

Proposed Amendments to the CBPA Designation and Management Regulations

REGIONAL ENVIRONMENTAL COMMITTEE

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Background

HB504, passed during the 2020 General Assembly session, required the State Water Control Board to add two additional considerations when developing the regulations to implement the Chesapeake Bay Preservation Act

- “Coastal resilience and adaptation to sea level rise and climate change”
- “Preservation of mature trees or planting of trees as a water quality protection tool and as a means of providing other natural resource benefits”

DEQ staff presented proposed amendments addressing both requirements to the SWCB on December 9, 2020

SWCB approved the publishing of the proposed amendments in the *Virginia Register* with a 90-day comment period and at least one stakeholder meeting to be held after the 2021 General Assembly session

Primary Issues

Protecting and adapting coastal properties to flooding, sea level rise, and other climate impacts is becoming increasingly challenging due to regulatory conflicts or impediments.

The regulations should address these conflicts by clearly identifying allowable activities, how proposals should be assessed by local governments, and how local governments should factor in future conditions resulting from climate change in conducting these assessments.

The regulations should stand on their own and be understandable and implementable by local governments without requiring additional guidance.

HRPDC Alternative Proposal

The regulations should clearly allow for a range of adaptation activities subject to appropriate and clearly defined performance standards:

- Add coastal resilience and sea level rise adaptation projects to the list of permitted modifications in 9VAC-25-830-140 (Development Criteria for RPAs)
- Add a requirement for a Coastal Resilience Assessment for any proposed modification within the RPA
 - Modeled after Water Quality Impact Assessments
 - Project description and map
 - Assessment of vulnerability to flooding and sea level rise
 - Estimated resilience benefits of proposal
 - Steps taken to mitigate impacts
 - Would include minimum standards while allowing for local flexibility in implementation

HRPDC Staff Review and Concerns

Assessment of Future Conditions

Best Management Practices

Expansion of the RPA

Delineating the RPA

Performance Criteria

Assessment of Future Conditions

The proposed regulations direct local governments to consider the impacts of climate change on any proposed developments in the RPA. They must:

- Account for a period of no less than 30 years
- Use the 2017 NOAA scenario to forecast future conditions
- Include climate change impacts such as future floodplains, water level, storm surge, etc.
- Identify “measures, conditions, or alterations to the proposed land development” to address those impacts.

Assessment of Future Conditions - Issues

What is the intent of the assessment? The detail and accuracy of the assessment will be different if it is intended to inform decision-making as opposed to reducing development options.

What does it mean to “consider the impacts of climate change?”

Are the 30-year horizon and 2017 NOAA Intermediate-High scenario appropriate for CBPA projects?

Is it feasible to require the consideration of future climate conditions for CBPA projects?

Assessment of Future Conditions - Discussion

1. Should local governments have to “consider” the future impacts of climate change on any proposed development in the RPA, and, if so, what is the intent? To increase public awareness of risks? To restrict development to reduce vulnerability and/or protect water quality? Other reasons?
2. Would you welcome more clear-cut instructions for what is included in a climate change impact consideration? Do you prefer to leave the language more flexible?
3. Is the 30-year planning horizon appropriate? If not, what would be better?
4. Is it helpful for the regulations to specify which sea level rise scenario to use? If so, do you support using the 2017 NOAA Intermediate-High scenario projection curve?
5. Who would do the technical work for evaluating future floodplains, water levels, storm surge, etc. on a site-by-site basis? Would you want the regulations to specify how and when to update floodplain maps or are more flexible requirements the preferred approach?

