

MEMBER
JURISDICTIONS

April 15, 2021

CHESAPEAKE

Mr. Justin Williams
Virginia Department of Environmental Quality
PO Box 1105

FRANKLIN

Richmond, VA 23218

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GLOUCESTER

RE: Proposed Amendments to the Chesapeake Bay Preservation Area
Designation and Management Regulations

HAMPTON

Dear Mr. Williams:

ISLE OF WIGHT

The Chesapeake Bay Preservation Act (Bay Act) was amended to include “coastal resilience and adaptation to sea level rise and climate change” and “the preservation of mature trees or planting of trees as a water quality protection tool and as a means of providing other natural resource benefits” to the criteria listed in 9VAC25-830. Subsequently, the Department of Environmental Quality (DEQ) published proposed amendments to the Chesapeake Bay Preservation Area (CBPA) Designation and Management Regulations on February 1, 2021, which initiated the 90-day public comment period.

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The Hampton Roads Planning District Commission (HRPDC) appreciates the opportunity to provide comments on the proposed regulatory amendments and requests DEQ’s consideration of the following comments and recommendations.

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I. Need for a Traditional Regulatory Advisory Panel Process

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The Bay Act is one of several state and federal regulatory programs with overlapping jurisdictions in the coastal zone. Making changes to this complex regulatory environment calls for a deliberate approach to align these various programs, avoid conflicts, and eliminate unintended consequences. There is too much at stake to rush the CBPA regulatory amendments. These proposed amendments create potential conflicts between coastal resiliency efforts, private property rights, and water quality preservation. The stakeholder engagement process was abbreviated because the amendments are exempt from the requirements of the Administrative Process Act. The CBPA program was designed to be a state-local partnership; however, local governments have been given only 90 days to review and comment on the draft rather than have an opportunity to ask questions and hash out concerns and compromises

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during the development of the amendments. Established local programs will have to change, and in recognition of the extensive lift, the proposed coastal resiliency amendments include a timeframe of three years for localities to make these changes to their ordinances and programs. The way the Commonwealth and its localities manage our coastline today will have lasting impacts, as the challenges we face, including sea level rise and coastal hazards, continue to increase.

Recommendation

Our local governments believe that a more inclusive process would result in the development of new regulations that will better address the challenges of water quality protection and coastal resiliency. It is our recommendation that the existing hurried process for regulatory development be abandoned in favor of utilizing an extensive stakeholder engagement process, such as a regulatory advisory panel, to provide input and allow for these interests to be heard and considered. Although this will make the process longer, we believe it would result in more comprehensive and practical regulations that would serve the Commonwealth in the long run.

Should DEQ and the State Water Control Board decide to continue with the existing abbreviated process for revising the CBPA regulations, we offer a revised approach to structure the regulation. We have also listed our concerns and provided suggestions for making the regulatory intent clear.

II. Adaptation Measures as Permitted Buffer Modifications with Conditions

The proposed amendments add a new section, 9VAC25-830-155, to address the provision of “coastal resilience and adaptation to sea level rise and climate change.” We believe a better approach would be to incorporate adaptation measures into the existing framework of permitted modifications and exceptions as listed in 9VAC25-830-140. It will be substantially easier for local governments to incorporate these changes into their existing framework rather than having to reorganize to accommodate a new separate section with overlapping requirements. There is no identified benefit to requiring localities to do this, whereas incorporating a permitted modification will be easier for the localities, the homeowners, and the developers. This simpler approach would better align the goals of improving coastal resilience and protecting water quality.

Recommendation

Our recommendation is to first modify and amend section 5(a) of 9VAC25-830-140 as indicated in the blue text below:

“In order to maintain the functional value of the buffer area, existing vegetation may be removed, subject to approval by the local government, only to provide for reasonable sight

lines, access paths, general woodlot management, ~~and~~ best management practices, including those that prevent upland erosion and concentrated flows of stormwater, and coastal resilience and adaptation to sea-level rise and climate change, as follows:

5. For coastal resilience and sea level rise or climate change adaptation projects, trees and woody vegetation may be removed, grading, filling, plowing, or other land disturbing activities employed, and appropriate vegetation established to enhance resilience and protect water quality in accordance with the best available technical advice and applicable permit conditions or requirements.

