

FAIRFAX COUNTY, VIRGINIA

MEMORANDUM

TO: BOARD OF SUPERVISORS **DATE:** May 30, 2003

FROM: Anthony H. Griffin 
County Executive

SUBJECT: Amendments to Chapter 118 (Chesapeake Bay Preservation Ordinance) of the Code of the County of Fairfax

REFERENCE: Information Requested by the Board o Supervisors at May 19, 2003, Public Hearing

At the referenced public hearing, the Board requested that staff respond to a list of issues. This memorandum transmits the requested information to the Board. Questions specifically directed to the County Attorney are being addressed separately. A copy of the Board Summary for this item from the May 19, 2003, meeting is attached for information.

- 1) Intensely Developed Areas (IDAs). The Board requested that staff determine whether Arlington County had designated any IDAs and asked for additional information on the use of IDAs.

Staff Response:

Amendments to Chapter 61 (Chesapeake Bay Preservation Ordinance) of the Arlington County Code were adopted by the Arlington County Board on February 8, 2003. At the time of adoption, Arlington County did not designate any IDAs. However, Chapter 61 of the Arlington County Code does include provisions which would allow IDAs to be designated by the Arlington County Board at a future date. Arlington County staff has advised Fairfax County staff that Arlington County will be reviewing the issue of IDAs as part of the master planning effort for the Shirlington area. The following jurisdictions, organized by regional planning districts, have designated IDAs:

NVRC – Town of Herndon, Prince William County, Town of Occoquan
RRPDC – City of Richmond
ANPDC – Town of Onancock, Town of Cape Charles
RADCO – City of Fredericksburg
MPPDC – Town of Urbanna
HRPDC – City of Newport News, City of Hampton, City of Portsmouth, City of Norfolk, City of Suffolk, Isle of Wight County and Town of Smithfield

The proposed amendments to Chapter 118 also include provisions that would allow IDAs to be designated at a future date. IDAs could be designated in any areas meeting one of the following criteria as of July 1, 1993:

- Development has severely altered the natural state of the area such that it has more than fifty percent (50%) impervious surface.
- Public sewer and water systems, or a constructed stormwater drainage system, or both, have been constructed and serves the area.
- Housing density is equal to or greater than four dwelling units per acre.

Within IDAs, all development is treated as redevelopment as defined in the ordinance. Therefore, any development within an IDA would be required to achieve a 10% reduction in phosphorus loadings relative to existing conditions. In addition, new development could be permitted within the Resource Protection Area (RPA) without the requirement for approval of an exception. Otherwise, development within IDAs would be subject to the same requirements as development outside of IDAs.

The application of the 10% phosphorus reduction requirement to all development within IDAs could affect developments differently, depending on the condition of the property prior to development. For a heavily developed property, the water quality control requirement likely would be less stringent with the IDA designation. For an infill parcel or minimally developed parcel within an IDA, the water quality control requirement likely would be more stringent than it would be without the IDA designation, particularly if a significant increase in impervious cover was being proposed.

Staff does not believe that the designation of IDAs is appropriate at this time. While some RPA lands within areas that could be designated as IDAs may not be of high quality, other RPA lands in such areas may be of high quality and worthy of protection. The Policy Plan of the Comprehensive Plan contains calls for the protection of streams and the preservation of the Environmental Quality Corridor (EQC) system which substantially overlays the RPAs. Designating IDAs would be inconsistent with these established policies. A case-by-case analysis of site conditions and proposed activities provided through review of an exception request is a more appropriate method of addressing the need for encroachments in the RPA in heavily developed areas.

- 2) Administrative Waivers. The proposed amendments to Article 8 (Appeals) of Chapter 118 provide that decisions of the Director of the Department of Public Works and Environmental Services (DPWES) or the Director of the Department of Health Services (DHS) may be appealed only by the applicant. The Board requested that staff address the types of administrative waivers that the Director may grant and the issue of appeals by any aggrieved party.

Staff Response:

The proposed amendments to Article 8 (Appeals) of Chapter 118 provide that decisions of the Director of DPWES or the Director of DHS may be appealed only by the applicant; whereas, decisions of the Exception Review Committee may be appealed by any aggrieved

party. The following is a list of the specific waivers and determinations for which approval is required in writing from the Director:

- Section 118-3-2(f)(5) Waiver of BMPs for site and subdivision plans.
- Section 118-3-2(f)(7) Waiver of BMPs for nonbonded lot grading plans.
- Section 118-3-3(d) Removal of indigenous vegetation from the RPA buffer for sight lines, access paths, general woodlot management, and habitat management.
- Section 118-5-3(a) Exemption for water wells, site amenities for passive recreation, historic preservation, and archeological activities located in an RPA.
- Section 118-5-4 Waivers for Loss of Buildable Area in an RPA.
- Section 118-5-5 Exceptions for Minor Additions in an RPA.
- Section 118-6-5 Modification of the submission requirements for exception requests.

In addition to the specific waivers and determinations for which approval is required in writing from the Director, the Director makes a determination for every approved plan that the plan complies with Chapter 118. If appeals by parties other than the applicant were to be allowed, decisions of the Director, including all plan approvals, would need to be stayed to allow time for appeals to be filed. This is inconsistent with the existing provisions of the Erosion and Sedimentation Control Ordinance, the Subdivision Ordinance, the Site Plan provisions of the Zoning Ordinance, and the Virginia Uniform Statewide Building Code which do not require waiting periods after plan approval before construction may begin. The waiting periods after adjoining property owner notification before site and subdivision plans may be approved provide adequate time for adjoining property owners to have their concerns considered during the review process for such plans. The Chesapeake Bay Preservation Act (the Act) and the Chesapeake Bay Preservation Area Designation and Management Regulations (the Regulations) do not specify an appeals procedure or even require that there be an appeals procedure. Staff does not believe the additional delay to accommodate appeals by parties other than the applicant is warranted for administrative determinations by the Director.

- 3) Restrictions exceeding minimum state requirements. The Board requested that staff identify the provisions of the proposed amendments that create restrictions exceeding what is minimally required by the Regulations.

