



May 15, 2003

The Honorable Katherine K. Hanley
Chairman, Fairfax County Board of Supervisors
Fairfax County Government Center
12000 Government Center Parkway, Suite 530
Fairfax, Virginia 22035-0071

Re: Proposed Changes to the Chesapeake Bay Preservation Ordinance and Related Regulations

Dear Chairman Hanley:

I am providing these comments on behalf of the Northern Virginia Chapter of the National Association of Industrial and Office Properties ("NAIOP"). We appreciate the opportunity to comment on the proposed changes to the Chesapeake Bay Preservation Ordinance and related regulations.

We understand the pressure faced by the Board of Supervisors ("BOS") from some interest groups to immediately adopt this Ordinance; however, we respectfully submit that the BOS recognize the inherent complexities of these regulations and fully assess the impact of this Ordinance on County residents and your critical base prior to its adoption. These significant impacts warrant careful consideration, analysis and timely notification to the many impacted residents of Fairfax. This Ordinance will permanently impact almost 18 square miles (over 11,000 acres) of the County. The sheer size and nature of these regulations warrant a careful, thoughtful and deliberative review by the Board.

The proposed Ordinance has been greatly improved by the Planning Commission. However, as you can see by the following comments, additional Workshops at the BOS level are absolutely necessary to refine this Ordinance before it is ready for final approval by the BOS. Since the deadline imposed by the State has been delayed until December 31, 2003, any time pressure is self-imposed and, we believe, unnecessary.

Although we recognize the considerable time and resources that the County has devoted to addressing this significant amendment, we hope that the BOS will devote the time necessary to fairly and thoughtfully consider these issues. The changes described herein could be made in a few weeks, affected landowners notified, and the Ordinance approved but not implemented until sixty days after the Maps of the Chesapeake Bay Preservation Areas are completed, if such speed is desired by the BOS.

I. Extent of Change

Fairfax County has provided¹ the following estimate of the extent of the proposed increases in Resource Protection Areas:

Resource Protection Areas (square miles)		
Existing	New (Additional)	Percent Change
55.4	17.7	+32.0 %

The magnitude of this increase alone warrants additional time to review and carefully consider this Ordinance.

II. Time for Review and Public Notice

This Ordinance is notable for its complexity and, thus, the public needs sufficient time to review and understand its effect. As this Ordinance will significantly affect the potential use of some parcels of land, comprising $\pm$ 17.7 square miles (over 11,000 acres), its effects are more far reaching and substantive than many BOS actions. Understanding these issues has been difficult for many because:

1. The revised version of the Ordinance introduced by Commissioner Alcorn on May 7, 2003 was not made available to the general public (only if you asked John Friedman in the Board Room could you obtain a copy) and the subsequently amended version of that was still not available on the Fairfax County website until May 14, 2003 – less than a week in advance of the BOS hearing.
2. The Perennial Stream Field Identification Protocol in the P.C. Staff Report, a key element of this Ordinance, was subsequently amended and dated May, 2003. No document describing the changes made from the December 2002 version was provided to the public, and little time provided for review.
3. The study demonstrating the scientific validity of the Perennial Stream Field Identification Protocol has not been completed as of May 14, 2003. In fact, Carl Bouchard stated² that “*The analysis is still not complete and not yet available. We hope to have it up next week before the Board meeting on the 19th*”. A draft was

¹ *Fairfax County Streams Mapping Project - Summary of Pilot Project and First Year Field Surveys, Draft for Review and Comment only, April 18, 2003, page 30.*

² *In an email to Michael S. Rolband dated May 8, 2003*

released to me after an appeal to you. However, the regulated public should have the opportunity to review this final document before the regulations that rely upon its validity are approved by the BOS.

4. The “Interim” RPA Maps were released on the web on April 18, 2003. However, their presence on the web has not been well communicated to those affected by the new RPA definition. Unless you have a broadband connection to the internet it is excruciatingly slow to “browse” and see that you are even affected.

