



CHESAPEAKE BAY PRESERVATION AND WETLAND MITIGATION UPDATE

As 2003 begins, major revisions to the Chesapeake Bay Preservation Ordinances in "Tidewater Virginia"¹ localities will affect the building industry and public works sector, while the federal government has released two documents regarding compensatory mitigation requirements for impacts to aquatic resources.

Chesapeake Bay Preservation Ordinance Revision Update

As we discussed in our September 24, 2002 newsletter, most local Chesapeake Bay Preservation ordinances will be revised before March 1, 2003, as required by regulations enacted at the state level by the Chesapeake Bay Local Assistance Board. The changes being made to these ordinances will likely result in a doubling (or more) of the extent of Resource Protection Areas (RPA) in Northern Virginia and will increase uncertainty regarding where RPAs are located until significant studies are conducted. We want to provide an update on the status of the changes being made to the local ordinances in Northern Virginia and to alert you to hearings on this issue being held in the major localities in the region:

- **Fairfax County:** Proposed revisions to the county's Chesapeake Bay Preservation Ordinance will be discussed at a Planning Commission hearing at 8:15 p.m. on January 15, 2003, and at a meeting of the Board of Supervisors on January 27, 2003. A copy of the draft revisions can be found on the Fairfax County website at <http://www.co.fairfax.va.us/gov/DPWES/environmental/cbay/cbayamendment2002.htm>.
- **Prince William County:** Revisions to the county's ordinance and Design and Construction Standards Manual were approved by the Board of County Supervisors on December 3, 2002, and will become effective on February 3, 2003. A copy of the updated ordinance can be found on the Prince William County website at <http://www.co.prince-william.va.us/planning/oldbocs/12032002.htm>. Vesting guidelines are described in a December 27, 2002 letter from County Planning Director Stephen Griffin, a copy of which is attached to this newsletter. In a December 31, 2002 e-mail to WSSI, Elizabeth Via, Chief of Development Services for Prince William County, stated that the vesting guidelines for PASAs on page 2 of Griffin's letter apply both to preliminary and final PASAs. Similarly, in a January 2, 2003 e-mail, County Environmental Engineer Patty Dietz stated that the

¹ "Tidewater Virginia" is legally different than what it is commonly thought to mean. It pertains to localities in Virginia that touch a tidal body of water (i.e. the Potomac River up to Little Falls for Fairfax County) or is surrounded by such a locality, with a few exceptions due to clerical errors that have not been corrected.

last item (on page 3) should read "Lots recorded prior to March 1, 2002" rather than March 1, 2003.

- Arlington County: Proposed revisions to the county's ordinance are scheduled to be discussed at a Planning Commission hearing on January 27, 2003, and at a meeting of the Board of Supervisors on February 8, 2003. A copy of the draft revisions can be found on the Arlington County website at <http://www.co.arlington.va.us/des/EPO/chesbay.htm>. Arlington County's RPA is proposed to encompass all natural streams (i.e., not just perennial) and open channels with a 100 ft buffer. It may also include 25% slopes and 15% slopes in some locations. Other major changes include a ten-fold increase in the Source Control Fund Fee and protection of trees >3" dbh (diameter at breast height) county wide. If these changes affect your land, you should participate in these hearings.
- City of Alexandria: The City is currently drafting revisions to its Chesapeake Bay Preservation ordinance. As of today it has not yet scheduled any public hearings on proposed amendments, and according to City staff, the amended ordinance may not be finalized until after March 1.
- City of Fairfax: Draft revisions to the City's Chesapeake Bay Preservation ordinance will be completed by January 9, 2003, and copies can be obtained by contacting Jeanie in the City offices at (703) 385-7820. These revisions are scheduled to be discussed at a Planning Commission hearing at 7:30 p.m. on January 13, 2003, and at a meeting of the City Council at 7:00 p.m. on January 28, 2003.
- Town of Herndon: The Town is currently drafting revisions to its Chesapeake Bay Preservation ordinance. As of today it has not yet scheduled any public hearings on proposed amendments, and according to City staff, the amended ordinance may not be finalized until after March 1.

We recommend that you participate in these public hearings to make your opinions and interests known to the localities that will be enacting these changes. The issues are numerous in each ordinance. The most significant are:

1. Will projects in the middle of the development process be granted by vesting or an exception process under approvals issued before the Chesapeake Bay Preservation Ordinance changes were made?
2. State regulations require a map of all Preservation Areas to be adopted by the locality (9 VAC 10-20-60.1). Yet so far, most localities are changing the definition of RPAs without updating the maps, even though preliminary studies in Fairfax County show the RPAs doubly as large (or more) under the new ordinance as they were before. Is this legally correct? Is it fair to people who may find out years later that their dream home has expansion limitations because they are in an RPA despite being nowhere near an RPA on the "official map"?