Staff Response

Two existing provisions of Chapter 118 are fundamentally more restrictive than what the state minimally requires. The first is the inclusion of major floodplains as part of the Resource Protection Area (RPA). Most construction and land disturbance in major floodplains requires approval of a special exception under the Zoning Ordinance. Because construction in a major floodplain generally is not allowed, the inclusion of major floodplains as part of the RPA has never been an issue. The second is the county-wide Resource Management (RMA) designation of all areas outside of the RPA. The Regulations require that RMAs be provided contiguous to the entire inland boundary of RPAs. Land types required to be considered for inclusion in RMAs include floodplains, highly erodible soils including steep slopes, nontidal wetlands not included in the RPA, and any other lands

considered by the local government to protect the quality of state waters. These land types are prevalent throughout the County. The county-wide RMA designation is appropriate because the entire County is tributary to the Chesapeake Bay and any use or development within the County can contribute pollutants to the Bay and because the protection of all state waters including local streams is a goal of the Act and Regulations.

The proposed amendments that will require written notice to property owners within 500 feet of the site of an application for an exception request requiring a public hearing and one homeowner association or civic association within the immediate area in addition to the notification of adjoining property owners. This provision would go beyond what is minimally required by the Regulations. However, staff does not believe that the additional notification requirements are burdensome to applicants.

Staff notes that some of the existing and proposed ordinance language expands upon general provisions included in the Regulations that lack details necessary for administration of the ordinance. An example of this would be the allowance for minor additions to existing nonconforming structures located in the RPA. The state regulations include provisions for the granting of administrative waivers for minor additions but are silent with respect to how large of an addition can qualify as minor. Both the existing ordinance and proposed amendments limit minor additions to 1,000 sq. ft. of new impervious area or 2% of the lot area, whichever is greater. Depending on one's perspective, this may be viewed as more restrictive or overly generous. However, it is not fundamentally more restrictive than the state regulations.

- 4) New provisions. The Board requested that staff identify the provisions of the proposed amendments that are different from the existing ordinance.

Staff Response:

Key elements of the proposed amendments are as follows:

- A) Resource Protection Areas (RPAs) must be designated around all perennial streams. It is anticipated that this will result in a significant increase in the extent of RPAs.
- B) A site-specific determination of perennial stream flow, based on in-field indicators, must be provided for all development plans and RPA boundaries adjusted as necessary. The Department of Public Works and Environmental Services (DPWES) field studies to identify perennial streams ultimately will satisfy this requirement.
- C) The Chesapeake Bay Preservation Areas map will be revised upon completion of the DPWES field studies to reflect the new RPA designation criteria.
- D) The review criteria for exceptions to permit encroachment into RPAs and for waivers of the water quality control requirements are more stringent in accordance with the new state regulations.

The review criteria are:

- The requested exception to the criteria is the minimum necessary to afford relief.
- The granting of the exception to the criteria will not confer upon the applicant any special privileges that are denied other property owners who are similarly situated.
- The exception is in harmony with the purpose and intent of the ordinance and is not of substantial detriment to water quality.
- The exception request is not based on conditions that are self-created or self-imposed.
- Reasonable and appropriate conditions are imposed, as warranted, that will prevent the allowed activity from causing a degradation of water quality.
- Other findings, as appropriate and required by the specific types of exception requests, are met.

E) Exception requests to permit encroachment into the RPA will require a public hearing and notification of adjoining property owners.

All requests for exceptions to permit encroachment into the RPA, except as noted below, will require a public hearing be held and that adjoining property owners be notified. The estimated number of exception requests requiring a public hearing is three to four per month. An additional fee of \$250 for the processing of exception requests requiring a public hearing is proposed.

Exception requests for loss of buildable area for lots created under the Subdivision Ordinance prior to March 1, 2002, that do not encroach into the “seaward” 50 feet of the RPA buffer, will not require notification of adjoining property owners or a public hearing.

- Exception requests for minor additions to existing legal principal structures constructed prior to July 1, 1993, will not require notification of adjoining property owners or a public hearing. Accessory structures are not eligible for exceptions under this provision.
- Exception requests for minor additions to existing legal principal structures constructed between July 1, 1993, and the effective date of the amendments, on lots that will have new RPAs designated on them because of changes to the RPA designation criteria, will not require notification of adjoining property owners or a public hearing. Accessory structures are not eligible for exceptions under this provision.

F) A special committee, the Exception Review Committee, will be established by the Board to conduct the public hearings and approve/disapprove exception requests to permit encroachment into the RPA not associated with concurrent rezonings or special exception requests. Review and approval of exceptions to permit encroachment into the RPA for concurrent rezonings and special exceptions will be handled by the Board of Supervisors.

G) Treatment of Approved and Pending Plans. Section 118-6-9 (Exceptions for Approved and Pending Plans of Development) will be deleted from the ordinance. Staff recommends that the Board concurrently adopt the Policy for Treatment of Approved and Pending Plans of Development at the time of adoption of the amendments. Under the policy, plans of development that are approved or pending as of the effective date of the amendments and

that do not fully comply with the amendments will not be subject to the exceptions review process. DPWES will make an administrative determination during the plan review process as to whether such plans meet the requirements of the adopted policy.

H) All Resource Protection Area (RPA) boundaries and all Resource Management Area boundaries will be required to be depicted on final record plats along with a note or notes with the following information:

- The source of the boundary information;
- The RPA is to remain undisturbed and vegetated in accordance with the requirements of Section 118-3-3(f) of Chapter 118 of the County Code;
- Only water-dependent facilities or redevelopment are permitted in the RPA; and
- Where houses are to be served by on-site sewage disposal systems, each disposal system shall be pumped-out at least once every five years and each disposal system shall be provided with a reserve sewage disposal site with a capacity at least equal to that of the primary sewage disposal site. Building shall be prohibited on the area of all such sewage disposal sites, including the reserve sewage disposal site, until the structure is connected to public sewer or an on-site sewage treatment system which operates under a permit issued by the State Water Control Board.

I) Appeals. The proposed amendments provide two alternatives for consideration. Appeals are currently restricted to the applicants under the existing Ordinance (Alternative 1). Alternative 2 would allow appeals by any aggrieved party. The Act and the Regulations do not specify an appeals procedure or even require that there be an appeals procedure. Staff recommends against changing the existing appeals procedure to allow appeals by parties other than the applicant. A review of prior exception requests indicates that the majority of projects subject to the public hearing requirement will be for the construction of single family homes and accessory structures on infill lots. If appeals by parties other than the applicant were to be allowed, decisions of the Exception Review Committee would need to be stayed to allow time for appeals to be filed. Based on the typical scope of these projects, the length of the review and approval process necessary for the public hearing, and the limited likelihood of an appeal being filed, staff does not believe the additional delay to accommodate appeals by parties other than the applicant is warranted.

