Chesapeake Bay Local Assistance Board's
Policy Committee Meeting – July 24, 2002
101 N. 14th Street, 17th Fl., Conference Rm.
Richmond, Virginia 23219

Committee Members Present	Committee Members Absent
The Honorable Frank L. Benser	The Honorable Dama E. Rice
The Honorable Anna Lee Bamforth	

Staff Present
C. Scott Crafton, Acting Executive Director
Carolyn Elliott, Administrative Assistant
Martha Little, Chief of Environmental Planning
Lee Tyson, Principal Environmental Planner
Doug Wetmore, Principal Environmental Planner
David Kovacs, Principal Environmental Planner
Shawn Smith, Principal Environmental Planner
Shep Moon, Principal Environmental Planner
Catherine Harold, Environmental Engineer

Mr. Benser called the meeting of the Policy Committee to order at 10:40 a.m. He noted that two of the three members of the Committee were presented therefore there was quorum. Mr. Benser recognized Mr. Lee Tyson to present the first item on the agenda, Local Government Compliance Evaluation Policies and Procedures.

Mr. Tyson began staff's presentation of the draft Local Government Compliance Evaluation Policies and Procedures noting that the policies and procedures had been developed in order to not only ensure the local governments were properly implementing the Act and Regulations, but to promote innovations and unique methods of addressing water quality protection. He noted that the draft materials had been provided to interested stakeholders.

Mr. Tyson provided an overview of the response documents noting that this document contained the subject of the comment, the commenter, the issues, and the Department's response.

On Pg. 4 of the DRAFT Compliance Evaluation Procedures, Mr. Benser asked about the discussion of findings and recommendation before the staff report is presented to local area review committees. Mr. Tyson agreed that the staff recommendations should be made available to local staff before the DRAFT staff reports and resolutions are distributed to the Local Area Review Committees, as has been done for the Phase I and II programs. Ms. Smith commented that the process that had prevailed in the past would continue.

Mr. Tyson reviewed the following subjects without comment from the Committee Members; Funding Assistance, Adjacent Property Owner Notifications.

Mr. Tyson reviewed the Comments on the Local Program Compliance Evaluation Locality Checklist, Local Land Use Ordinances, Resource Protection Areas. There were no comments by Committee Members.

Mr. Tyson reviewed Erosion and Sediment Control and Plan of Development Review Process, and noted that there had been a typographical error regarding land disturbances less than 2,500 square feet and a reference to the Code of Virginia. Both errors have been corrected.

Mr. Tyson went on to discuss Stormwater Management and Best Management Practices.

Mr. Benser asked Mr. Tyson to note Page 8 of the Checklist for Local Program Compliance Evaluation, the first sentence states, "Describe the local maintenance requirements for BMPs. Are they complete and adequate, Yes or No.
Mr. Tyson advised that the complete and adequate sentence should have been removed. He noted that the words had been removed from all the other checklists.

Mr. Tyson went on to review Agricultural and Silvicultural Requirements, Wetlands Permitting, Regulatory Relief Mechanisms, Program Administration and Enforcement.

Mr. Benser referred to Pg. 15 under Program Administration and Enforcement noting that this section should be IVa, not III.a. Mr. Benser also noted that a question remained concerning the number of building permits issued for activity in a CBPA. Mr. Tyson responded that this question will be moved to the annual report section, and the question was removed from the locality checklist. Mr. Benser confirmed that it would be deleted from this section.

Mr. Tyson advised that the remaining comments in the response document dealt with Plan Development and Field Investigation Reporting and commented on both. He noted that under Resource Protection Area Buffers, the use of the word "wooded" had been changed to read "vegetated" on the Site Evaluation Sheets.

Mr. Tyson reviewed the New Residential Lot Checklist, New Subdivision Checklist. Under Expansion of Nonconforming Structure Checklist, Mr. Tyson noted that this item had been amended to make it more clear.

Mr. Tyson reviewed the Pre-1989 Lot Checklist, and noted that the Checklist assumed that development on the property required an exception or waiver, and noted that the checklist had been amended to reference non-conforming pre-1989 lots.