Additionally, in order to be consistent with the overall objective to have applicants consider climate change impacts when developing in the Resource Protection Area (RPA), we recommend a new requirement for a coastal resilience assessment that is similar to the Water Quality Impact Assessment. The suggested language to include as a new subsection, 9VAC25-830-140.8, is indicated in blue text below:

8. A coastal resilience assessment shall be required for any proposed modification within the Resource Protection Area to address sea level rise and climate change consistent with this part and for any other development in Chesapeake Bay Preservation Areas that may warrant such assessment because of the unique characteristics of the site or intensity of the proposed use or development.
 - a. The purpose of the coastal resilience assessment is to identify existing and future vulnerabilities to flooding and inundation from precipitation, tides, storm surge, and sea level rise on Chesapeake Bay Preservation Areas consistent with the goals and objectives of the Act, this chapter, and local programs, and to determine specific measures for mitigation of those impacts. The specific content and procedures for the coastal resilience assessment shall be established by each local government.
 - b. The coastal resilience assessment shall be of sufficient specificity to demonstrate compliance with the criteria of the local program.

III. 9VAC25-830-155 Climate Change Resilience and Adaptation Criteria

A. Need Clarification for the Assessment of Future Conditions

Section C of 9VAC25-830-155 directs local governments to consider the impacts of climate change with any proposed development in the RPA. They are to account for a period of no less than 30 years, use an appropriate forecasting model, estimate future site conditions, and identify “measures, conditions, or alterations” to the proposed development to address the impacts. This section is problematic for the following reasons.

(1) Intent of Assessment

First, the intent of the assessment of future conditions is not clear. The assessment could be intended to make property owners aware of the risks of more frequent flooding on their proposed development project or it could be designed to restrict projects based on future vulnerabilities as a result of climate change. The intent will determine how the assessment should be conducted and what can and should be done with that information. Clarity of the intent of these regulations will help ensure that they are consistently applied across Tidewater.

(2) Define “Impacts of Climate Change” and “Consider”

Second, the “impacts of climate change” that local governments need to “consider” should be defined. It is unclear whether “impacts of climate change” refers to future conditions (such as higher sea levels or expanded floodplains), water quality impacts such as increased runoff due to precipitation changes, or more general site impacts such as property damage, the loss of septic drain fields, vegetation losses due to saltwater intrusion, or loss of wildlife habitat. The lack of clarity is a significant problem. Additionally, it is unclear what it means to “consider” these impacts. Is the intention for local governments to require applicants to offset or mitigate these impacts or develop a benefit-cost analysis? Or, is it intended to educate property owners about climate risks?

(3) Methodology

Third, local governments are also to consider the impact of future conditions, such as floodplains, water levels, and storm surge levels on development projects in the RPA. There is no recognized model or methodology that can accurately predict future floodplains, water quality decline, or storm surge to the level of detail and precision required for regulating land development. This type of analysis would be an academic exercise but not practical to implement at the local level. At best, these projections would have significant uncertainty and error, and as a result should not be used for delineating future RPAs. It is also unclear if this consideration requires local governments to provide updated floodplain maps, and if it does, how often they should be revised.

(4) Application to Intensely Developed Area

Fourth, it is unclear if a local government would need to apply the same consideration of climate change impacts to development projects in the Intensely Developed Area (IDA).

(5) Planning Scenario

Lastly, the regulations do not contain justification for the selection of the 30-year horizon for future impacts or for the use of the NOAA Intermediate-High sea level rise scenario. Although this scenario has been referenced in other state resilience policies, the original selection of it for Executive Order 45 was intended to guide decisions involving the siting and construction of state-owned buildings. NOAA Technical Report NOS CO-OPS 083, “Global and Regional Sea Level Rise Scenarios for the United States,” which defines the Intermediate-High Scenario, recommends selecting an appropriate scenario based on “the specific system,

problem, goals, and preferences” for a specific setting or type of project. It is unclear whether the scenario specified in the proposed regulations is appropriate for the range of projects or planning decisions considered by local programs in implementing the Bay Act.

Recommendation

The regulations need to be more specific so that local governments clearly understand what is necessary to meet the requirements and can practically meet those standards.

(1) Intent

It is our recommendation that the regulations be amended to state that the Commonwealth allows activities that are necessary for climate adaptation, what those allowed activities are, and the conditions that are required to be met in order to use them. However, if the intent of the future conditions assessment is not to allow for coastal adaptation strategies but instead to eliminate or reduce development, a higher standard of methodological rigor and accuracy should be required for the assessment, since these provisions often conflict with constitutionally vested rights as more fully discussed below

(2) Define “Impacts of Climate Change” and “Consider”

It is our recommendation that “impacts of climate change or sea level rise” and “consider” be defined in the regulation. It is imperative that the impacts be narrowed to include only those that are reasonable to consider for a proposed development project in the RPA. To “consider” the impact should mean that a local government informs an applicant of the potential vulnerability of their project to the impacts of climate change or sea level rise.