The Planning Commission has recommended a combination of the alternatives that would allow appeals by aggrieved parties other than the applicant but only for decisions of the Exception Review Committee. Administrative waivers and other determinations by the Director could be appealed only by the applicant. The Planning Commission also has recommended lengthening the appeal period to 30 days.

- 5) Issues raised by the National Association of Industrial and Office Properties (NAIOP). The Board requested that staff respond to a May 15, 2003, letter from Wetland Studies and Solutions, Inc. on behalf of the Northern Virginia Chapter of NAIOP.

Staff Response:

Please see attachment.

Attachments

cc: Robert A. Stalzer, Deputy County Executive
John Wesley White, Director, Department of Public Works and Environmental Services
David P. Bobzien, County Attorney
James P. Zook, Director, Department of Planning and Zoning
William Shoup, Zoning Administrator
Michelle Brickner, Director, Office of Site Development Services, DPWES

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4:30 P.M. – PH ON PROPOSED AMENDMENTS TO THE CODE OF THE COUNTY OF FAIRFAX, CHAPTER 101 (SUBDIVISION ORDINANCE), CHAPTER 104 (EROSION AND SEDIMENTATION CONTROL), CHAPTER 112 (ZONING ORDINANCE), CHAPTER 118 (CHESAPEAKE BAY PRESERVATION ORDINANCE), AND TO THE PUBLIC FACILITIES MANUAL (PFM) REGARDING IMPLEMENTATION OF REVISIONS TO THE CHESAPEAKE BAY PRESERVATION AREA DESIGNATION AND MANAGEMENT REGULATIONS (9 VAC 10-20 ET SEQ.) (Tapes 10-12)

(NOTE: At its January 27, 2003, meeting the Board deferred the public hearing on this item until March 24, 2003. It was moved to the Board meeting scheduled for April 28, 2003. At its April 28, 2003, meeting the Board deferred the public hearing on this item until May 19, 2003.)

A Certificate of Publication was filed from the editor of the *Washington Times* showing that notice of said public hearing was duly advertised in that newspaper in the issues of May 1 and May 8, 2003.

Following the staff presentation by John Friedman, Engineer III, Site Development Services, Department of Public Works and Environmental Services (DPWES), discussion ensued.

Following the testimony of John Debell, Speaker Two, Chairman Hanley relinquished the Chair to Vice-Chairman Hyland and asked unanimous consent that the Board direct the County Attorney to provide the Board with information addressing the issue of "vesting" in the ordinance. Following discussion, with input from David P. Bobzien, County Attorney; and Mr. Friedman, without objection, it was so ordered.

Vice-Chairman Hyland returned the gavel to Chairman Hanley.

Following the testimony of Thomas D. Fleury, Speaker 13, Chairman Hanley relinquished the Chair to Vice-Chairman Hyland and asked unanimous consent that the Board direct staff to report with an answer as to how much of Arlington is defined as an Intensely Developed Area (IDA). Without objection, it was so ordered.

Followed the testimony of Patrick Kessler, Speaker 15, Chairman Hanley asked unanimous consent that the Board direct staff to provide answers to Mr. Kessler's questions regarding the effective date and the definition of an "approved plan." Without objection, it was so ordered.

Following the testimony of Pete Rigby, Speaker 16, Chairman Hanley asked unanimous consent that the Board direct the County Attorney to revisit the language regarding "vesting" that reads "aggravate conflicts shall mean to create any new or additional non-compliance with an amended ordinance such as

increasing the impervious area or disturbance in the RPA" and provide a response. Without objection, it was so ordered.

Vice-Chairman Hyland returned the gavel to Chairman Hanley.

Following the public hearing, which included testimony by 20 speakers and discussion with input from Mr. Friedman; Matthew Meyers, staff, Stormwater Planning Division, DPWES; Pamela K. Pelto, Assistant County Attorney; and David P. Bobzien, County Attorney; Supervisor Mendelsohn moved to:

- Defer decision on proposed amendments to the Code of the County of Fairfax, Chapter 101 (Subdivision Ordinance), Chapter 104 (Erosion and Sedimentation Control), Chapter 112 (Zoning Ordinance), Chapter 118 (Chesapeake Bay Preservation Ordinance), and to the Public Facilities Manual (PFM) regarding implementation of revisions to the Chesapeake Bay Preservation Area Designation and Management Regulations (9 VAC 10-20 ET SEQ) until June 2, 2003, at 3:30 p.m.
- Keep the public record open until that time.

Supervisor Gross seconded the motion.

Chairman Hanley relinquished the Chair to Vice-Chairman Hyland and asked to amend the motion to direct staff to provide information on the following:

- Vesting and grandfathering, and the differences between the two.

The advantage and disadvantage of addressing vesting in the ordinance or having a separate Policy on it.

- The definition of "approval."
- Specifically on the above-referenced topics and the implementation issues, except in expansion of stream, how this differs from the existing ordinance.
- A review of the issue of notification, with the provision of cost estimates for both providing notifications as were done for the previous Chesapeake Bay amendment or providing notifications using the Area Plans Review procedure.

Vice-Chairman Hyland returned the gavel to Chairman Hanley.

Following a brief discussion, Supervisor Gross asked to amend the motion to also:

- Refer the letter from Michael Rolband, President, Wetland Solutions, Incorporated, to staff for a response regarding the whole

issue, especially the use of the terms "water bodies," rather than streams.

Direct staff to provide more information on IDAs and whether other areas in the County would meet the criteria for an IDA.

These amendments were accepted.

In reference to the assertion that the County's ordinance significantly exceeds the State's minimum and the only specific item pointed out was the difference of the width of the stream, Supervisor Frey asked to amend the motion to direct staff to enumerate anything related to the code amendments that exceeds the State's required minimum. Following input from Mr. Friedman, this was accepted.

With reference to the only items that are not subject to appeal by any aggrieved party being "administrative waivers and determinations by the Director," and the three bulleted items listed on page 98 of the Board Agenda regarding minor additions to existing principal structures, Supervisor Kauffman asked to amend the motion to direct staff to specifically explain those items that are "administrative waivers and determinations by the Director."

Following input from Mr. Friedman, this was accepted.

With reference to the map provided to the Board, Chairman Hanley relinquished the Chair to Vice-Chairman Hyland and asked to amend the motion to direct staff to explain what the blue-colored area indicated at the corner of I-495 (the Beltway) and I-66 in Tax Map 49-2. This was accepted.