Mr. Tyson reviewed the Sight Line Clearing Checklist, and noted that the checklist had been amended to ask what type of sight line clearing activity has occurred, and distinguish between pruning, complete clearing, some other type of activity. He said the Department is also asking the types of vegetation that have been removed.

Mr. Tyson reviewed the Exception Checklist. He noted that the Checklist assumed the exception was for an encroachment and not relief from other requirements. He said that the checklist has been amended to refer to the type and extent of the exception associated with the site.

Mr. Tyson noted that the comments have been answered and made changes where appropriate.

Mr. Benser noted that on Pg. 7, Section F, the question is asked "Does the Department have a copy of the local BMP Checklist and a copy of any calculation procedures or locally produced guidance documents." He asked if there was any CBLAD guidance documents regarding the BMP requirements. Mr. Tyson advised that there had been rough guidance provided and also DCR, thru the Stormwater Management Program, has guidance or checklist.

Mr. Tyson asked Ms. Bamforth where she found reference material. She stated that she used the DCR, Stormwater Management Handbook. She also said that there are locality produced guidance documents.

Mr. Benser then asked about the second part of the question, "Describe the checklist and calculation procedures/locally-produced guidance," and stated that if the Department has a copy, why is the Department requiring localities to describe it? Mr. Tyson stated that for his purposes, the locality may simply say that the Department has a copy, see file. Mr. Benser asked again, why is the Department asking for the locality to describe it when they already have a copy? He also noted that he questions why the Department would ask for a BMP Manual when they already have a copy. He stated that answering these questions would be a terrible waste of time.

Ms. Bamforth asked about the locality checklist and whether there is an administrative waiver process in place for non-conforming structures and if included pre-1989 lots.

Mr. Tyson responded that an administrative review process is permitted for the construction of a principal structure on a pre-1989 lot.

Ms. Bamforth also asked about the current CBPA map, if the locality has a site-specific RPA designation how do they handle the new data. Do they collect until the map is revised or does it vary. Mr. Tyson said that it varied by locality, and it has become an issue that must be resolved by the court.

Ms. Bamforth asked about the non-tidal wetlands, does DEQ intend to start tracking that? Certainly the wetlands board keeps track of all the permits for the wetlands. As far as, other sites, will DEQ begin tracking. Mr. Tyson said that he did not believe so, and to the extent possible the Department is requesting this information for informational purposes only.

Ms. Harold stated that DEQ was attempting to get a grant to work with VIMS to try to get a handle on wetland impacts, mitigation, and restoration. She did not know how this information is going to be put together.

Mr. Crafton stated that it might be helpful to know that Virginia is committed to the restoration of wetlands, and permitting agencies are going to try to track this information. He said he was uncertain where they are in the process, but it is information that the Commonwealth needed.

Mr. Benser went back to Pg. 4a, Resource Management Area, What makes up the locality's Resource Management Area? He stated that there are localities that do not have RMAs, but have designated the entire locality to be included under the Regulations, otherwise subject to the RMA requirements.

Ms. Little responded that those would be jurisdiction wide resource management areas. They are considered RMAs even though not designated. Mr. Benser went on to say that Bowling Green agreed to the requirements of the RMA even though the area had not been designated an RMA. Mr. Benser asked if everyone understood the distinction.

Mr. Benser noted that he could see nothing in the documentation that took this issue into account. Mr. Tyson advised that this distinction would be added. Mr. Benser went on to state that it was his understanding that this distinction was an acceptable alternative for localities based on land types and soil types.

Mr. Tyson stated that Ms. Smith pointed out that the question regarding the distinction is asked during the Phase I checklist and he would obtain the language directly from that checklist.

Mr. Benser noted that the meeting was not a public hearing and opened the meeting to public comments.

Mr. Joe Lerch asked about silviculture activities, and noted that as a planner from Spotsylvania, you may have someone come in under a silviculture operation and purchase 900 acres. Then they subdivide it all out on paper and then sell each of these individual lots quickly. Then a homebuyer puts in a POD and all of a sudden they receive notice that they have to put a 100 foot buffer in.