III. Significant Effect Deserves Significant Notification Effort

During the process of developing this Ordinance Amendment, NAIOP has advocated that Fairfax County emulate the good practices of Arlington County and notify, in writing, all affected property owners – the people and companies who fund a substantial portion of our County government. While ideally this should wait until the RPA Map is completed, the interim RPA Map could be used to save time (i.e., so we don’t have to wait several more months).

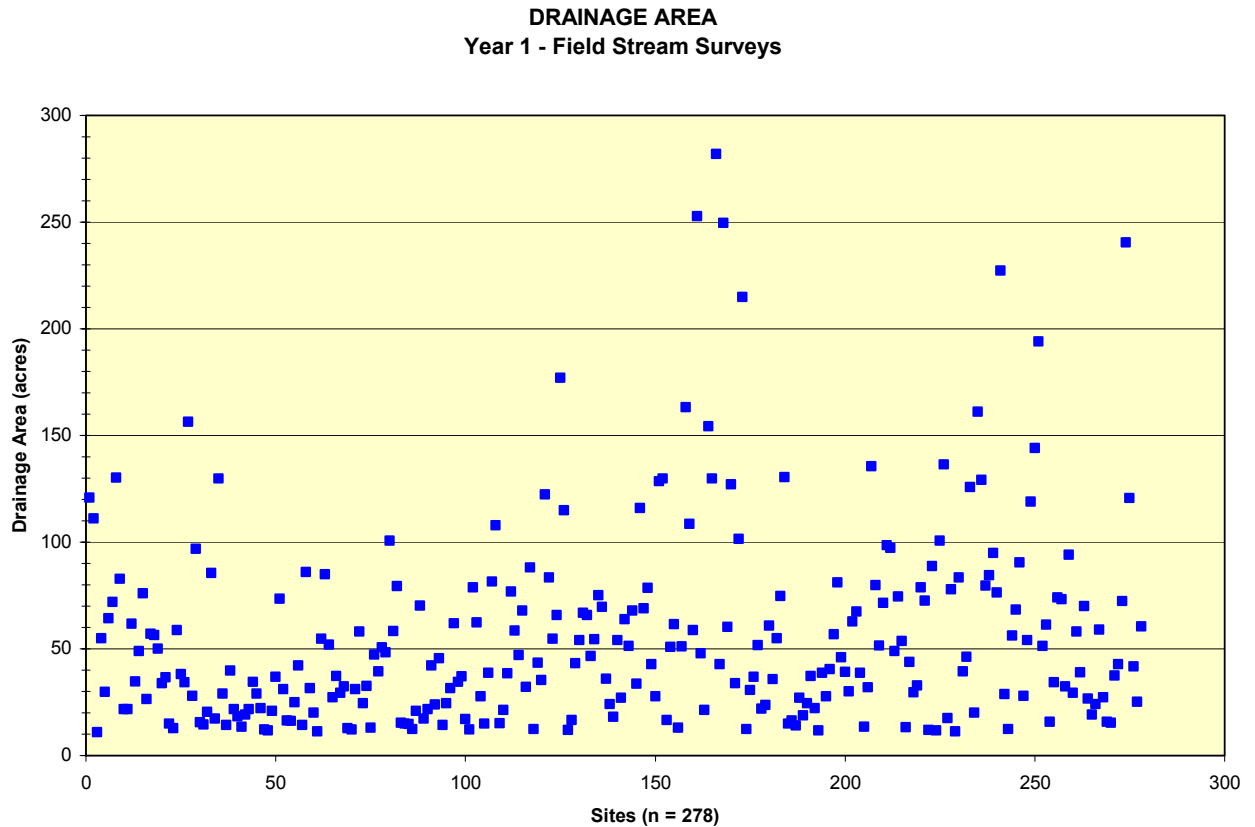
The argument against this notification is that there is no significant effect of the Ordinance Amendment. Respectfully, that is inaccurate, as simply looking at the Interim RPA Maps clearly suggests. People and corporations own approximately 11,000 acres of land that will have new restrictions on their use. While the property rights of many will be protected by vesting and limited expansion waivers, others will face the costs and uncertainty of a public hearing process to do things as innocuous as constructing a tool shed in their back yard or building a home of the size and in the location of their choosing. **If you are one of these people – this is a significant effect.**