Vice-Chairman Hyland returned the gavel to Chairman Hanley.

The question was called on the motion, as amended, and it carried by a vote of nine, Supervisor McConnell being out of the room.

BOARD ADJOURNMENT (Tape 12)

At 8:45 p.m., the Board adjourned.

Staff Response to Issues Raised by NAIOP

NAIOP Comment:

Extent of Change

Fairfax County has estimated that the area of the County designated as RPA will increase by 17.7 square miles from 55.4 square miles to 73.1 square miles. The magnitude of this increase alone warrants additional time to review and carefully consider this Ordinance.

Staff Response:

The proposed amendments have been thoroughly reviewed and carefully considered. The pending amendments were discussed at the Board's March 25, 2002, Development Process Committee meeting. An initial draft was transmitted to the Board on September 16, 2002. Comments from the Environmental Quality Advisory Council (EQAC), the Northern Virginia Soil and Water Conservation District (NVSWCD), the Engineers and Surveyors Institute (ESI), the Northern Virginia Building Industry Association (NVBIA), and the National Association of Industrial and Office Properties (NAIOP) were solicited on the initial draft prior to advertising. The proposed amendments were initially advertised almost six months ago. The Planning Commission held two public hearings and four work sessions over a four-month period prior to making a recommendation to the Board.

NAIOP Comment:

II. Time for Review and Public Notice

The public was not provided an adequate amount of time to review important documentation. As a result it has been difficult for the general public to understand the difficult issues involved. Specifically:

- 1 The draft of the Planning Commission recommendation of the proposed amendment language introduced by Commissioner Alcorn on May 7, 2003, was not made available to the general public prior to the Planning Commission meeting for decision only and the final recommended language was not made available on the Fairfax County web site until May 14, 2003, - less than a week in advance of the Board public hearing.
- 2 The Perennial Stream Identification Protocol distributed as an attachment to the Planning Commission Staff Report was subsequently amended prior to being included as an attachment to the Staff report for the Board public hearing without any documentation describing the changes made and no time provided for review.
- 3 The study demonstrating the scientific validity of the Perennial Stream Identification Protocol has not been finalized and is not yet available to the general public. The regulated public should have the opportunity to review the final document before the regulations are adopted.

Staff Response to Issues Raised by NAIOP

4. The interim guidance maps have only been available for one month, their availability is not well known to the public, and the maps are difficult to download without a broadband connection.

Staff Response:

The staff report and advertised amendments have been made available to the public in accordance with standard practices. In addition, the advertised amendments were made available on the County's web site. Commissioner Alcorn's recommendation to the Planning Commission was not finalized until shortly before the meeting and was distributed to the other commissioners at the meeting. The Planning Commission made some minor changes to the language distributed by Commissioner Alcorn prior to making their recommendation to the Board. Subsequently, the Planning Commission's recommended language was placed on the County web site.

2. Only minor editorial changes were made to the protocol document.
3. A Technical Advisory Group (TAG) consisting of representatives from industry, government, stakeholder groups and the scientific community was created to assist, in an advisory capacity, in development of the protocol. The final draft of the study has been distributed to the TAG for review. The TAG and CBLAD have previously reviewed the protocol and the results of the pilot study. Throughout the process, no deficiencies or concerns have been raised regarding specific elements of the protocol that would call into question the use of the protocol or the determinations of perenniality that have been made by staff. A delay in adoption of the amendments pending review of the study is not warranted.
4. A press release, issued a week prior to the Board public hearing to increase public awareness of the pending amendments, includes the web site address for the maps. The web site address was published in a story in the May 14, 2003, edition of the Washington Post.

NAIOP Comment:

III. Significant Effect Deserves Significant Notification Effort:

Because of significant new restrictions on land use, all property owners affected by the new RPA designation be notified in writing prior to adoption of the proposed amendments.

Staff Response:

All legal requirements for advertising the public hearings have been satisfied. In addition to the legal notices, a press release was issued a week prior to the Board public hearing to increase public awareness of the pending amendments. Staff notes that the press release was picked up by the Washington Post and published in the Fairfax Weekly on the Wednesday prior to the Board's public hearing.

Staff Response to Issues Raised by NAIOP

NAIOP cited Arlington County as an example of a model notification process. Arlington County, which is one eighth the size of Fairfax County, only has approximately 1500 properties with RPA. Notifying Fairfax County property owners who have RPA on their properties would require notifying an estimated 38,000 people.

NAIOP Comment:

IV. The interim Maps Increase Uncertainty and Concern

The County should defer the effective date until the perennial stream mapping is complete because of the uncertainty of the RPA boundaries depicted on the Interim Guidance Map and the costs to the property owners to perform in-field determinations of perennial streams during the interim period.

Staff Response:

The Interim Guidance Maps have different symbols to indicate which areas have been field surveyed and which have not been field surveyed. Forty percent of the RPAs shown on the map are based on completed field surveys and the maps will be updated approximately every two months as additional field studies are completed. County staff will be available to assist homeowners in identifying perennial streams on their property in connection with proposed development projects.

Section 9 VAC 10-20-80 of the amended Regulations provides that for purposes of generally determining whether water bodies have perennial flow, local governments may use water bodies depicted as perennial on the most recent U.S. Geological Survey 7 1/2 minute topographic quadrangle map. This is the basis of the existing adopted Chesapeake Bay Preservation Areas (CBPA) map. The point is that the existing adopted map meets the requirements of the amended Regulations and a new map is not required. The field study and the resulting revised CBPA map is something the County has chosen to do, at considerable expense, for the benefit of County citizens and to better protect the environment.

The underlying issue is not the costs of engineering studies or the uncertainty of the RPA boundaries depicted on the map. The underlying issue is the effective date of the amendments. The Planning Commission recommended making the amendments effective 60 days after adoption because of legitimate public concerns raised at the public hearings regarding the possible loss of perennial streams and the long term detrimental impact on water quality of additional encroachments into what will become the RPA buffer. Staff believes that the avoidance of the long-term detrimental impact on water quality outweighs the short-term impact of not having the mapping completed prior to adoption of the amendments.

NAIOP Comment:

V. Perennial Stream Field Identification Protocol:

Staff Response to Issues Raised by NAIOP

Since it is a means of regulating our industry – the protocol 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 perennality regardless of score in the 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.