Mr. Tyson and Ms. Little stated that there had been discussion about that, and at what stage should there be notification. It was suggested that when the Regulations suggest that when silviculture operation stops and a subdivision plan comes in.

Mr. Benser called for a motion. Ms. Bamforth motioned to recommend that the Local Program Compliance Evaluation Checklist and Policies to the next Board meeting and recommend it for approval with corrections noted by the committee.

Mr. Benser seconded the motion. Mr. Benser called for further discussion. There was none. Mr. Benser called for the vote. All members voted aye. Mr. Benser noted that the motion carried.

Mr. Benser called for discussion regarding Nonconforming Structures and Uses.

Mr. Tyson reviewed the Expansion of a Nonconforming Structure.

Ms. Bamforth asked if the CBPA ordinance is included in the local zoning ordinance and in that case the local ordinance is already dealing with nonconforming uses, would this guideline tie in or conflict with the locality ordinance?

Mr. Tyson said that he did not know how to weigh the different treatment of an activity or building in a CBPA versus one that is not. Mr. Tyson provided an example and Ms. Little explained that the Regulations provide more flexibility now with respect to expansion of nonconforming structures. Mr. Benser stated that he remembered one of the requirements was that there would be no further expansion into the RPA. . Mr. Tyson stated that the guidance discouraged further encroachments into the RPA. However, localities will review each request for expansion on a case by case basis, and if the encroachment is justified according to the required findings, then expansions further into the RPA may be approved through this administrative process.

Ms. Little said that one of the required findings is that encroachments into the buffer area shall be the minimum necessary to achieve a reasonable buildable area for a principal structure and utilities for pre-1989 lots.

Mr. Tyson said that there may be situations where a lot may not have any other place to build an expansion, and if the property owner can show their locality that there is a legitimate need for further encroachment into the RPA, then the local government would be empowered to approve the encroachment.

Mr. Joe Lerch asked a question about existing drainfields and what happens when a homeowner wanted to expand it and would that be considered an expansion of a nonconforming use. Mr. Tyson stated that drainfields are a necessary utility and that localities will be able to look at that administratively and approve it.

Mr. Lee Rosenberg also suggested that it would be a good idea to refer to BOCA existing regulations that a specific regarding structures. He said that that there are instances where there are indoor swimming pools which are normally considered as part of the structure, but that BOCA says if there is a tiny gap between the two structures, then BOCA considers that structures are separate.

Ms. Little stated that the Department recognized that the definition from BOCA with respect to "structures" would be a good idea. There was additional discussion from staff regarding decks, pools and patios.

Mr. Benser stated that his understanding of the comments were that the reference to vested rights would be deleted and a definition of a structure would be added. Mr. Tyson agreed to make the changes to address both items.

Mr. Benser recognized Mr. David Kovacs for the presentation of guidance relating to Exceptions.

Mr. Kovacs noted that the guidance did not provide any new information with respect to exceptions that had not already been discussed by the Board members as part of the revision process for the Regulations. He said that the guidance was set up to outline a process, basic requirements and subjective guidance dealing with the required findings for reviewing exception requests as well as some guidance on how to handle specific situations. He said that there was no one specific process or method for handling, because exception requests are requests for exceptions from local regulations and local regulations are set up to fit local circumstances.

Mr. Kovacs went on to say that the guidance for exceptions are not considered to be exceptions to the Regulations themselves, rather they are exceptions to local Bay Act programs requirements. He said that Department staff provides general information and has always encouraged the identification of findings, noting that findings are now required

Mr. Crafton stated that he understood that Mr. Kovacs had not gotten comments from anyone. Mr. Kovacs that he was not aware of any comments.

Mr. Benson confirmed the two changes that Ms. Little indicated.

Ms. Bamforth commented that there was a letter from the Hampton Roads Planning District Commission that talked about the exceptions process. Mr. Tyson said that he had spoken to Kathy James-Webb of the City of Newport News and that she had asked that the comments in that letter with respect to the exceptions guidance be disregarded.

Mr. Joe Lerch said that he would like to see more discussion on special committees or board and the procedures were silent on what happens when there is a need for an appeal.

Mr. Crafton suggested that staff use locality appeals process as an example, and noted that staff had examples and they could be added.