IV. The Interim Maps Increase Uncertainty and Concern

The “Interim Map” provides landowners with general policy guidance as to the “ballpark” extent of the RPA. However it is not of sufficient accuracy for individual homeowners to rely upon. This map uses the median drainage areas of perennial streams in the pilot studies (40 acres in Piedmont, 50 acres in Coastal Plain). However, for example, the range of drainage areas for perennial streams in the Piedmont study was 11 acres to 282 acres. The data for the drainage area of where a stream’s flow becomes perennial for 278 streams, provided by Fairfax County³ shows this scatter:

³

Fairfax County Stream Mapping Project – Summary of Pilot Project and First Year Field Surveys, Draft for Review and Comment only, April 18, 2003, pg. 29.



This scatter clearly depicts why the Interim Map raise uncertainties and concern for landowners.

Since it's not proposed to make the Interim Map definitive, the Effective Date should be deferred until the map is completed if citizens are to be provided any reliable way to determine if they are faced with RPA issues. The Planning Commission's recommendation will require field studies by the land owner to define the RPA streams in the interim period between July 18, 2003 and December 31, 2003, when the map is expected to be completed by Fairfax County Staff.⁴ We believe that the County must defer the effective date until the RPA streams are fully mapped to avoid foisting these costs and uncertainties upon the individuals impacted.

V. Perennial Stream Field Identification Protocol

State regulations require that waterbodies with perennial flow be identified with the use of a scientifically valid system of in-field indicators of perennial flow. Unfortunately, after requiring such a system to be used, the Chesapeake Bay Local Assistance Board (CBLAB) failed to create or adopt one (a failure being addressed by the Secretary of Natural Resources). However, Fairfax County has dedicated significant Staff, time and money to address this issue, and has developed a "Perennial Stream Field Identification Protocol", dated December 2002 ("Protocol").

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Even after December 31, 2003, a field study will be required to determine the precise location and width of the RPA along county-mapped perennial streams – as is currently required.

Much has been said about this protocol during the hearings and workshops. Fairfax County should be commended for hiring Staff to undertake leading edge development of a regional protocol for identifying the perennial/intermittent stream interface. This is the best system that we are aware of that is applicable to the region for identifying perennial streams, short of physical observation of a stream in the summer/early fall period of a year with “normal” rainfall (a time consuming method that is not always practicable).

The problems associated with the Protocol can be grouped into two areas:

1. Should it be in our regulations?
2. Is it scientifically valid?

The answer to the first issue appears obvious to the regulated community. Since it is a means of regulating our industry – it should be placed in the Public Facilities Manual (“PFM”) so that it cannot be changed without due public process. And in doing so, the decision making portion of the protocol must be explicitly stated. It should state the cutoff score, the range of scoring when a definitive decision cannot be made without other corroborative evidence, and the biological indicators that can be used to determine perenniality regardless of score in this protocol. The fact that a new version of the protocol (May, 2003) was placed on the web without inclusion in a staff report for the P.C. Hearing is reason to incorporate it into the PFM.

On the second issue, many people in the regulated community doubt the scientific validity of this protocol because of the way this issue has been handled. In workshops the Protocol was touted as being approved by CBLAB and George Mason University – until it was learned otherwise. Requests for a copy of a “scientifically valid study” did not result in a definitive response until Commissioner Walter Alcorn intervened.

A draft of a document entitled “Fairfax County Stream Mapping Project - Summary of Pilot Project and First Year Field Surveys”, dated April 18, 2003, was provided to me on Wednesday, April 23, 2003. It is not yet available, to the best of our knowledge, to the general public. In fact, Carl Bouchard stated *“The analysis is still not complete and not yet available. We hope to have it up next week before the Board meeting on the 19th⁵”*.