1. The lack of a uniform protocol for determining which streams are perennial, and thus now an RPA component.

Regulatory Guidance Letter on Mitigation

On December 24, 2002, the U.S. Army Corps of Engineers (COE) and U.S. Environmental Protection Agency (EPA), in concert with other federal agencies, issued two documents affirming their commitment to the goal of "no overall net loss" of wetlands (both may be viewed at <http://www.epa.gov/owow/wetlands/guidance/index.html#mitigation>). The multi-agency *National Wetlands Mitigation Action Plan* lists actions that these agencies will undertake to improve the effectiveness of wetland restoration in the hope of achieving a net gain in wetland functions and values in the future. The COE's Regulatory Guidance Letter (RGL 02-2) on Compensatory Mitigation Projects indicates that the COE will take a watershed/ecosystem approach to wetland mitigation, increase the use of functional assessment methodologies in determining mitigation requirements for authorized impacts, and increase performance standards for mitigation sites. As the contents of this RGL are implemented in Northern Virginia, there may be greater emphasis on functional assessment of wetland values (in determining mitigation requirements) than there has been in the past, the mitigation credit granted for wetland/buffer preservation may be reduced, and requirements for mitigation site maintenance, monitoring, and financial accountability may become more stringent (i.e., more similar to the requirements currently imposed on wetland mitigation banks in the region). Compensatory mitigation costs will likely increase, and mitigation plans will likely require more time for approval, as a result.

For Further Information

Call or Email Wetland Studies and Solutions, Inc. at:

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Mark Headly at mheadly@wetlandstudies.com /703-631-5800, Ext. 115.

Or call your WSSI Project Engineer, Scientist or GIS Specialist.

About WSSI:

WSSI has provided wetlands consulting on 70,000+ acres comprising over 1,100 sites in Northern Virginia, D.C. and Maryland and has restored over 800 acres of wetlands and 22,000 linear feet of streams in three wetlands banks and 85 stream and wetlands mitigation projects in this area since its inception in 1991. WSSI's team of 38 engineers, scientists, technicians, GIS/survey specialists and administrative staff takes a holistic approach to environmental issues associated with real estate development and public works projects, integrating the practical constraints of economics and land plan requirements with the need to satisfy local, state, and federal regulatory requirements. For more information about WSSI, visit our web site at <http://www.wetlandstudies.com>.



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PLANNING
OFFICE

Stephen K. Griffin, AICP
Director of Planning

December 27, 2002

Reissued: February 7, 2003

To: Development Community

From: Stephen K. Griffin, AICP
Planning Director

Re: Applicability of the Amended Chesapeake Bay Regulations on
Development Plans

On December 3, 2002, the Board of County Supervisors adopted the amendments to Section 740 *et seq.* of the Design and Construction Standards Manual (DCSM) and Part 504 of the Zoning Ordinance to incorporate the updated Chesapeake Bay Preservation Area Designation and Management regulations. The amendments become effective on February 3, 2003.

The following provides a County Staff overview of the applicability of those regulations on certain development plans.

Vesting/Grandfathering Guidelines

All site and subdivision plans (sketch, preliminary, public improvements, storm water studies, etc...) submitted on or after February 3, 2003 must comply with the updated regulations unless they fall under one or more of the criteria listed below.

- **Final Site and Subdivision Plans** -- Approved final plans that are still valid in accordance with Section 110.04 of the DCSM will not be subject to the updated regulations. However, revisions to such approved plans, if impacting an established RPA, will have to comply with certain aspects such as the provisions limiting encroachments. These plans will not be subject to a review of the delineated RPA limits.