(3) Methodology

Local governments also need clarification on *how* to consider the impacts. DEQ should provide instructions and identify the tools that should be used to evaluate the future floodplains, water quality decline, or storm surge on the parcel level. This information needs to be included in the regulation. The questions of climate change impacts are further complicated when considering how they would apply to a small-scale development project, such as a new accessory structure, versus a larger resiliency project on a neighborhood scale. Local governments should not be required to provide updated floodplain maps because they may create confusion with FEMA products especially if frequency and timing of updates are not aligned.

(4) Intensely Developed Area

We recommend local governments be given the authority to determine whether to apply the same consideration of climate change impacts to development projects in the Intensely Developed Area (IDA).

(5) Planning Scenario

In addition, we recommend that the regulations base the time horizon for considering climate change impacts and the selection of an appropriate sea level rise scenario on the

proposed action under consideration. This should account for a project's type, expected lifespan, what is at risk, and the character of the project's immediate surroundings. For example, many shoreline management projects may have a projected lifespan of approximately twenty years. For projects such as these, a quadratic extrapolation of observed sea level trends, such as those from the Virginia Institute of Marine Science Sea Level Rise Report Cards, may be a more appropriate standard than a climate change scenario intended for long-term projects.

B. Need Clarification for Best Management Practices (BMPs)

Section C.4 directs local governments to identify measures to address the climate change impacts of the proposed development "such as state or federally recognized or approved best management practices." Sections E.1.a, E.2.a, and E.3 refer to such practices as "best management practices applicable to the adaptation measure or activity as recognized or approved by a state or federal agency." The proposed amendments are not clear if the intention is to identify flood mitigation practices that have been recognized or approved by a state or federal agency or water quality BMPs that would offset the impacts of flood mitigation practices.

Recommendation

Local governments are familiar with the Virginia BMP Clearinghouse and Chesapeake Bay Program BMPs that have been approved to treat stormwater runoff. BMPs are defined in the Virginia Stormwater Management Program regulations (VAC25-870) as proprietary and nonproprietary practices that "prevent or reduce the pollution of surface waters and groundwater systems." If the term "best management practices" is used in the proposed regulation to refer to practices that mitigate flood risk, then we suggest a different term, such as "Adaptation Practices", to avoid confusion.

Additionally, if there is a list or Clearinghouse of practices that address the impacts of rising seas, wetland migration, increased precipitation, etc. that have been recognized by a state or federal agency, we recommend referencing that list in the regulations. If there is no such list, we recommend that the regulations include a process for how a local program should determine whether a proposed adaptation measure meets the criteria.

C. Add Conditions for Fill Exceptions Instead of Eliminating Them

Section D eliminates a local government's authority to grant exceptions for applications that consist "solely of the use of fill or other material" within 100 feet of the RPA or within the RPA. The proposed amendments are supposed to clarify that adaptation measures are a permitted activity within the CBPA; however, Section D limits the options that the current regulations permit. For example, adding fill material in the Resource Management Area is allowed under the existing regulations. It is inappropriate to single out development

projects that are using fill on a flood prone property. At a minimum, local governments require stabilization and seeding, and often additional plantings, to mitigate for the impacts to water quality of adding fill material to a site. It is unfairly limiting to owners of flood prone properties to eliminate the use of fill as an adaptation measure and could incentivize flood walls and other structural practices. The language should make clear exactly what would be permitted using performance standards, rather than prohibiting solely fill with no guidance for local governments on what may or may not meet that threshold. Without that clarification, individual interpretations will vary which is inconsistent and detrimental to the Commonwealth.

Recommendation

Listing the circumstances under which a local government cannot grant exceptions in Section D is contrary to 9VAC25-830-130 and 9VAC25-830-140, both of which list the conditions the land development has to meet in order to comply. To the extent that the RPA has been previously approved through the current process, adding new requirements is contrary to Va. Code §62.1-44.15:79 as well. It is recommended that applications utilizing fill be subject to conditions similar to those listed in Section E, which require planting of vegetation and minimizing land disturbance.

D. Remove De Facto Expansion of the Resource Protection Area

There are several references in the proposed amendments that apply additional requirements to areas outside of the designated RPA, resulting in a de facto expansion of the RPA. In Section D.2, exceptions to the requirements are not to be granted for “solely the use of fill or other material” within 100 feet of the RPA or within the RPA. In Section E.2.b, when the adaptation measure or development occurs within a naturally vegetated RPA, property owners are to protect “any existing vegetation” in the additional 50 feet beyond the RPA. Both of these are significant new requirements for areas where property owners and local programs have generally had more flexibility to balance development with water quality protection. Sea level rise impacts are directly related to elevation, a vertical measure. Applying additional horizontal buffers is an ineffective response to sea level rise that could result in unfair restrictions of properties that may not be impacted.