2. Many people in the regulated community doubt the scientific validity of the 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 19th.*”

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 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 and provide it to the public; and
3. Propose the final Protocol for inclusion into the PFM.

The completion of the study demonstrating the scientific validity of the Perennial Stream Field Identification Protocol be DPWES’s highest priority, that the study and the protocol be published, and the protocol be incorporated into the PFM after public review.

Staff response:

The development of a protocol for mapping perennial streams was begun prior to the time that the designation of RPAs around perennial streams became a regulatory requirement. The impetus for the project was a recommendation to the Board by the Environmental Quality Advisory Council (EQAC). Subsequent to approval of funding by the Board, development of the

Staff Response to Issues Raised by NAIOP

protocol began in 2001. A Technical Advisory Group (TAG) consisting of representatives from industry, government, stakeholder groups and the scientific community met in July 2001 to discuss development of the protocol. A pilot project was conducted in the fall of 2001 and spring of 2002 to test and refine the protocol. The protocol was distributed to the TAG in February 2002 for review. The protocol and the final report for the pilot study were distributed to the Engineering Standards Review Committee (ESRC) in September 2002 as part of the back-up materials for the proposed amendments to the Public Facilities Manual. The Chesapeake Bay Local assistance Department has been involved with the development of the protocol from the outset.

During periodic discussions over the last two years, CBLAD staff has indicated that CBLAD was not going to dictate the use of a specific protocol for identifying perennial streams. Likewise, the proposed amendments to the PFM do not require the County protocol be used. Although the Chesapeake Bay Local Assistance Board (CBLAB) must ultimately determine if the County's regulations and program are consistent with the State Regulations, there is no specific requirement in the Regulations for protocols to be approved by CBLAB. Although staff is seeking endorsement of the protocol from CBLAB and staff fully expects to obtain that endorsement, endorsement of the protocol by CBLAB is not specifically required by the Regulations.

Staff has used their best professional judgment in developing the protocol and mapping the perennial streams. The protocol is based on sound scientific principles, has been adapted from an existing protocol used by the State of North Carolina, has been field tested, has been developed with stakeholder input, has been reviewed by CBLAD, and is being considered by CBLAD for use in other parts of the state. Staff briefed the Board several times during the development and implementation of the County's protocol. Furthermore, the proposed Ordinance amendments provide appropriate protection to landowners by allowing the designation of streams as perennial to be challenged. If a property owner can conclusively demonstrate that the original designation of a stream segment as perennial was incorrect then the designation can be changed.

The PFM does not require use of the protocol. There only will be limited need for use of the protocol after the County mapping project is complete because the in-field studies required by ordinance will have been completed. The protocol eventually will be endorsed by CBLAB. The protocol document is in large part a description of a methodology rather than a set of engineering calculations. For the above reasons, the incorporation of the protocol into the PFM by reference is appropriate.

NAIOP Comment:

VI. Major Issues

- 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

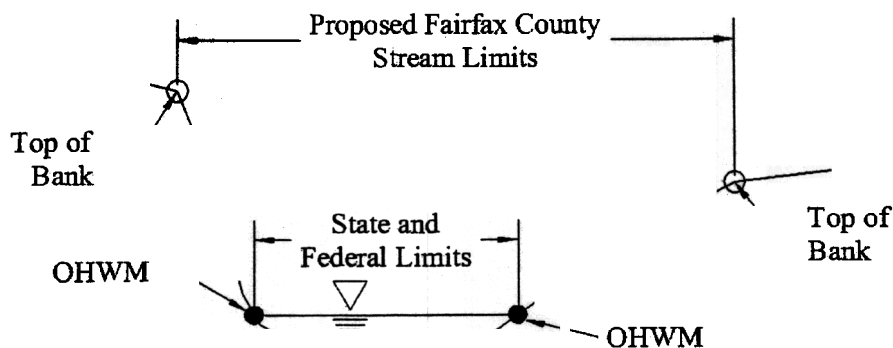
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flow character (i.e., perennial vs. intermittent). Even if your property is currently outside the estimated RPA, your property could potentially be included in the field verified RPA zone. Providing two different definitions of the RPA (from 7/18/03 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 publication, landowners should be granted a reasonable period of time (Perhaps 12 months so streams could be viewed in the late summer/early fall draw down period.) 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.

Staff Response:

The Planning Commission recommended making the amendments effective 60 days after adoption because of legitimate public concerns raised at the public hearings regarding the possible loss of perennial streams and the long term detrimental impact on water quality of additional encroachments into what will become the RPA buffer. The avoidance of the long-term detrimental impact on water quality outweighs the short-term impact of not having the mapping completed prior to adoption of the amendments.

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. 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.**



Staff Response:

The use of the top-of-bank of a stream channel in defining the width of a perennial stream is consistent with the method that has been used for the past ten years to measure the minimum required 100-foot buffer from tributary streams under the current ordinance provisions. The diagram provided is not-to-scale and exaggerates the difference in the width of the stream based on use of the OHWM versus use of top-of-bank. There is no indication that the COE or DEQ had any specific intent to define the width of perennial streams using the OHWM.

Staff Response to Issues Raised by NAIOP

The OHWM defines the extent of COE and DEQ jurisdictional authority. It is true that CBLAD guidance allows the OHWM to be used to define the width of perennial streams. It is also true that CBLAD guidance allows the top-of-bank to be used in defining the width of perennial streams. The location of the top-of-bank of a stream is information that is collected as part of any routine topographic survey used to prepare a plan of development. In fact, the entire stream cross-section is necessary to demonstrate that the stream is an adequate outfall. Determining the location of the OHWM is only required for projects that propose disturbance in jurisdictional waters. Any duplicative cost is associated with the determination of OHWM not with locating the top-of-bank of the stream. It is staff's opinion that use of the top-of-bank of a stream in defining stream width is a more understandable concept to the non-professional and that, contrary to NAIOP's opinion, the top-of-bank is more easily identified in the field than the OHWM.

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.

Staff Response:

- a. This is contrary to how CBLAD requested these issues be handled.
 - b. The requested change would amount to a grandfathering of activities that are not yet proposed from the effects of the new RPA definition. This is not permitted under the amended State regulations. 9 VAC 10-20-80.B.5 clearly requires that RPAs be designated along all perennial streams regardless of whether or not there was a prior detailed mapping of the RPA or existing encroachments into the RPA. Proposed development is not required to be shown on RPA delineation plans and is not reviewed as part of RPA delineation plans. RPA delineation plans are engineering studies that do not authorize construction.
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 118-1-1(dd).