This document, when completed, should satisfy most doubts about the scientific validity. Since it is logical to develop a protocol, test it, adjust it, complete the protocol development and document its validity before implementation. We urgently suggest that the Board:

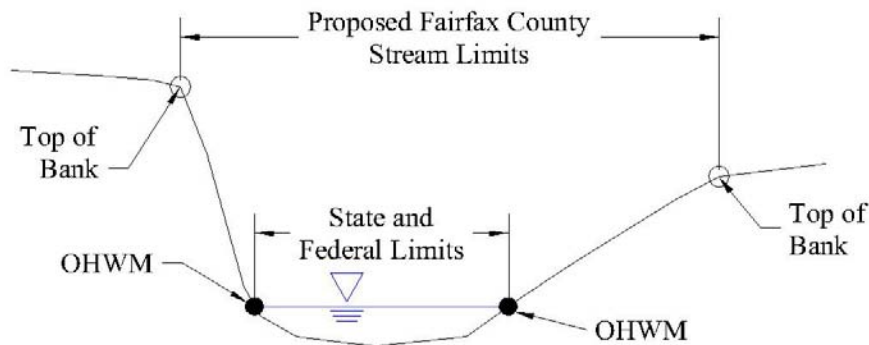
1. Make completion (by DPWES) of the study demonstrating the scientific validity of the Perennial Stream Protocol its highest priority task;
2. Publish the final Protocol and supporting study, provide it to the public, allow time for public review; and

3. Propose the final Protocol for inclusion into the PFM.

V. Major Issues:

Because this Ordinance is so complex and its effect wide-ranging, many issues and “nuts and bolts” corrections are described in this letter that need to be addressed to minimize the uncertainty, resulting economic impact and achieve an effective implementation. To avoid losing track of the big picture while reviewing these detailed comments, here is a summary of the big issues. Attached to this letter is a detailed listing of specific suggestions to improve the Ordinance, PFM and related codes.

1. Effective Date. The state does not require these changes to occur until December 31, 2003. By proposing to effect these changes on July 18, 2003 – 5 months prior to completion of the RPA maps – the County will ensure that landowners in much of the County cannot be certain if they are affected without conducting a field study of stream flow character (i.e., perennial vs. intermittent). Even if your property is currently outside of the estimated RPA, your property could potentially be included in the field verified RPA zone. Providing two different definitions of the RPA (from 7/18/03 to 12/30/03 and another after 1/1/04) is unnecessarily complicated and simply creates uncertainty, confusion and economic cost. Delay implementation until the perennial stream mapping project and RPA map are complete. After that publication, landowners should be granted a reasonable period of time⁶ to notify the county of any mapping corrections that are necessary – as some errors are likely to occur due to the scale of the project and inherent variability of the Protocol.
2. Stream Width. The County proposes to define the width of a stream differently than what the U.S. Army Corps of Engineers (COE) and Virginia Department of Environmental Quality (DEQ) define as the width of a stream. The difference is depicted below:



⁶

Perhaps 12 months so streams could be viewed in the late summer/early fall draw down period.

This will increase the extent of the RPA and the cost of locating these boundaries as often two parallel lines will need to be flagged and surveyed. **It is not required by the state.**

3. Vesting.

- a. Incorporate the proposed vesting policy into the Ordinance so that landowners and financiers can rely, without question, on their vested rights – not as a separate BOS motion.
 - b. Vest RPA Plans. Unlike Prince William County, Fairfax is not proposing to grandfather or vest Resource Protection Area Plans already approved by the County. People who have expended time and money to prepare a RPA plan and have financial expectations in reliance upon this boundary, will not be able to rely upon this previous County approval. Prince William County determined that state law required RPA plans to be vested for 5 years after their approval. Fairfax County, so far, has reached a different conclusion. We ask that you and the BOS please rectify this situation.
4. Perennial Stream Definition. Make the Perennial Streams mapped by DPWES the definitive description of which streams shall be a core component of the RPA to eliminate costly and disruptive squabbles and lawsuits over which streams are regulated under the Ordinance. Achieve this by deleting the temporary definition proposed in the first half of 118-1-6(dd).
5. Perennial Stream Map. Depict the Perennial streams on the RPA Map and provide their locations in a digital format that provides coordinate geometry of their end points so that engineers and land planners can use these data to locate the end of each RPA in a precise manner.
6. RPA Map Updates. Field surveys are required to precisely locate the RPA on a given site. Since July 1, 1993 approximately 129 RPA Plans have been approved by DPWES – none are reflected in the County RPA Maps. Direct staff to develop a process for these plans (where applicable), and future RPA Plans, to be utilized in updating the County's Map of RPAs – so property owners, lenders, and prospective purchasers can be informed of such changes. When an RPA Plan is approved by the County, the Chesapeake Bay Preservation Area Map should be updated (just like tax maps are when land is subdivided) so that a typical homeowner can determine the RPA limits.
7. Notify and Inform Impacted Residents. All land owners expected to be affected by the new RPA definition should be notified in writing and directed to an information source that describes to them what this means – as Arlington County did. Complete the report that documents the scientific validity of the Protocol, provide it to the public, and incorporate the Protocol into the PFM.