Mr. Lee Rosenberg commented that the reference in the guidance that a property owner could show that the property was acquired in "good faith" as one of the required findings. He suggested that "good faith" be defined more narrowly. Mr. Tyson said that the language came directly from state code.

Mr. Benser said that there is case law that defines what is and what is not "good faith" and good faith must be determined on a case- by –case basis.

Mr. Rosenberg said that the guidance was said to be for locality use, however, it appeared to be geared more for the development community on how to go about doing a project. He suggested that the guidance information be for localities to help with setting up local Bay Act programs and not geared towards the public or the development community.

Mr. Benser asked if he had a list of the guidance documents that appeared to be aimed more toward the general public and not local program establishment. Mr. Rosenberg referred to the draft Wetland Guidance and suggested that there were three draft documents as well. Ms. Harold commented that the agency's existing Local Assistance Manual is now being used as a reference document and the draft guidance documents will be used to provide general and specific Bay Act program information.

Mr. Crafton suggested that the guidance could be made more specific about who and what the information applies to. Mr. Benser advised that the Board's direction was to provide information to local governments and that local governments are responsible for Bay Act program implementation and informing their local citizens about the Bay Act requirements. Staff also indicated that guidance should be made available to local governments, but that it should also be pertinent to citizens and others because the guidance will be made available to anyone who requests it. Ms. Smith noted that it was important to provide information to all interested parties, including local governments, citizens, developers and that some of the guidance was targeted towards this larger audience.

Mr. Benser recessed for lunch at 12:05 p.m.

Mr. Benser reconvened at 12:50 p.m.

Mr. Benser recognized Catherine Harold to present the draft guidance on Stormwater Management Requirements.

Ms. Harold stated that the stormwater guidance described the new the language for the performance criteria and addressed any potential issues that might arise. She said that the changes will standardize the requirements of the CBPA and DCR's programs. She said that the Regulations provide the option of using a performance or technology based approach. Each provides similar results.

Ms. Harold reviewed the changes and noted that the information was informational. Mr. Benser asked if there were any questions. Ms. Bamforth noted that she was comfortable with it and Mr. Crafton noted that it was straightforward.

Mr. Benser recognized Mr. Doug Wetmore for the staff's presentation on Silviculture guidance.

Mr. Wetmore advised that there has been an issue with landowners cutting down trees under the premise of a forestry operation when in reality it is development or landscaping activity. He also noted that previously there was no definition of a silviculture activity in the Regulations. He noted that the definition was noted on Pg. 1 of the guidance document and it defined the kinds of activities that are forestry related.

He said that the guidance document provided clarification of the authority of local governments to insure that clearing operations are true forestry operations and deserving of an exemption from the CBPA. It clarifies the required establishment and planting of the 100 foot buffer when the silviculture activity ceases, and that the landowner is the responsible party for silviculture operations and any violations that occur from them. The document provides enforcement and site mitigation procedures for localities when there is a violation, and for monitoring procedures for the required mitigation efforts.

He said that staff received several comments from the Department of Forestry that were incorporated into the document as well as comments from Department staff and local governments.

Mr. Benser asked if there were any suggestions or recommendations that were not incorporated. Mr. Wetmore said that all comments were included.

Mr. Crafton advised that staff had worked closely with the Department of Forestry during the Regulations process.

Mr. Benser asked if CBLAD's definition differ significantly from that of the Department of Forestry.

Mr. Wetmore noted that there had been some concern over CBLAD's requirement for a 20 acre minimum. Mr. Crafton said that CBLAD's definition was a blend of Virginia code and that the 20 acres refers to the entire tract. Mr. Wetmore explained that HB448 passed which now requires notification to the State Forester 10 days prior to the start of a forestry operation.

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

Mr. Benser recognized Ms. Harold for staff's presentation of Wetlands Protection and Mitigation.

Ms. Harold noted that the guidance represented an informational piece. She said that it provides guidance on the CBPA however, nothing new was represented and did not grant any new authorities. She stated that the guidance was needed because the manual was becoming a historic document.