Best Management Practices

Sections C and E both refer to “best management practices”:

- Section C: localities should identify measures...”such as state or federally recognized or approved management practices” to address climate impacts for development proposals
- Section E: Adaptation measures or activities shall “be designed, implemented, and maintained in accordance with best management practices applicable to the adaptation measure or activity as recognized or approved by a state or federal agency”

Best Management Practices - Issues

“Best Management Practices” are widely understood by local governments to refer to stormwater management practices such as those approved by the Virginia BMP Clearinghouse or the Chesapeake Bay Program

- Are these references intended to be interpreted as stormwater management practices? If so, that should be made clear. If they are not meant to be stormwater management practices, a different term should be used to avoid confusion.
- Other regulations specifically refer to the references, such as the BMP Clearinghouse, that can be used to address requirements. The regulations should include specific references as opposed to those “recognized or approved by a federal or state agency.”

Best Management Practices - Discussion

1. What types of practices would address the impacts of rising seas, wetland migration, increased precipitation, etc. on a proposed development project in the RPA?
2. What tool would you use to assess water quality impacts from climate change? Would/Should the regulation require “measures” so post development impacts were equal to pre-development impacts?

Resource Protection Areas

The proposed regulations apply additional standards to areas adjacent to RPAs that are currently subject only to the General Performance Criteria:

- Section D2: Local governments shall not grant an exception where it “consists of approval solely for the use of fill or other material to the Resource Protection Area **or within 100 feet of the Resource Protection Area**”
- Section E2b: Adaptation measures or activities in naturally vegetated or undeveloped RPAs shall “preserve to the maximum extent practicable any existing vegetation **in the additional 50 feet landward from the RPA**”

Resource Protection Areas - Issues

Applying additional development standards in areas already developed may result in takings claims.

It is not clear that additional horizontal standards will be effective for addressing sea level rise or other climate impacts.

It is not clear from the proposed regulations if or how future climate conditions should be accounted for in delineating the RPA. Will local programs be required to map future RPAs and then apply the additional buffers?

Section E2b applies to “any existing vegetation” whereas the current RPA regulations apply to “indigenous vegetation.”

Resource Protection Areas - Discussion

1. Is a 50-foot expansion of the RPA an appropriate safety factor for estimating future conditions?
2. Would expanding the RPA based on a 30-year projection and restricting development be considered a taking?
3. Naturally vegetated area is not defined. Is it reasonable to expand the RPA by 50ft based on that condition?
4. Most applicants would replant after applying fill. Is it more appropriate to establish revegetation requirements instead of focusing on banning the sole use of fill within 100ft of the RPA?
5. Would you rather implement the simpler 50- or 100-foot fixed expansion to address climate change or estimate the conditions in 30-years on a rolling basis?
6. How impactful would either option be on waterfront homeowners?

Performance Criteria

Section E states that the performance criteria for adaptation measures or activities within the RPA shall apply “in lieu” of the general performance criteria and RPA development criteria.

Section E includes blanket prohibitions on “the use of fill or other materials to raise the elevation of a Resource Protection Area” in both previously developed and naturally vegetated/undeveloped areas.

Section E requires that adaptation measures be “designed, implemented, and maintained in accordance with BMPs applicable to the adaptation measure as recognized or approved by a state or federal agency”.

Performance Criteria - Issues

It is unclear why the performance standards for adaptation measures would be applied “in lieu” of the standard criteria instead of in addition to.

In most cases, the use of fill is followed by revegetation, so setting standards for preserving existing vegetation, reestablishing disturbed vegetation, and minimizing land disturbance would better allow property owners to protect their property while also protecting water quality.

In the absence of recognized state or federal practices, establishing performance standards or metrics to evaluate adaptation measures or activities would allow for a wider range of measures and give local governments the direction on how to assess proposals.

Performance Criteria - Discussion

1. Should the performance criteria for adaptation measures be in lieu of those for other types of development?
2. Does it make sense to include adaptation measures as permitted buffer modifications?

Next Steps

Review of proposed regulations by localities and HRPDC staff

HRPDC staff will draft regional comments and send out to localities for review and comment

REC will consider comment letter at upcoming meeting and vote on a recommended action for the board

HRPDC board will consider comment letter for submittal to DEQ