Staff Response to Issues Raised by NAIOP

Staff Response:

The request to only utilize the second definition presumes that the Board will not make the ordinance effective until the map is completed, an issue that has not been decided. If the Board follows the Planning Commission recommendation, both definitions will be needed.

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.

Staff Response:

The limits of perennial streams will be depicted on the final Chesapeake Bay Preservation Area (CBPA) map with an appropriate legend. When the maps are finalized, the CBPA map layer will be available in a standard GIS format.

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.

Staff Response:

Approved RPA Boundary Delineation Studies are on file with DPWES and available to the public. Amending the boundaries on the adopted CBPA map to reflect approved RPA Boundary Delineation Studies is not practical. The CBPA map would need to be re-adopted by the Board on a continuing basis. Staff is reviewing the possibility of creating an additional overlay for the CBPA map to notate the approved studies in a manner that would be similar to the manner in which zoning case numbers are notated on the Zoning Map.

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.

Staff Response:

All legal requirements for advertising the public hearings have been satisfied. In addition to the legal notices, a press release was issued a week prior to the Board public hearing to increase public awareness of the pending amendments. Staff notes that the press release was

Staff Response to Issues Raised by NAIOP

picked up by the Washington Post and published in the Fairfax Weekly on the Wednesday prior to the Board's public hearing. Arlington County is cited as an example of a model notification process. Arlington County, which is one eighth the size of Fairfax County, only has approximately 1500 properties with RPA. Notifying Fairfax County property owners who have RPA on their properties would require notifying an estimated 38,000 people.

Throughout the process of developing the protocol, no deficiencies or concerns have been raised regarding specific elements of the protocol that would call into question the use of the protocol or the determinations of perennality that have been made by staff. A delay in adoption of the amendments pending review of the study not warranted.

The PFM does not require use of the protocol. There only will be limited need for use of the protocol after the County mapping project is complete because the in-field studies required by ordinance will have been completed. The protocol eventually will be endorsed by CBLAB. The protocol document is in large part a description of a methodology rather than a set of engineering calculations. For the above reasons, the incorporation of the protocol into the PFM by reference is not appropriate.

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.

Staff Response:

The primary purpose of most wetland creation and/or restoration projects is to facilitate other activities that destroy wetlands by providing required mitigation. It also has not been demonstrated that a created wetland will provide better water quality control than a forested or otherwise naturally vegetated RPA buffer. This is at best a zero-sum game and wetlands constructed to mitigate other activities cannot be presumed to provide an overall environmental benefit. Further, wetlands can be created in areas outside of RPAs. Under the proposed ordinance, the creation of wetlands in the RPA can be considered as a means of restoring a degraded RPA.

Under the proposed ordinance, bioengineering techniques can be used for stream bank stabilization. The allowance in the ordinance for stream bank stabilization to be considered as a water-dependent activity and thus permitted in the RPA was crafted narrowly to avoid projects that require major reconstruction or realignment of streams and adjoining riparian areas. Projects that include the realignment of streams potentially can enlarge RPAs and may adversely impact adjoining property owners.

It is reasonable that the above types of projects should be subject to the higher level of scrutiny that accompanies an exception request.

Specific Ordinance and PFM Comments from NAIOP:

Staff Response to Issues Raised by NAIOP

I. Chapter 118- Chesapeake Bay Preservation Ordinance

NAIOP Comment:

- A. Section 118-1-6 (t) – Add “Resource Protection Area Plans” and do not delete “waivers and exceptions, preliminary site plans”.

Staff Response:

RPA plans are not “plans of development”. They are engineering studies and are not required to display proposed development. The result would be to have RPA plans included under the proposed Policy for Treatment of Approved and Pending Plans of Development. Staff recommends against this proposal.

The requested changes do not reflect current Zoning Ordinance provisions. The waivers and exceptions referred to are site plan waivers and exceptions. Site plan waivers and site plan exceptions are not included in the current provisions of Article 17 (Site Plans) of the Zoning Ordinance and preliminary site plans have been replaced by PRC plans.

NAIOP Comment:

- 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.

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:

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.

Staff Response:

The request to utilize only the second definition presumes that the Board will not make the ordinance effective until the map is completed, an issue that has not been decided. If the

Staff Response to Issues Raised by NAIOP

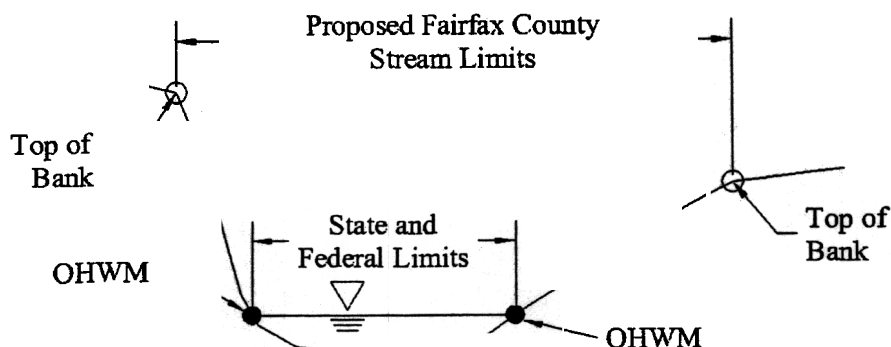
Board follows the Planning Commission recommendation, both definitions will be needed. The limits of perennial streams will be depicted on the final Chesapeake Bay Preservation Area (CBPA) map with an appropriate legend. The proposed change to the language in the second definition of “Water body with perennial flow” is not substantive. Therefore, staff does not have any objection to the proposed change to the language but also does not see a need for it.

NAIOP Comment:

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.

Staff Response to Issues Raised by NAIOP

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.

Staff Response:

The use of the top-of-bank of a stream channel in defining the width of a perennial stream is consistent with the method that has been used for the past ten years to measure the minimum required 100-foot buffer from tributary streams under the current ordinance provisions. The diagram provided is not-to-scale and exaggerates the difference in the width of the stream based on use of the OHWM versus use of top-of-bank. There is no indication that the COE or DEQ had any specific intent to define the width of perennial streams using the OHWM. The OHWM defines the extent of COE and DEQ jurisdictional authority. It is true that CBLAD guidance allows the OHWM to be used to define the width of perennial streams. It is also true that CBLAD guidance allows the top-of-bank to be used in defining the width of perennial streams. The location of the top-of-bank of a stream is information that is collected as part of any routine topographic survey used to prepare a plan of development. In fact, the entire stream cross-section is necessary to demonstrate that the stream is an adequate outfall. Determining the location of the OHWM is only required for projects that propose disturbance in jurisdictional waters. Any duplicative cost is associated with the determination of OHWM not with locating the top-of-bank of the stream.