Ms. Harold said that the Regulations require local governments show that the applicant received all of the appropriate permits. She said that it came to staff's attention that there is a perception that if the permits had been granted by the Corps, VMC or DEQ that this automatically exempted the activity under the Bay Act.

Ms. Harold went on to say that the guidance notes whose responsibility it is to verify wetland delineations and how they should be performed. She noted that all state agencies must be consistent with the Bay Act according to the Governor's Executive Agreement. She noted that wetland mitigation and shoreline erosion control was also addressed and is an allowable activity. She closed her statements by noting that even though the information is not new, it is all in one place.

Ms. Bamforth asked about joint permit applications, does that joint permit application exist all over the state. Ms. Harold responded that it did and that VMRC is the clearing house of joint permit applications.

Ms. Bamforth also stated that permits that she gets back state that even though the permit has been approved, the CBPA still needed to be adhered to.

Mr. Crafton noted that a concern has been the local Wetland Boards and their authority. Mr. Crafton spoke briefly about consistency within agencies and what needed to be done to make that happen.

Mr. Benser noted that Mr. Tyson had spoken briefly about locality Wetland Boards considered our requirements and that language caused him to think that our requirements not only need to be considered but followed. Ms. Little stated that there would be more detailed guidance on shoreline management and several other issues, and will offer best technical advice. Mr. Crafton said the classic example is eroding bluff with trees on it and the standard is to cut the trees and grade it back to 4 to 1 or flatter, and then grass is planted on the slope. He said there are times when you need to cut the trees and grade it back, but there are other things that can be planted that provide stabilization that do not need to be fertilized and will not block your view.

Ms. Smith said that the agency is the only agency that asks that all views be balanced, however, it has not been clear that this is CBLAD's goal. She said she believed the Wetlands Guidance will make it clear that there are different prospective but we need to look at all of them together.

Ms. Bamforth stated that her experience with Wetland Boards after submission of a site plan review in whatever city your are working in, once it heads to the environmental department that reviews the Chesapeake Bay, that is the time that wetlands

come up, even if you have not realized that your property is affected. She said that if it is a city project they may go out and delineate it for her, or they will say this has to be delineated. She said that in her area there appeared to be good coordination.

Mr. Crafton said that he believed there was good coordination in some areas, clearly there are some areas that there isn't. He also pointed out that the Hampton Roads Planning District Commission is very involved in the area.

Ms. Bamforth's other question was the placement of BMPs in the RPA, and the statement about it is not being considered a water quality enhancement of the buffer. Catherine Harold stated that the statement had been removed. She asked Martha Little about the statement about the applicant must obtain an exception from the local governing body for construction of a wetland in an RPA. . She asked whether that means that they have through a separate process outside of the joint permit process, this is just restating the normal process. Ms. Harold stated that it would be treated as an exception in an RPA encroachment.

Ms. Bamforth asked if the language used in the guidance was consistent with the other agencies. Ms. Harold stated that DEQ had reviewed it and thought it looked great. Staff had not heard from VMRC. Ms. Little said she heard from the HRPDC who said there was a conflict but had not voiced what the conflict is. Ms. Little said that she would continue to looking into what the conflict is.

Ms. Little said that Mr. Wetmore had a diagram that noted CBLAD's jurisdiction that might be helpful. Ms. Bamforth and Mr. Benser thought that a visual would be helpful addition.

Mr. Crafton asked if anyone present knew what the nature of the conflict was from HRPDC. Mr. Rosenberg said that the conflict appeared to be that it is not closely integrated with the Regulatory process regarding wetlands law and in CBPA, but many of the technical comments are not correct. He said the document indicates that the Corps of Engineers is the official delineator of wetlands and that is not the case. Ms. Harold said that they verify the boundaries. Mr. Rosenberg said they do not do that anymore. Ms. Harold said that they do verify the boundaries of the wetlands per memorandum of agreement. Ms. Harold also advised that the document will be used by many different audiences, not just local governments and is a consolidation of information.

Mr. Rosenberg suggested that since this was the area that there were more comments made about this section that all of the comments should be provided to him. Mr. Rosenberg noted that he did not have the most current document even though the one he had was printed from the webpage.