Recommendation

The application of new requirements to the areas adjacent to the Resource Protection Area in Sections D.2 and E.2.b should be removed. Additional stakeholder engagement would be necessary to evaluate requirements to areas outside of the RPA.

E. Need Clarification on the Boundary of the Resource Protection Area

Section C requires local governments to consider future impacts to the RPA based on a 30-year planning horizon and data from models, suggesting the RPA will move based on future

projections. Additionally, Sections D.2 and E.2.b set requirements based on the RPA, and it is unclear whether the boundary is to reflect the current RPA or a predicted RPA considering climate change impacts. Local governments delineate the RPA on a site-specific basis at the time of permit application, and they would need a new methodology to delineate the RPA based on future conditions. The way the proposed amendments are written, the mapping exercise could include the current RPA, sea level rise, floodplains, water level, and storm surge projections, and the 50-foot and 100-foot expansions.

Recommendation

Sections D.2 and E.2.b should be revised to state that the 50-foot and 100-foot extensions are based on the current mapped RPA. It should be clarified that the extensions are not intended to be in addition to a future mapped RPA boundary.

F. Allow Option to Require Water Quality Impact Assessments (WQIA)

Section E.3 states that a WQIA “shall not be required” when the adaptation measure or activity within the RPA is an approved BMP designed to “reduce runoff, prevent erosion, and filter nonpoint source pollution.” The construction of water quality BMPs often creates a temporary land disturbance and can require the removal of existing vegetation. Local governments use the WQIA as a tool to require mitigation for these impacts and request to have the option of requiring them.

Recommendation

We recommend changing “shall” to “may” in the following sentence included in Section E.3: “Where the adaptation measure or activity is a best management practice...a Water Quality Impact Assessment in accordance with 9VAC25-830-140(6) ~~shall~~ **may** not be required **by the locality.**”

G. Need Clarification for Living Shoreline Projects

Section E.4 lists the conditions a “living shoreline project or related activity” needs to meet to be exempt from certain requirements, including a WQIA. The conditions include securing local approval, maintaining or establishing a vegetative buffer, minimizing land disturbance, and “approval from the Virginia Marine Resources Commission, including a permit as applicable.” Based on this language, it is not clear if a living shoreline project that does not require approval by the Commission but does meet the other conditions would be subject to other requirements, including a WQIA.

Additionally, the regulations do not include a definition of “living shoreline project or related activity,” and it is not clear what types of projects could be categorized as a “related activity.”

Furthermore, local governments should be able to require a WQIA for a living shoreline project if they so choose.

Recommendation

In order to provide clarification, we recommend the following changes to Section E.4: 1) include local wetland board approval as a qualifying condition for the exemption, 2) add a reference to the existing definition of living shorelines listed in section 28.2-104.1 of the Virginia Code, 3) delete the reference to “related activity,” and 4) change “shall” to “may” require a WQIA.

Our suggested revisions to Section E.4 are noted in blue text below:

“Where the proposed adaptation measure is a living shoreline, ~~as defined in section 28.2-104.1 of the Virginia Code or related activity~~, the locality otherwise approves of the project, the project maintains or establishes a vegetative buffer inland of the living shoreline to the maximum extent practicable, minimizes land disturbance to the maximum extent practicable, and the project receives approval from the Virginia Marine Resources Commission ~~or the local wetlands board, including a permit~~ as applicable, ~~and any other necessary permits or approvals~~, the adaptation measure ~~shall~~ **may** be exempt from additional requirements including a Water Quality Impact Assessment **imposed by the locality.**”

H. Unintended Consequences with Floodplain Management

Local floodplain management ordinances are required for communities that want to participate in the National Flood Insurance Program (NFIP). The NFIP requires, through the Code of Federal Regulations, localities to implement certain minimum standards in floodplains, which in many cases overlap with CBPAs. Aligning allowed activities under the Bay Act and local floodplain management ordinances is critical to allow communities to continue to participate in the NFIP, which is a requirement for allowing residents of those communities to purchase federal flood insurance policies.

