

TAB G - Chesapeake Bay Preservation Area Designation and Management Regulation - 9VAC25-830
- Proposed Amendment - Coastal Resilience and Adaptation to Sea-level Rise and Climate Change
Criteria

At the December 9, 2020, meeting of the State Water Control Board (Board), staff will ask the Board for approval to proceed to public notice with proposed amendments to the Chesapeake Bay Preservation Area Designation and Management Regulations (9 VAC 25-830). The proposed amendments were developed pursuant to Chapter 1207 of the 2020 Acts of Assembly, which required that a provision of “coastal resilience and adaptation to sea-level rise and climate change” be added to the criteria requirements in 9 VAC 25-830 as established by the Board. This memorandum provides a brief background on the Chesapeake Bay Preservation Act, the implementing regulations and the proposed amendments, as well as the General Assembly action authorizing this regulatory action.

BACKGROUND

The Chesapeake Bay Preservation Act (§ 62.1-44.15:72 of the Code of Virginia) provides that the State Water Control Board shall promulgate regulations that establish criteria for use by local governments in granting, denying, or modifying requests to rezone, subdivide, or use and develop land in Chesapeake Bay Preservation Areas. Chesapeake Bay Preservation Areas include Resource Protection Areas, Resource Management Areas and Intensely Developed Areas.

Chapter 1207 of the 2020 Acts of Assembly amended § 62.1-44.15:72 and added a provision of “coastal resilience and adaptation to sea-level rise and climate change” to the criteria requirements for regulations to be established by the State Water Control Board for use by local governments under the Chesapeake Bay Preservation Act. Chapter 1207 also included a clause requiring the State Water Control Board to adopt regulations to implement the change, and a clause that initial adoption of applicable regulations shall be exempt from the requirements of Article 2 (§ 2.2-4006 et seq.) of Chapter 40 of Title 2.2 of the Code of Virginia, but shall be subject to a public comment period of at least 60 days prior to final adoption by the Board.

Consistent with this provision, a Notice of Intended Regulatory Action and a Regulatory Advisory Panel were not utilized. However, staff did engage in individual discussions with state agencies and stakeholders and held a public input session to receive information and feedback on potential considerations.

The Office of the Attorney General will be sent the regulation for certification of authority to adopt the amendments.

PROPOSED AMENDMENT TO THE CHESAPEAKE BAY PRESERVATION AREA DESIGNATION AND MANAGEMENT REGULATIONS (9VAC25-830)

The proposed regulatory amendment provides clarity that climate change adaptation and resilience measures are a permitted activity within Chesapeake Bay Preservation Areas. This ensures these activities are specifically recognized consistent with identification of other allowable activities, particularly within the Resource Protection Area (RPA).

Consistent with the language in the statutory change, the proposed regulatory amendment provides that climate change impacts are considered for land development within the RPA. Given the primary nature of impacts, particularly sea-level rise, and that the RPA consists of water bodies and adjacent buffers, the amendment ensures consideration of these impacts when localities are reviewing projects. Moreover, it allows localities to incorporate or require conditions based upon a consideration of these impacts, including the use of best management practices. In considering these impacts, localities would utilize a model or forecast (2017 National Oceanographic and Atmospheric Administration (NOAA) Intermediate-High

scenario projection curve) specifically recognized by the Commonwealth, while having the option to consider other models or forecasts that are generally recognized and appropriate.

Additionally, the regulatory amendment proposes limitation on the granting of exceptions to activities in the RPA to ensure consideration of these impacts, avoid allowance of fill as a sole measure, and to provide for preservation and maximization of natural and nature-based features.

To allow for activities that are necessary to adapt or address climate change impacts, the regulatory amendment provides an allowance for these activities with certain requirements. These requirements apply in lieu of the performance criteria found in 9 VAC 25-830-130 and 9 VAC 25-830-140. For most activities, given the current site conditions and options in terms of adaptation measures, the regulatory amendment distinguishes between previously developed RPAs and vegetated or undeveloped RPAs.

The regulatory amendment maintains the requirement for a Water Quality Impact Assessment (WQIA) for these projects within the RPA. Given the nature of the projects and the recognition of certain activities by other DEQ programs including the Nonpoint Source Pollution control programs, the amendment also provides an exemption from the WQIA where the project is a best management practice recognized or approved by a state or federal agency to reduce runoff, prevent erosion, and filter nonpoint source pollution.

Additionally, in recognition of a common practice under regulatory oversight by the Virginia Marine Resources Commission (VMRC) and supported by commonwealth policy, the regulatory amendment provides an exemption for living shorelines where the locality has otherwise approved it, buffers and vegetation are addressed, and the project obtained necessary approval from VMRC.