33 CFR Part 328.3(e) defines the OHWM as follows:

e. The term "ordinary high water mark" means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

It is staff's opinion that use of the top-of-bank of a stream in defining stream width is a more understandable concept to the non-professional and that, contrary to NAIOP's opinion, the top-of-bank is more easily identified in the field than the OHWM. Staff recommends against the requested changes.

NAIOP Comment:

D. Section 118-1-9 (a)

(a) There shall be a map of Chesapeake Bay Preservation Areas adopted by the Board of Supervisors

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

Staff Response to Issues Raised by NAIOP

Staff Response:

The requested change presumes that the Board will not make the ordinance effective until the map is completed, an issue that has not been decided. If the Board follows the Planning Commission recommendation, the requested change is not appropriate. The existing language is flexible enough to work with either option. There is no need to revise this section.

NAIOP Comment:

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”.

Staff Response:

The requested change presumes that the Board will not make the ordinance effective until the map is completed, an issue that has not been decided. If the Board follows the Planning Commission recommendation, site-specific determinations will be required until the map is completed. Once the map is completed, Chapter 118 will no longer “require” studies to be provided. The language is flexible enough to work with either option. There is no need to revise this section.

NAIOP Comment:

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.

Staff Response:

The Regulations do not require that a detailed RPA boundary study be performed for all proposed construction in or adjoining RPAs. DPWES’ administrative practice for the past 10 years has been to require detailed RPA boundary delineation studies only where necessary for administration of the Ordinance. Typically a detailed RPA boundary delineation study is not required when the proposed construction is sufficiently far from the RPA boundary shown on the adopted CBPA map that the possibility of an encroachment is deemed remote or where the proposed construction is clearly in the RPA and the applicant is seeking an exception. There is no basis provided for the assertion that DPWES commonly approves plans that inadvertently permit encroachment into the RPA because a detailed RPA boundary delineation study was not required. If this proposal is incorporated into the Ordinance, all proposed construction, including

Staff Response to Issues Raised by NAIOP

small homeowner projects, in or adjoining RPAs will require RPA boundary delineation studies be performed regardless of circumstance. Staff recommends against the proposed changes.

NAIOP Comment:

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)”.

Staff Response:

This is contrary to how CBLAD requested these issues be handled.

NAIOP Comment:

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.”

Staff Response:

The requested change would amount to a grandfathering of activities that are not yet proposed from the effects of the new RPA definition. This is not permitted under the amended State regulations. 9 VAC 10-20-80.B.5 clearly requires that RPAs be designated along all perennial streams regardless of whether or not there was a prior detailed mapping of the RPA or existing encroachments into the RPA. Proposed development is not required to be shown on RPA delineation plans and is not reviewed as part of RPA delineation plans. RPA delineation plans are engineering studies that do not authorize construction.

NAIOP Comment:

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

- (3) The facility must be consistent with Fairfax County’s stormwater management program as approved by the Chesapeake Bay Local Assistance Board; and

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.”

Staff Response to Issues Raised by NAIOP

Staff Response:

The proposed language implements changes to 9 VAC 1-20-130.1.e which reads:

(iii) the facility must be consistent with a stormwater management program that has been approved by the board as a Phase I modification to the local government's program;

Staff recommends against incorporating the requested change which is not consistent with the Regulations.

NAIOP Comment:

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.

Staff Response:

No reason is given as to why current projects would be in jeopardy. There are other options available for meeting the water quality control requirements of the Regulations. The amended language is required to implement changes to 9 VAC 10-20-120.8(2). that reads:

(2) Compliance with a locally adopted regional stormwater management program, which may include a Virginia Pollution Discharge Elimination System (VPDES) permit issued by the Department of Environmental Quality to a local government for its municipally owned separate storm sewer discharges, that is reviewed and found by the board to achieve water quality protection equivalent to that required by this subsection; and

The “board” referred to in 9 VAC 10-20-120.8(2) is the Chesapeake Bay Local Assistance Board (CBLAB). CBLAB has not reviewed the County’s regional stormwater management program or VPDES permit. Because CBLAB has not reviewed the County’s program regional stormwater management program or VPDES permit, the language serves essentially as a placeholder pending future CBLAB action. Staff recommends against incorporating the requested changes which are not consistent with the Regulations.

NAIOP Comment:

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

Staff Response to Issues Raised by NAIOP

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. A photo of this particular site example is attached. This is allowed now – but will be prohibited by new language unless an exception is obtained.

The solution is to delete the following 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?

Staff Response:

The proposed language is taken directly from 9 VAC 10-20-130.1.c which reads:

c. Redevelopment outside locally designated Intensely Developed Areas shall be permitted only in the Resource Protection Area only if there is no increase in the amount of impervious cover and no further encroachment within the Resource Protection Area, and shall conform to applicable erosion and sediment control and stormwater management criteria set forth in subdivisions 6 and 8, respectively, of 9 VAC 10-20-120, as well as all applicable stormwater management requirements of other state and federal agencies.

The requested change is not consistent with the Regulations. Further, the stated interpretation of the provisions is not correct. For the example given, the extent of the existing encroachment within the RPA is determined by the outer boundary of the parking lot and associated grass or landscaped areas. Therefore, the expansion of the building within an existing paved parking lot does not increase the encroachment within the RPA. Staff recommends against incorporating the requested changes.

NAIOP Comment:

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.

Staff Response:

Staff Response to Issues Raised by NAIOP

The proposed amendment appears to be intended to resolve a dispute over administration of the existing ordinance provisions. Specific examples were not provided for review. There is sufficient authority under the existing provisions of Section 118-5-2(a) to exempt the widening of existing public roads provided they meet the definition of public roads in Section 118-1-6(u) and comply with the stipulated requirements of Section 118-5-2(a). No changes to the ordinance language are necessary.

NAIOP Comment

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.