Mr. Rosenberg suggested that there be a tighter integration with the law regarding the wetlands guidance, and make sure that all the statements in the guidance are

supported and is an appropriate vehicle. He also asked if the guidance was still open for comment.

Mr. Crafton said that staff had hoped to get concurrence from the committee to recommend that the documents being presented today would be forwarded to the full board in September. He said his preference is that if the wetlands guidance need more work that it be slowed down. He said that the guidance is informational guidance, it does not affect what the local governments revise in their ordinance language to pick up the new Regulations, as once they have their new ordinances these are things they will need to know. He said the IDA piece is also being slowed. He said that perhaps there is a need for a special committee and board meeting to deal with at least the IDA issue, and if the wetland guidance needs more work then it can be worked with at the same time as the IDAs.

Mr. Rosenberg asked if there was anything really new in the wetland portion of the Regulations. Mr. Crafton advised that there was not.

Mr. Benser stated that there really are conflicts and the information is very vague, however, the conflicts needed to be resolved. He said that he agreed with Mr. Crafton that the committee should slowdown approval of the wetlands guidance. Ms. Bamforth asked if there were any others besides the IDAs. Mr. Crafton said there were others that are still under development. Mr. Benser and Ms. Bamforth agreed that the wetlands and IDA guidance be put off until the concerns are resolved.

Mr. Benser stated that the stormwater management and silviculture requirements had been covered, and asked if there were any further comments. There were none.

Mr. Benser recognized Ms. Shawn Smith for the presentation of Resource Protection Area, Onsite Buffer Delineation and Resource Protection Area Buffer Area Encroachments.

Ms. Smith said that both of these items are reworking of old information bulletins. She said that there were minor changes, and one part advises local governments when is a buffer supposed to be delineated, at what point in the development process. She said the guidance says that before any land disturbance you have to make sure the buffer is delineated on that specific site. She said the second part is a technical part that discusses how to measure the buffer. She said it was nearly verbatim to the old information bulletin number 5. She stated that there were no comments received on this subject.

She asked if there were any questions. There were none.

Mr. Benser called for further public comment, and commented that the information is geared toward local governments. Ms. Smith stated that she thought the guidance would be useful to a lot of people.

Mr. Rosenberg commented that a common occurrence where the wetland line will come in on an adjacent property and that verification process is hard to establish when it is on someone else's property. Ms. Harold asked if there was a problem with getting permission from the adjacent property owner. Mr. Rosenberg said that obtaining permission is a problem. Ms. Harold said that her experience has been that obtaining permission was not a problem. Mr. Rosenberg went on to say that in many cases, those property owners do not want to be involved because they are not asking for anything, and many people are concerned why someone is measuring for wetlands. Mr. Rosenberg said that he brought it up as another issue that they were having. Mr. Crafton said that staff would be provide additional guidance about buffer delineation before the Board meeting.

Ms. Smith went on to address buffer area encroachments. She said that this guidance is a reworking of the old Information Bulletin Number 10, and the changes refer to when a someone want to put a structure in the buffer and when they are permitted. She said that basically they are permitted on the pre-1989 lots and on some others when there are special circumstances. She said that a diagram had been that illustrates when you are allowed to put a commercial building in the RPA. She said there no comments regarding this particular guidance.

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

Mr. Benser called for a motion.

Ms. Bamforth motioned to forward to the full board at their September meeting for approval the guidance information with the changes that had been made today, and that the wetlands protection and mitigation, and the IDA guidance be slowed for further review.

Mr. Benser seconded the motion.

Mr. Benser called for further discussion. There was none.

Mr. Benser called for the vote. All members voted aye. Mr. Benser noted that the motion carried.

Mr. Crafton updated the Committee members regarding staff who had recently left CBLAD. They were Susan Haas, Michael Voijta and Doug Beisch. He advised that he was going to attempt to have these positions filled but did not know that he would be able to based on the Commonwealth's budget.

Mr. Mike Toalson asked when the updated version of the guidance would be on the website. Mr. Crafton responded that it would be within the next 10 days.

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

Ms. Bamforth motioned, Mr. Benser seconded.

The meeting was adjourned at 2:00 p.m.