Consistent with other performance criteria, local governments much include these provisions in their ordinances and incorporate the requirements into their programs. Additionally, given the timeframe necessary for ordinance changes and in recognition of the need for additional training and implementation tools such as guidance, localities would have three years from the effective date to adopt these changes.

Regulatory Text:

9 VAC 25-830-155 Climate Change Resilience and Adaptation Criteria

- A. This Section applies in addition to 9 VAC 25-830-130 and 9 VAC 25-830-140. Local governments shall incorporate these provisions into all relevant ordinances and ensure their enforcement through implementation of appropriate processes and documentation for oversight and enforcement. Localities shall update and amend their ordinances to adopt and incorporate these performance criteria by [insert date 3 years after effective date of the regulation amendment].
- B. Land development, adaption measures or activities including buffer modifications or encroachments necessary to install adaptation measures, mitigation measures, or other actions necessary to address the impacts of climate change, including but not limited to sea-level rise, recurrent flooding and storm surge, may be allowed in a Chesapeake Bay Preservation area provided the activity complies with all other applicable provisions of these regulations. Nothing in these provisions shall preclude a locality from adopting requirements or criteria in addition to the requirements of these provisions to address the impacts of climate change and sea-level rise in Chesapeake Bay Preservation areas in the locality including extension of the Resource Protection Areas, further restrictions on development, or further preservation of existing vegetation.
- C. Local governments shall consider the impacts of climate change or sea level rise on any proposed land development 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; OR
 - 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 upon 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.
- D. Local governments shall not grant exceptions to the requirements of 9 VAC 25-830-130, or 9 VAC 250-830-140, or 9 VAC 20-830-155 where:
1. The impact of climate change including sea level rise on the land development is not considered as outlined in Section C for exceptions in the Resource Protection Area;
 2. The exception consists of approval solely for the use of fill or other material to the Resource Protection Area or within 100 feet of the Resource Protection Area; OR
 3. The exception permits encroachment into seaward 50 feet of the buffer area of the Resource Protection Area notwithstanding permitted modifications and adaptive measures.
- E. Local governments may allow adaption measures or activities within the Resource Protection Area to address climate change including sea level rise subject to the following criteria. These criteria and requirements shall apply to such adaptation measure or activity in lieu of the criteria in 9 VAC 25-830-130 and 140:
1. Where the adaptation measure or activity is within a Resource Protection Area that has been previously developed, including IDAs, and is not naturally vegetated, the adaptation measure or activity shall:
 - a. Be designed, implemented, and maintained in accordance with best management practices applicable to the adaptation measure or activity as recognized or approved by a state or federal agency;
 - b. Not consist solely of the use of fill or other materials to raise the elevation of a Resource Protection Area;
 - c. Incorporate natural features or measures such as the planting of vegetation or trees, maximize preservation of existing natural vegetation and trees particularly mature trees, and minimize land disturbance and impervious cover to the maximum extent practicable consistent with the applicable best management practices; AND
 - d. Where applicable, obtain any applicable federal, state, and local permits and comply with any applicable federal, state and local requirements.
 2. Where the adaptation measure or activity is within a Resource Protection Area that is naturally vegetated or has not been previously developed, the measure or activity shall:
 - a. Be designed and implemented in accordance with best management practices applicable to the adaptation measure or activity as recognized or approved by state or federal agencies;
 - b. Preserve to the maximum extent practicable any existing vegetation in the additional 50 feet landward from the RPA;

- c. Not consist solely of the use of fill or other materials to raise the elevation of a Resource Protection Area;
 - d. Maximize the preservation of existing vegetation and trees particularly mature trees, incorporate the planting and establishment of vegetation particularly trees, and minimize land disturbance and impervious cover to the maximum extent practicable consistent with the applicable best management practices; AND
 - e. Where applicable, obtain any applicable federal, state, and local permits and comply with any applicable federal, state and local requirements.
3. Where the adaptation measure or activity is a best management practice recognized or approved by a state or federal agency to reduce runoff, prevent erosion, and filter nonpoint source pollution, a Water Quality Impact Assessment in accordance with 9 VAC25-830-140(6) shall not be required. All other measures or activities shall require a Water Quality Impact Assessment in accordance with subdivision 6 of 9 VAC 25-830-140.
4. Where the proposed adaptation measure is a living shoreline project or related activity, the locality otherwise approves of the project, the projects maintains or establishes a vegetative buffer inland of the living shoreline to the maximum extent practicable, minimizes land disturbance to the maximum extent practicable, and the project receives approval from the Virginia Marine Resources Commission, including a permit as applicable, and any other necessary permits or approvals, the adaptation measure shall be exempt from additional requirements or criteria including a Water Quality Impact Assessment.