8. Remove the Proposed Barriers. Do not discourage activities that are beneficial to the environment and our society such as the hurdles proposed for stream restoration (vs. just stream stabilization), wetlands creation and restoration, and redevelopment projects; all worthy activities that are strongly encouraged under many other public policy initiatives.

Thank you for your time and consideration of these important issues.

Sincerely,

WETLAND STUDIES AND SOLUTIONS, INC.



Michael S. Rolband, P.E., P.W.S.
President

Enclosure: Specific Ordinance and PFM Comments

cc: Members of the Board of Supervisors (w/enc.)
Martha D. Marks, NAIOP (w/enc.)

Specific Ordinance and PFM Comments from NAIOP

I. Chapter 118- Chesapeake Bay Preservation Ordinance

- A. Section 118-1-6 (t) – Add “Resource Protection Area Plans” and do not delete “waivers and exceptions, preliminary site plans”.
- B. Section 118-1-6 (dd) – Definition of Perennial Stream. Two definitions are provided. One is for the period of 7/18/03 to 12/31/03. The second is effective on 1/1/04. As discussed, this is an unnecessarily confusing and costly definition.

Please only use the second definition because it provides certainty to the regulated community and minimizes County staff implementation costs. To clearly implement this option a few minor house keeping changes are needed:

- 1. Water bodies with Perennial Flow must be clearly depicted on the Map of Chesapeake Bay Preservation Areas. The latest map does not clearly indicate those specific types of streams graphically, nor depict them in the legend.
- 2. Consistent language should be used in this definition (i.e. “water body with perennial flow” vs. “perennial stream” vs. “stream identified as perennial”). Thus rewrite the two double underlined sentences in Option 2 to read:

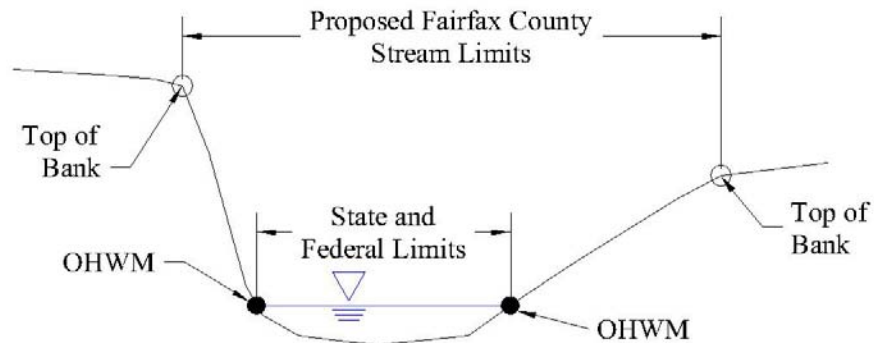
The upstream limit of the perennial stream waterbodies with perennial flow is the limit depicted on the map of Chesapeake Bay Preservation Areas adopted by the Board of Supervisors in accordance with Section 118-1-9 (a). Streams Such waterbodies identified as perennial on the adopted map are based on field studies conducted by the Department of Public Works and Environmental Services.

- C. Section 118-1-6 (dd) – Width of Perennial Streams (both Options 1 and 2).

