participation Guidelines, Amendment**

WHEREAS the Chesapeake Bay Local Assistance Board adopted Public Participation Guidelines with an effective date of May 20, 1994, as 9 VAC 10-10 et seq.; and

WHEREAS changes to § 2.2-4007(A) and § 2.2-4007(G) of the Code of Virginia were made in the 2002 Session of the Virginia General Assembly, and these changes affected certain provisions of 9 VAC 10-10 et seq.; and

WHEREAS the Board has statutory authority under § 10.1-2103.4 of the Code of Virginia to promulgate regulations and amendments thereto; and

WHEREAS because the proposed amendments are mandated by 2002 changes to the Code of Virginia and the Board may adopt the proposed amendments, as necessary to conform to changes in

Virginia statutory law, pursuant to § 2.2-4006(A)(4)(a) in an action exempt from the operation of Article 2 (§§ 2.2-4006, et seq. of the Administrative Procedures Act; and

WHEREAS the Board's Regulatory Review Committee reviewed the proposed amendments and associated adoption procedures at a meeting held on October 29, 2002 and recommended that the proposed amendments be approved; now

THEREFORE BE IT RESOLVED that the Public Participation Guidelines (9 VAC 10-10) be amended and reenacted as contained in Attachment A, attached hereto.

The Director of the Chesapeake Bay Local Assistance Department certifies that this resolution was adopted in open session on December 9, 2002 by the Chesapeake Bay Local Assistance Board.

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C. Scott Crafton  
Acting Executive Director  
Chesapeake Bay Local Assistance Department

Mr. Bannach seconded the motion.

Mr. Benser called for further comment. There were none.

Mr. Benser called for the vote. All members voted aye.

Mr. Benser advised that the motion had passed unanimously.

Mr. Benser recognized Ms. Martha Little for discussion about Intensely Developed Areas Issues. Ms. Little advised that there would not be any further discussion at the day's meeting because staff had not heard from any of the localities legal counsel who were supporting a general application.

There was some discussion between members about the fact that staff had not heard anything from the localities because at the October 29, 2002 meeting, these localities reported that staff would be hearing from legal counsel in support of the general application in the very near future.

Mr. Benser asked Mr. Chaffe to provide the Board with current information regarding the Freedom of Information Act (FOIA) noting that the Board and any committee of the Board was a public body and as such any record was available upon public request. Mr. Chaffe reminded the Board that FOIA's could be complicated and controversial at times, however, in almost all cases, information requested by the public is to be provided. He also brought to everyone's attention that a FOIA did not have to be in writing even though it was preferred. He noted that in spite of the fact that there are over 80 categories in the Act that may be, at the agency's discretion, exempt, there were just a few categories in which the agency may not have to turn over records and mentioned Attorney/Client privilege, Governor's Working Papers, Personal Records and criminal investigations. He said that beyond these, most records that the agency has would be

FOIA. Mr. Chaffe addressed meetings and once again these records do fall under FOIA. He went to say that there is a procedure that needs to be followed that specifically addresses how things should be followed, and each member will be required to attest that the requirements were followed.

Mr. Benser asked if there were any questions. There were none.

Mr. Benser called for Public Comment. There was none.

Mr. Benser called for the Discussion of Board Enforcement Options, and recommended that the discussion to be in open session.

Mr. Crafton commented that the reason he was addressing this subject was that in the JLARC report, a comment was that members responded that they did not understand the power of the Board, and the available enforcement options. He also said that the JLARC report suggested that training be provided to the Board regarding this subject and it was for this reason that he had asked Mr. Chaffe to address the Board. He also referenced a letter that had been included in the Board package addressing this subject that had been written for the benefit of the previous Director.

Mr. Chaffe commented that he had also seen the JLARC report and was disappointed that any of the members did not understand the extent of their power. He said that the Board had been given specific authority in an amendment to the Bay Act that would provide that the Board has exclusive authority to either bring it's own action against a locality through their local court or ask the Attorney General's Office to intervene in the action to either stop violations of the Act or enforce a locality to be compliant. He advised that asking the Attorney General's Office required the approval by their office. Mr. Chaffe also advised that JLARC suggested that procedures be developed, but did not know exactly what they needed.

Mr. Chaffe advised the Board that they have considerable power and there was no question about that, and that in a appropriate case consideration should be given by the Board to bring action.

Ms. Fitz-Hugh asked Mr. Chaffe how successful the threat of litigation has been in the past.

Mr. Chaffe responded that it had been pretty successful.

Mr. Crafton stated that in there had been an issue with the City of Portsmouth, and when it became apparent that there was no other recourse but to sue them, a letter went to Portsmouth and it was then that the City's attitude became cooperative. Mr. Crafton said that he felt the philosophy is a partnership rather than a dictatorship. He also reminded everyone that localities have limited resources and would prefer to do everything that is possible to get them to do what is necessary before considering legal action. He said by doing this it can be clearly shown that the Department has done everything possible to work with the locality.



Mr. Davis commented that he recalled at one of the Board meetings that a statement had been made that the Attorney General's office did not want to take a locality to court.

Ms. Little asked Mr. Chaffe the following: If the Department decided to sue the developer, wouldn't they, in fact, also need to file suit against the locality since the locality is charged with implementing and enforcing the program. Mr. Chaffee responded that most likely that would be case, and it would be seen that the locality was making this person do the right thing. Mr. Crafton said the Department would be saying to the developer stop what you are doing right now while the Department works with the locality. Mr. Chaffe reminded everyone that litigation would be in the local court.

Mr. Cowling noted that he had experience a situation with a locality where the entire 100 foot buffer was waived by a locality for a particular individual, and wanted to know where the Department stood with this kind of situation. Mr. Crafton commented that these types of concerns would be addressed beginning in January 2003 when the agency begins compliance reviews. He said that records of exceptions would be reviewed, and other related documentation. He said doing this would create a snapshot of how the locality is performing, and staff would be able to make necessary recommendations. Mr. Crafton went on to say that it was Mr. Cowling's situation that staff hoped to be able to act on timely because very often the Department does not find out about the situation either at all or in time to do anything about it. Mr. Davis commented that situations like this very often have only 30 days to take any type of action. Mr. Crafton summarized the discussion about this situation and others noting that it was the implementation of compliance where the agency could see exactly what is going on in the localities and where there may be variances that are given that are far and beyond being correct.

Mr. Benser asked if there was any other business to come before the Board. Mr. Crafton noted that the next full Board meeting would be March 24, 2003, and a schedule of dates would be sent out during the next several weeks. He also advised that Mr. Shepard Moon resigned to take a job with the Virginia Coastal Program at the Department of Environmental Quality. He said it was fair to say that the second reason for leaving was the anxiety over the position of the agency and the need to be a bit more secure. He also advised that he had been given approval to hire a planner but intended to wait until after the first of the year.

Mr. Benser called for a motion to adjourn the meeting.

Mr. Davis motioned to adjourn and Mr. Bannach seconded.

The meeting was adjourned at 12:29 p.m.

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Frank L. Benser  
Chairman

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C. Scott Crafton  
Acting Executive Director