

Draft recommendations on proposed
Department of Environmental Quality
(DEQ) amendments to Chesapeake Bay
Regulations

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Draft recommendations to guide discussion

- The following draft recommendations are based on one-on-one conversations with members of the ERC.
- They are intended to be a guide to our April 7 discussion of ERC recommendations to the Board of Supervisors (BOS) about proposed amendments to the Chesapeake Bay regulations.
- May be accepted, modified, rejected. New recommendations may be offered and debated.
- Draft recommendations are shown in red. Lettered parts are to be voted on separately. Comments from ERC members are included.
- The intent is to incorporate agreed-upon recommendations in a letter to the BOS from the ERC.

DRAFT RECOMMENDATION 1: MATURE TREES

(a) ERC supports this amendment, (b) which should be limited to native tree species. The regulations should (c) allow for removal of unhealthy trees or those immediately adjacent to a downcutting stream, and (d) eliminate the allowance to remove trees in RPAs to provide vistas. (e) BOS should seek clarification on the definition of “mature tree,” and the meaning of “maximum extent practicable.”

Comments from individual ERC members:

1. Both species and condition of mature trees should be considered. A Silver Maple, for example, does not equal a Red Oak in importance. Trees that are unhealthy or located immediately adjacent to a downcutting stream may not be worth saving. Environmental Quality Advisory Committee (EQAC) has been given several briefings regarding an ongoing debate about inconsistencies (size, spacing) in replanting regulations.
2. The proposed amendment should be restricted to native tree species. The state and county should not seek to preserve or replant non-native species, esp. invasive species.
3. Should DEQ consider removing the allowance for removal of trees in Resource Protection Areas (RPAs) to provide vistas? (9 VAC 25-830-140)
4. What is a mature tree?
5. The “maximum extent practicable” language is unclear and too weak—easy for developers to ignore.

DRAFT RECOMMENDATION 2: DEVELOPMENT IN SEAWARD 50'

2. The ERC recommends the BOS seek to retain local authority of decisions to grant exceptions for development within the 50 seaward feet of the RPA.

Comments from ERC members:

1. I am all for banning development in the 50 seaward feet.
2. I support a ban within the seaward 50'.
3. I have a big problem with taking away local control.
4. If you hand power to the state, you won't get it back. You've got to be able to have flexibility.
5. This would replace reasoned judgment with a bright line rule, which will be over inclusive and/or under inclusive. It eviscerates judgment.

2 modified. The ERC recommends that the BOS seek to retain local authority, but set a higher standard for granting exceptions than the current “not of substantial detriment to water quality” standard.

DRAFT RECOMMENDATION 2 mod: Standard for granting exceptions?

Comments from ERC members:

- (Very strong standard) The *raison d'être* of the ERC is that a 100' buffer may not be suitable for the 1000 miles of perennial streams in Fairfax County, and that reasonable exceptions sometimes may be in everyone's interest—the general tradeoff rule. Another principle is that pollution tradeoffs must account for uncertainty in favor of the environment. Thus, I would favor something like the following in the new rules:
 - a. The net impacts on Chesapeake Bay of the proposed project and any mitigation measures must be positive (i.e., a reduction of pollutant loadings). For computation purposes, to allow for uncertainties, the loading reductions estimated for any mitigation measure shall be 1/3 that determined from reputable scientific literature.***
- (McKay standard) In the BOS discussion, Chairman McKay asked staff for examples where an RPA encroachment was permitted, but mitigation more than compensated for its damaging effects, yielding a net environmental benefit.
 - Although there are such examples, mostly there are net environmental harms from RPA encroachments in the seaward 50'. The required finding of “not of substantial detriment to water quality” almost guarantees cumulative detriments, as long as in each case it's not a substantial detriment.
 - To prevent cumulative adverse impacts, **b. replace the standard of “not of substantial detriment” with “net environmental benefit” and require every exception request to meet it as a condition for approval.**

DRAFT RECOMMENDATIONS 3-6: COMPLIANCE, EDUCATION, TAKINGS

3. The BOS should assess whether additional tools (and funds) are needed to address problems of compliance and enforcement, and if so, request that DEQ modify regulations to provide them.

- Even when mitigation might yield a net environmental benefit, county requirements have all too often been ignored or even defied. Mitigation conditions are useless if they're ignored. Can a complaint-driven process, as Fairfax County has, ensure that harms are addressed? Is more funding needed? Are stronger penalties needed?

4. The state should require that real estate agents and sellers be required to disclose the presence of RPA on a property to prospective buyers.

5. The BOS should ask that DEQ seek the Attorney General's view on whether the state or the county or both will be liable if development within the seaward 50' is banned.

6. The BOS should recommend that impacts of development in the landward 50' be evaluated.

- Although the seaward 50' is the more sensitive portion of the RPA, development in the landward 50 feet can still negatively affect water quality, and is much more common.

DRAFT RECOMMENDATION 7: NO FILL WITHIN 100' OF RPA

7. The ERC supports restrictions on fill within 100' of the RPA.

Comments from ERC members

1. I really like increasing restrictions on fill. It's really hard to judge the effects of fill, especially when it is near the floodplain. Especially for a single residential property typical of ERC requests, the necessary flow modeling likely is cost prohibitive.
2. What is a "fill-only" project?

DRAFT RECOMMENDATION 8-9: CONSIDERATION OF IMPACTS OF CLIMATE CHANGE FOR LAND DEVELOPMENT IN RPA

8. The ERC supports modifying the regulations to require consideration of impacts of climate change for land development in RPAs.

9. The BOS should recommend that DEQ commission a study of the depth-duration-frequency curves used in Piedmont and Coastal Plain Virginia for hydrologic design.

Comments from ERC members:

- I've attached a paper by Sridhar et al. in which they look at climate-change induced precipitation extremes in southwestern Virginia. They make a good case that 100-year floods on the Peninsula are going to get bigger. Based on this, I would ask DEQ to commission a study of the depth-duration-frequency curves used in Piedmont and Coastal Plain Virginia for hydrologic design. Reevaluating the 100-year floodplain limits would, in turn likely move RPA boundaries back from the stream. Good floodplain maps are essential.

RAISE OTHER ERC ISSUES ABOUT CBPO?

- The Chesapeake Bay Preservation Ordinance (CBPO) makes provision for appeals to ERC decisions, but does not define a process. Currently, there is no public hearing, and no role for the ERC to defend its decision. **Should ERC recommend to BOS that the CBPO be modified to better define a rigorous process for appeals that allows ERC to explain its decisions?**
- The CBPO exempts land use decisions involving rezoning from scrutiny of Chesapeake Bay impacts by the ERC (a Water Quality Impact Assessment (WQIA) is still required). It seems odd to devote great scrutiny to individual homeowner projects impacting a few hundred square feet of RPA, while removing much bigger and potentially far more impactful projects from ERC scrutiny. **Should ERC recommend to BOS that such projects also be required to come before the ERC to request RPA exceptions?**