Please change “The width of the perennial stream extends from top-of-bank to top-of-bank of the channel.....” to “The width of the perennial stream extends from the Ordinary High Water Mark (OHWM) to the OHWM of the opposite side of the stream....”.

The difference between what the County proposes for the width of a stream and what the U.S. Army Corps of Engineers (COE) and Virginia

Department of Environmental Quality (DEQ) define as the width of a stream is depicted below:



We are proposing that Fairfax County's definition be consistent with state and federal regulations.

There are several reasons to make this change:

- a. Delineations of the boundaries of all Water of the U.S. (WOUS) – which include streams – are done in accordance with U.S. Army Corps of Engineers (COE) regulations and procedures. These Jurisdictional Determinations (JD's) are also used by the Department of Environmental Quality (DEQ) for their regulatory purposes. The COE limits of jurisdiction of Non-Tidal Waters of the U.S. in absence of contiguous wetlands is "to the Ordinary High Water Mark" (33 CFR Part 328.4(c) (1)). Ordinary High Water Mark is defined at 33 CFR Part 328.3 (e).
- b. Since developers and Public Works Agencies must locate and survey the OHWM for COE and DEQ regulatory programs – requiring the location of an adjacent top-of-bank line is a duplicative cost that could be avoided.
- c. CBLAD's Guidance of September 16, 2002 allows OHWM to be used.
- d. It's not always "clear cut" as to where the top-of-bank is – not all stream edges have a clearly defined top-of-bank.

D. Section 118-1-9 (a)

After "Areas", add the phrase "and a map of water bodies with perennial flow".

E. Section 118-1-9 (b)

Delete and replace with: “A county wide field evaluation of streams has been conducted by DPWES to create the Map described in 118-1-9 (a). Only the water bodies with perennial flow depicted on this map shall be the streams regulated as an RPA component under this Ordinance”.

F. Section 118-1-9 (c)

Change “The Director may require” to “The Director shall require” to comply with State regulation that states that the text governs, as stated earlier in this same section. It is still common for DPWES to process plans that impact the “real” RPA because a RPA plan is not always required by DPWES when there is RPA on the parcel.

G. Section 118-1-12

1. Please add “To accomplish this, the following vesting policy shall be followed: ____ (and then insert the vesting memo, as appropriately modified, provided in the workshop)”.
2. Add vesting for RPA Plans approved prior to the effective date or a date as early as this hearing if you are concerned about a “vesting rush”. Thus add a sentence that states: “All site-specific determinations of RPA boundaries approved by the Director, or the predecessor department of the Director, prior to (insert date) shall remain valid and supercede all RPA and RPA element definition changes for the parcel or parcels of property subject to said site specific RPA determination.”

H. Section 118-2-1 (e)(3)

Replace with:

“The facility must be designed in accordance with Fairfax County’s stormwater management requirements of the Public Facilities Manual or the Virginia Department of Conservation and Recreation’s “Virginia Stormwater Management Handbook” First Edition, 1999 or subsequent editions when published.”

I. Section 118-3-2 (f)(6)(ii)

The phrase “that is reviewed and formed by the Chesapeake Bay Local Assistance Board” should be deleted unless staff can say our regional SWM program has been approved. Otherwise a number of projects currently underway could be in jeopardy.

J. Section 118-3-3 (c)

The proposed changes will have a dampening effect on redevelopment activities.

Already one redevelopment project proposed on Route 1 is threatened by this change. The prospective purchaser needs to expand an empty building into the rear parking lot in order to provide the space required by a new retailer that would re-energize the center. It will not increase impervious area – but does encroach further into the RPA. This is allowed now – but will be prohibited by new language unless an exception is obtained.

The solution is to delete the phrase: “and no further encroachment within the RPA”.

Such an action will have no effect on water quality – so why impose such a condition that will cause economic restriction on a property owner undertaking an activity that is normally encouraged in Fairfax County?

K. Section 118-5-2 (a)

Please add the phrase “including the widening or improvement of such existing facilities,” after the phrase “appurtenant structures”.