Staff Response:

The proposed amendment appears to be intended to resolve a dispute over administration of the existing ordinance provisions. Specific examples were not provided for review. There is no explicit authority in 9 VAC 10-20-150.B. 2 to exempt storm sewer outfalls. Storm sewer outfalls are defined as water-dependent facilities under 9 VAC 10-20-40. Although they are permitted uses, construction of water dependent facilities requires the submission of a water quality impact assessment. Staff recommends against incorporating the requested changes.

NAIOP Comment:

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).

Staff Response to Issues Raised by NAIOP

- 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 following:

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

Staff Response:

Section 9 VAC 10-20-150 of the Regulations provides a very specific list of exempt activities that does not include wetland creation/restoration projects or stream restoration activities using bioengineering techniques. Therefore, the inclusion of these types of activities as exemptions would not be consistent with the Regulations. The primary purpose of most wetland creation and/or restoration projects is to facilitate other activities that destroy wetlands by providing required mitigation. It also has not been demonstrated that a created wetland will provide better water quality control than a forested or otherwise naturally vegetated RPA buffer. This is at best a zero-sum game and wetlands constructed to mitigate other activities cannot be presumed to provide an overall environmental benefit. Further, wetlands can be created in areas outside of RPAs. Under the proposed ordinance, the creation of wetlands in the RPA can be considered as a means of restoring a degraded RPA.

Under the proposed ordinance, bioengineering techniques can be used for stream bank stabilization. The allowance in the ordinance for stream bank stabilization to be considered as a water-dependent activity and thus permitted in the RPA was crafted narrowly to avoid projects that require major reconstruction or realignment of streams and adjoining riparian areas. Projects that include the realignment of streams potentially can enlarge RPAs and may adversely impact adjoining property owners. It is reasonable that these types of projects should be subject to the higher level of scrutiny that accompanies an exception request and that they should be considered measures of last resort.

Staff recommends against incorporating the requested changes.

II. Chapter 101 – Subdivision Ordinance

NAIOP Comment:

A. Section 101-2-2 (13)

(13) Stormwater Quality. All required Water Quality Impact Assessments, site-specific determinations of water bodies with perennial flow, Resource Protection Area Boundary Delineations and Resource Management Area Boundary Delineations shall be submitted and

Staff Response to Issues Raised by NAIOP

adequate measures shall be provided in compliance with Chapter 118 of the County Code and the Public Facilities Manual.

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

Staff Response:

The language in paragraph 13 refers to “All required . . . site-specific determinations of water bodies with perennial flow . . . be provided in compliance with Chapter 118 of the County Code and the Public facilities Manual.” The requested change presumes that the Board will not make the ordinance effective until the map is completed, an issue that has not been decided. If the Board follows the Planning Commission recommendation, site-specific determinations will be required until the map is completed. Once the map is completed, Chapter 118 will no longer “require” studies to be provided. The language is flexible enough to work with either option. There is no need to revise paragraph 13.

NAIOP Comment

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

Change “(i) The source of the boundary information” to “(i) The source of the site specific boundary information based upon field study”.

Staff Response:

The RPA boundary is not required to be based on a site specific field study. See prior comments on the requirements for field studies.

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.”

Staff Response

Although it is true that waivers and exceptions are available for some activities, it is not necessary to indicate so every time a requirement or prohibition is listed. The advertised language replicates the specific language of a note required to be placed on subdivision plats by 9 VAC 10-20-191.A.4. Staff recommends against the requested change.

III. Chapter 104 – E & S

No Comments

IV. Chapter 112 – Zoning Ordinance

Staff Response to Issues Raised by NAIOP

NAIOP Comment:

A. Section 17-106 (Required Information on Site Plans) paragraph 32

32. Delineation of Resource Protection Areas and Resource Management Areas and a Water Quality Impact Assessment and required measures in accordance with Chapter 118 of The Code.

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

Staff Response:

Within Chapter 118, “Resource Protection Area” and “Water body with perennial flow” are defined separately. The definition of “Resource Protection Area” includes a reference to water bodies with perennial flow. It is the definition of “Water body with perennial flow” that references the perennial streams displayed on the CBPO map. There is no need to revise paragraph 32.

V. Public Facilities Manual

NAIOP Comment:

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.

Staff Response:

B. The amendments to PFM 6-0402.6B are required to implement changes to 9 VAC 10-20-120.8(2). which reads:

(2) Compliance with a locally adopted regional stormwater management program, which may include a Virginia Pollution Discharge Elimination System (VPDES) permit issued by the Department of Environmental Quality to a local government for its municipally owned separate storm sewer discharges, that is reviewed and found by the board to achieve water quality protection equivalent to that required by this subsection; and

The “board” referred to in 9 VAC 10-20-120.8(2) is the Chesapeake Bay Local Assistance Board (CBLAB). CBLAB has not reviewed the County’s regional stormwater management program or VPDES permit because it was not previously a requirement. Staff anticipates it will be reviewed by CBLAB at some point in the future. Until that time, the language functions as a placeholder. This is only one of a number of options for demonstrating compliance with the water quality control requirements of the Regulations. No reason is given as to why current projects would be

Staff Response to Issues Raised by NAIOP

in jeopardy and staff does not see this as an issue. Because the requested changes are not consistent with the Regulations, staff recommends against inclusion of the requested changes.

NAIOP Comment:

C. PFM 6-1701.2, PFM 6-1701.4, PFM 6-1704.2E, PFM 6-1704.4 and PFM 6-1704.4A

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

Staff Response:

Staff is unable to evaluate this comment. There are no specific comments regarding Section 118-1-7(b) included in the May 15, 2003, letter.

NAIOP Comment:

D. PFM 6-1704.8D

The phrase “and any relevant correspondence” should be replaced with “and a copy of the Jurisdictional Determination (JD)” to accurately convey the appropriate document needed to evidence approval of all wetlands delineations by the U.S. Army Corps of Engineers (USACE).

Staff Response:

The Regulations do not require approval of wetland delineations by the USACE for the purpose of determining RPA boundaries. The requested change to PFM 6-1704.8D would require that Jurisdictional Determinations (JDs) be made by the USACE prior to approval of RPA delineation plans by the County. The intent of PFM 6-1704.8D is that such information be provided if available not that it is mandatory. A case has not been made that such information is required to assure an accurate delineation of the RPA boundary. Further, the USACE could, at any time, decide not to provide JDs for projects that do not propose the disturbance of wetlands or might not be able to provide timely review. For the above reasons, staff does not believe it is advisable to tie the County’s review process to an approval of the wetland delineation by the USACE and recommends against the requested change.