- All final site and subdivision plans already in the review process and those accepted for review before February 3, 2003 will not be subject to the updated regulations so long as they remain valid. “Accepted” shall mean those plans that were submitted to quality control by close of business on February 2nd and were subsequently accepted for review by the County. Engineers shall have two weeks from the receipt of comments to submit sets to the County for review or the plans will be rejected from Quality Control. Any plans rejected by the County from Quality Control and subsequently resubmitted after the effective date will have to comply with the new, updated regulations.
- Preservation Area Site Assessments (PASA) -- A PASA already approved and where development has begun and is diligently being pursued will remain valid. A PASA approved and where no development has occurred yet, will remain valid for 5 years from the date of its approval except for those approved before March 1, 1998 (5 years or older) and where no development has occurred. These will no longer be valid and a field verified perennial flow determination and a resubmission of PASA will be required in accordance with the new, updated regulations.
- A PASA under review but not yet approved will be valid for five years from the date of its approval or as long as the corresponding final site/subdivision plan remains valid. An approved PASA vests a project only with respect to further identification of RPA on site. Other requirements of the updated regulations must be complied with, such as the provisions for encroachments. If proffers are inconsistent with these provisions, the proffers may control.
- Sketch Plans – Sketch plans approved prior to February 3, 2003 will not automatically be vested, nor will they automatically vest any subsequent final plans. Sketch plans may be vested if, under a review of the project, it is determined that a substantial amount of final engineering is shown on that plan, in order to assess issues relevant to the environmental aspects of the site, and/or an approved PASA is valid on the property. Development may also be determined to be vested in accordance with Section 15.2-2307 Va Code Ann. (Saslaw vesting). If the plan remains valid, the final plans implementing this vested sketch plan will also be deemed vested, so long as the development of all phases are diligently pursued. Generally, for sketch plans deemed vested under Section 15.2-2303 Va Code Ann. (Quillen vesting), the final plans will also be vested as to use and density if substantial proffers not addressing needs generated solely by the development, have already been implemented. Applicants will require a vesting determination by the Office of Planning.

- Preliminary Plans - Preliminary plans approved prior to February 3, 2003 will not automatically be vested, nor will they automatically vest any subsequent final plans. Preliminary plans may be vested if, under a review of the project, it is determined that a substantial amount of final engineering is shown on that plan, and/or an approved PASA is valid on the property. Development may also be determined to be vested in accordance with Section 15.2-2307 (Saslaw vesting). If the plan remains valid, the final plans implementing this vested plan may also be deemed vested, so long as the development of all phases are diligently pursued. Applicants will require a vesting determination by the Office of Planning.
- Once a preliminary plan is deemed vested in accordance with Section 15.2-2307 (Saslaw vesting), and remains valid, the final plans implementing this vested preliminary plan will also be deemed vested, so long as the development of all phases are diligently pursued. Generally, for preliminary plans deemed vested under Section 15.2-2303 (Quillen vesting), the final plans will also be vested as to use and density if substantial proffers not addressing needs generated solely by the development, have already been implemented.
- “Diligent pursuit” for projects with an approved and valid preliminary plan shall generally mean that a final plan must be submitted, approved, bonded and the plat recorded within two years of preliminary plan approval, in order for the project to be vested. That plan must remain bonded to completion. For phased projects, the first phase of the project must be bonded within two years, subsequent phases must continue to be diligently pursued as evidenced by such actions as regular submission, approval and bonding, and the preliminary plan must remain valid in order for the project to maintain its vesting.
- Rezoning and Special Use Permits -- Approved Rezoning and Special Use Permits may vest the subsequent development plans that implement them. Similar to preliminary plans vesting determination noted above, a vesting determination will be made on cases by case basis. The following generally defines “diligent pursuit” as it relates to the different stages of a project:
 - Special Use Permits: For projects vested due to approval of a special use permit, diligent pursuit of the project would include the submission of a preliminary or final plan within 12 months (or other date as approved by the BOCS) of SUP approval and diligent pursuit of its approval and construction of the project.

- Rezonings: For projects vested due to rezoning approval, “diligent pursuit” of the project would include the submission and approval of preliminary plan within 24 months of rezoning approval and the subsequent submission, approval of the final plan and bonding of the project within no more than 24 months. That plan must remain bonded to completion. For phased projects, the first phase of the project must be bonded within 24 months and subsequent phases must continue to be diligently pursued as evidenced by the regular submission, approval and bonding, in order for the project to maintain its vesting.
- Lots Recorded prior to March 1, 2002 – Lots recorded prior to March 1, 2002, when application of the RPA would result in the loss of buildable area, will be able to encroach into the RPA. They are not, however, fully vested. (Section 740.06 of the DCSM).

Please note that other projects may be vested under traditional vesting. Vesting determination for such projects will be made by Planning staff in coordination with the County Attorney and will require specific information to be submitted for evaluation in accordance with current practices. In addition, since most vesting determinations are time sensitive, they must be updated. Saslaw and Quillen vesting legislation is not retroactive.

If you have any questions please do not hesitate to contact either myself or Liz Via, Development Services Division Chief at (703) 792-6830.

CC: County Executive
Assistant County Executive
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