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AquaLaw PLC

May 3, 2021

By Electronic Mail (Justin.Williams@deq.virginia.gov)

Mr. Justin Williams
State Water Control Board
1111 East Main Street, Suite 1400
P.O. Box 1105
Richmond, Virginia 23218

Re: Proposed Amendments to CBPA Regulations

Dear Mr. Williams:

I am writing on behalf of the Virginia Municipal Stormwater Association (VAMSA) with comments on the Department of Environmental Quality's (DEQ or Department) proposed amendments to the Chesapeake Bay Preservation Area Designation and Management Regulations (9VAC25-830) (Proposed Regulations).

I. INTRODUCTION

Many of VAMSA's members are obliged by statute (VA Code §62.1-44.15:67) or have voluntarily chosen to implement a Chesapeake Bay Preservation Act (CBPA) program. The Proposed Regulations are of significant interest to the VAMSA membership for this reason.

VAMSA has carefully reviewed the Proposed Regulations and provides the comments below for the Department's consideration. VAMSA appreciates the opportunity to comment and to participate in the Stakeholder Advisory Group (SAG) that DEQ will convene in May. VAMSA requests that the Department also consider any individual comments filed by VAMSA members on this important topic.

II. COMMENTS

DEQ Should Establish a SAG to Advise on Regulatory Changes

As noted above, VAMSA is pleased to participate in the SAG that will meet in May 2021 as directed by the State Water Control Board. However, the proposed regulatory revisions are significant and will impact 84 localities, including all of Tidewater Virginia, which is defined by statute to include communities from Central Virginia (e.g., Henrico County, the City of Richmond) to Northern Virginia (e.g., Arlington County) to Hampton Roads and the Eastern Shore. Va. Code §62.1-44.15:68. In addition, as DEQ's website itself acknowledges, the Chesapeake Bay Preservation Act itself as established in 1988 is "the only program administered by the Commonwealth of Virginia that comprehensively addresses the effects of land use planning and development on water quality."

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Given the number of localities touched by these changes, the long history of the CBPA, and the likely significant changes for development across a wide swath of the Commonwealth, VAMSA requests that DEQ establish a traditional SAG to review potential regulatory changes and provide feedback before the regulations are finalized.

VAMSA is currently participating on the Regulatory Advisory Panel (RAP) for the Consolidation of the Erosion and Sediment Control Program and Virginia Stormwater Management Program regulations (Consolidation RAP). The RAP met 5 times in 2019, before the pandemic forced a change in public meeting protocols. Changes to the CBPA regulations to incorporate climate change and mature trees deserve an equal effort.

If DEQ agrees, VAMSA recommends including local CBPA program staff in the SAG. They are responsible for implementing these programs on a day-to-day basis and are the most qualified people in the State to explain how regulatory changes will impact local development processes and outcomes.

DEQ Should Clarify Local Requirements Associated with Climate Change

The Proposed Regulations state that a local government subject to the CBPA “shall consider the impacts of climate change or sea-level rise on any proposed land development in the Resource Protection Area” and that this consideration shall span no less than 30 years and “[i]nclude the consideration of future floodplain, water level, storm surge, or other impacts in altering the Resource Protection Area or diminishing the protection of water quality due to the proposed development from these impacts;” (Proposed Regulations, 9VAC25-830-155(C), (C)(1), (C)(3)).

It is not clear from this text whether a local government should review potential climate change or sea-level rise impacts if the development in question is: (1) currently in the RPA or (2) may be in the RPA in the future based on how the RPA may change over the following 30 years. VAMSA believes that DEQ intends for local CBPA programs to review impacts on a proposed development if the development is currently in the RPA, but the Proposed Regulation could be read either way. This will likely cause unnecessary confusion and differing approaches depending on the CBPA staff in a particular locality.

For this reason, VAMSA requests that DEQ make the following change:

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

C. Local governments shall consider the impacts of climate change or sea level rise on any proposed land development if it will occur wholly or partially in an area currently identified as part of ~~in~~ the Resource Protection Area. Based upon this consideration, local governments may require the installation of additional measures or design features as part of the proposed land development consistent with the requirements of the Act and these regulations. In considering the future impact, local governments shall:

1. Consider a potential impact range of no less than 30 years; AND
2. Utilize an appropriate model or forecast to aid in the consideration of impacts through use of:
 - i. The most updated 2017 National Oceanographic and Atmospheric Administration (NOAA) Intermediate-High scenario projection curve;
 - ii. A model or forecast that incorporates or utilizes the 2017 National Oceanographic and Atmospheric Administration (NOAA) Intermediate-High scenario projection curve;

- iii. A peer-reviewed model or forecast that includes NOAA 2017 projections, including the Intermediate-High curve and has been developed, utilized, or recognized by a state or federal agency and is not based solely upon extrapolation of historical data.
3. Include the consideration of future floodplain, water level, storm surge, or other impacts in altering the Resource Protection Area or diminishing the protection of water quality due to the proposed development from these impacts.
4. Identify measures, conditions, or alterations to the proposed land development to address these impacts as necessary and appropriate based on site conditions, type of proposed land development, and projected potential impacts. This includes measures such as state or federally recognized or approved best management practices appropriate for the site conditions and land development to address such impacts.

DEQ Should Dovetail Ordinance Updates with Other Regulatory Changes

The Proposed Regulations give localities three years after the effective date to incorporate new performance criteria into their ordinances.

VAMSA requests that, if possible, DEQ coordinate this ordinance work with other work that will require ordinance updates. As a Consolidation RAP participant, VAMSA expects that the final Consolidation regulations will require an extensive amount of ordinance work at the local level. VAMSA understands that the timing for final adoption is dependent on numerous factors, some of which are outside of DEQ's control. However, if it is possible for DEQ to align these two regulatory proceedings, Virginia's localities could then streamline two highly technical, substantive ordinance changes, saving precious local resources.

III. CONCLUSION

Again, VAMSA appreciates DEQ's willingness to consider these comments. I am available if you have any questions regarding this correspondence.

Sincerely,



Timothy A. Mitchell, P.E.
President