For almost 9 years county staff has considered the widening of a public road to be exempt under this section of the Ordinance. However, this summer some DPWES reviewers began determining that this only applies to the construction of a new road – not the widening of an existing public road. This simply is an unnecessary time and expense, as public roads are not widened unless required by governmental bodies, and it’s not practicable to relocate such roads.

L. Section 118-5-2 (b)

Please add the phrase “and outfalls” after “pumping stations” so that this section reads:

“The construction, installation, and maintenance of water lines, storm or sanitary sewer lines including pumping stations and outfalls,....”.

For almost 9 years county staff has considered stormwater outfalls to be an “appurtenant structure” and thus covered by 118-5-2 (b). However this summer some DPWES reviewers began determining that this is no longer true and required a Water Quality Impact Assessment (WQIA) for such

outfalls. Since the outfall location is usually determined by other regulatory requirements such as “adequate outfall” – this is leading to unnecessary time and expense for all involved.

M. Section 118-5-3 (a)
Remove Regulatory Barriers for Environmentally Beneficial Projects

It seems unreasonable to place regulatory barriers in front of projects that benefit the environment and improve water quality. Specifically, public hearings will now be required to obtain an exception to restore streams and create wetlands in riparian areas that are RPAs. Thus, please consider adding two exemptions under 118-5-3 (a) for:

- Stream restoration activities that utilize bioengineering techniques and have been granted all necessary approvals from the Virginia Marine Resources Commission (VMRC), U.S. Army Corps of Engineers (COE), and/or Department of Environmental Quality (DEQ).
- Wetland creation or restoration projects required under a permit issued by the COE and/or DEQ or authorized as a mitigation bank operating under a Mitigation Banking Instrument approved by the COE and DEQ.

Alternatively, Section 118-1-6 (ff) (the definition of water-dependent facility) could be modified to achieve a similar result. This could be achieved by modifying the last phrase: “*and (vi) stream bank stabilization measures*” with the following⁷:

“(vi) stream bank stabilization measures, (vii) stream restoration projects, and (viii) wetlands creation and restoration projects.”

II. Chapter 101 – Subdivision Ordinance

A. Section 101-2-2 (13)

⁷

There is a significant difference between stream bank stabilization and stream restoration. In the last 2 years, DPWES and FCPA have indicated a preference for the latter (as well as the U.S. Army Corps of Engineers (COE) and Department of Environmental Quality (DEQ). The difference in definitions, per Stream Mitigation Guidelines, COE-Wilmington District, April 2003 is:

Stream Restoration – *The process of converting an unstable, altered or degraded stream corridor, including adjacent riparian zones (buffers) and flood-prone areas, to its natural stable condition considering recent and future watershed conditions.*

Stream Bank Stabilization – *The in-place stabilization of an eroding stream bank.*

This will need to change to reflect Option 2 – since the map will now define water bodies with perennial flow.

B. Section 101-2-5 (c)(12)

1. Change “(i) The source of the boundary information” to “(i) The source of the site specific boundary information based upon field study”.
2. Add the following phrase at the end of (iii): “...unless a waiver or exception is granted under Chapter 118 to allow a use or encroachment in the RPA.”

III. Chapter 104 – E & S

No Comments

IV. Chapter 112 – Zoning Ordinance

A. Section 17-106-Para.32

This will need to change to reflect Option 2 – since the map will now define water bodies with perennial flow.

V. Public Facilities Manual

A. 6-0402.6B

The phrase “that is reviewed and found by the Chesapeake Bay Local Assistance Board” should be deleted unless staff can say that our regional SWM program has been approved. Otherwise a lot of projects currently underway could be in jeopardy.

B. 6-1701.2, 6-1701.4, 6-1704.2E, 6-1704.4 and 6-1704.4A

These will need to change if any of our ideas in 118-1-7(b) are accepted.

C. 6-1704.8D

The phrase “and any relevant correspondence” should be replaced with “and a copy of the Jurisdictional Determination (JD)” to accurately convey

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the appropriate document needed to evidence approval of all wetlands delineations by the U.S. Army Corps of Engineers (COE).

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