Additionally, many communities in Tidewater participate in the NFIP’s Community Rating System (CRS), which grants policyholders in those communities a discount on their flood insurance premiums if the communities implement certain policies or activities, such as adopting higher regulatory standards for development in floodplains. Recently, several Tidewater communities have received credit through the Bay Act for preserving open space. This credit is based on the default position that development is heavily restricted both in type and extent in RPAs. The CRS program currently allows only a few types of development in areas that count for open space preservation credit. These include alterations that do not create obstructions to the flow or loss of storage of flood waters, construction of sand dunes, beach nourishment, or habitat restoration projects. The broad allowance of “adaptation measures, mitigation measures, or other actions necessary to address the impacts of climate

change,” may be interpreted as allowing development that would not qualify as open space. This could result in localities losing CRS credit for open space credit for RPAs, resulting in increased flood insurance premiums for citizens.

Furthermore, regulatory floodplains are delineated by the Federal Emergency Management Agency (FEMA) based on the results of flood insurance studies. The resulting flood insurance rate maps (FIRMs) have significant impacts on land development, construction, and property values. Mapping of future floodplains under the Bay Act, as is called for in the proposed regulations, in the absence of official guidance or support from FEMA has the potential to cause confusion among property owners and conflicts with local floodplain management programs.

Recommendation

We recommend that DEQ coordinate with the Department of Conservation and Recreation, FEMA, and the Virginia Floodplain Managers Association to ensure that potential conflicts between the proposed regulations, the NFIP, and the CRS are addressed. In addition, we recommend that the adaptation measures or activities allowed within RPAs without an exception be limited to those that would be credited under the Community Rating System’s Open Space Preservation Activity, as in the HRPDC’s recommended approach in Section II of this letter (see also National Flood Insurance Program Community Rating System Coordinator’s Manual FIA-15/2017, Activity #420).

I. Program Requirements should be in the Regulations rather than in Guidance

DEQ has indicated that any questions about implementation will be answered through guidance. To be consistent with the current CBPA program, these requirements should be included in the proposed regulatory amendments rather than in the forthcoming guidance, as “guidance” is not enforceable as duly enacted law. Va. Code §62.1-44.15:72(A) requires that any such provisions must be in the form of regulations. The regulations should be widely understood and implementable without relying on guidance to provide definitions and clarify the goal of the regulation.

Recommendation

The regulations should explain what types of measures or activities are allowed and the appropriate water quality mitigation requirements for each measure. The guidance should provide additional information for implementing those metrics at the local level, much like the existing Riparian Buffers Modification and Mitigation Guidance Manual (Buffer Manual). This too is clearly “guidance” and does not have the force of law. Va. Code §62.1-33.15:73 requires local governments to be given authority to exercise police and zoning power. Local governments are also given the right to designate CBPA ordinances under Va. Code §62.1-44.15:74(A) and (B). Local governments need clarity to ensure their programs are compliant.

IV. Mature Trees Preservation Provisions

A. Need Clarification of Mature Trees

The proposed regulatory amendment includes requirements to protect existing mature trees and to promote tree plantings in buffers. A definition of “mature tree” is not provided in the regulations.

Recommendation

A definition of “mature tree” must be included in the proposed regulations. The height, diameter, canopy, species, whether the tree is producing flowers or bearing fruit, and health of the tree could be considered as factors in determining whether a tree is mature. The definition should be expressed in such a way that makes it simple to evaluate whether a tree is considered mature.

B. Timeline for Ordinance Update not Specified

The preservation of mature trees provisions will impact every development project in the CBPA; however, no timeline was provided for incorporating these new protections into local ordinances. It is important to designate a timeframe within which the ordinance changes should be adopted so that local programs will not be automatically out of compliance once the proposed regulations are final.

Recommendation

Section A of the proposed 9VAC25-830-155 grants local governments three years to incorporate the coastal resiliency provisions. It is our recommendation that the same timeframe be allowed for the preservation of mature tree provisions so that local governments can consolidate their updates into one ordinance revision.

V. Additional Resources Request

The proposed amendments will increase the staff time and resources needed for local governments to implement the CBPA program. The technical resources provided by DEQ will also need to be updated.

Recommendation

To best support program modifications, we respectfully request for DEQ to prioritize updates of the Buffer Manual and model local ordinance so that they reflect the regulatory changes. Additionally, local governments request technical assistance and training for implementation of the new provisions. The most pressing topics to address will be: 1) how

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to review the impacts of climate change on a project and 2) how to review the impacts of an adaptation measure on water quality.

In conclusion, by documenting our extensive concerns with the proposed regulatory amendments to the CBPA regulations, we request for DEQ and the State Water Control Board to support our recommendation to slow down this process and work through these changes in the traditional way, using a regulatory advisory panel. The Hampton Roads Planning District Commission appreciates your consideration of these comments and suggestions.

Sincerely,

Andria P. McClellan
Chair

Copy: State Water Control Board
Hampton Roads Caucus

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