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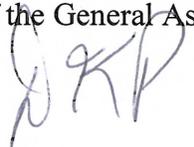
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To: The Honorable Timothy M. Kaine
And Members of the General Assembly

From: David K. Paylor 

Date: November 16, 2007

Subject: Citizen Board Legislation, HB 3113 and SB 1403; *A Progress Report on the Efforts of the HB 3113/SB 1403 Stakeholder Group*

In accordance with the request of Delegate M. Kirkland Cox and Senator Charles Hawkins, the Department of Environmental Quality has prepared the attached report to document the progress of the Stakeholder Group formed by the Department to address issues and concerns with HB3113/SB1403 (2007).

This report is being made available at www.deq.virginia.gov/regulations/reports.html. If you need further information or would like a hard copy of this report, please contact Rick Linker, Acting Policy Coordinator at 804-698-4195.

**CITIZEN BOARD LEGISLATION
HOUSE BILL 3113/SENATE BILL 1403**

**A Progress Report on the Efforts of the HB 3113/SB 1403
Stakeholder Group**



***A Report to the Honorable Timothy M. Kaine, Governor
the House Committee on Agriculture, Chesapeake and Natural Resources
and the Senate Committee on Agriculture, Conservation and
Natural Resources***

Virginia Department of Environmental Quality

November 2007

I. Executive Summary

This report is prepared by the Department of Environmental Quality (DEQ or Department) to report the progress of the Stakeholder Group formed by DEQ at the request of Delegate M. Kirkland Cox and Senator Charles Hawkins to address issues and concerns with HB3113/SB1403 (2007).

II. History and Process

During the 2007 General Assembly session, the House and Senate passed SB1403 and HB3113; identical pieces of legislation drafted to do three things:

- Replace the current Air Pollution Control Board, Water Control Board and Waste Management Board with a single Virginia Board of Environmental Quality. The new Board would be charged with promulgating the regulations that set standards and requirements for air quality, water quality, and waste management.
- Assign to the DEQ the responsibility for issuing permits, enforcing regulations and other duties that are not the promulgation of regulations.
- Establish a nonbinding Environmental Appeals Board to hear administrative appeals and make recommendations on permit decisions made by the Department.

The legislation contains a reenactment clause indicating that no changes will go into effect unless the General Assembly approves them during the 2008 session. This reenactment clause was the result of concerns raised about the impact of the legislation that were not fully explored or answered during the hearings conducted during the 2007 session. Delegate Cox and Senator Hawkins, Chairs of the House Committee on Agriculture, Chesapeake and Natural Resources and the Senate Committee on Agriculture, Conservation and Natural Resources, asked DEQ to meet with stakeholders to discuss the legislation and report back to them on any recommended changes to the legislation, and any areas discussed where the group was not able to reach consensus. See attachment 1.

DEQ held at least two planning meetings in May – one with conservation and other public interest groups and a separate meeting with industry, business and regulated associations. As a result of the discussions at these meetings, DEQ conducted research on topics raised during these planning meetings that members felt was needed to understand and prepare for group discussions regarding current citizen Board structure and procedures. Following these meetings, DEQ formed the work group known as the “Stakeholder Group” to assist with these efforts. The Stakeholder Group includes representatives of the business community, regulated community, local government, legal community, environmental and other public interest organizations that advocate before the current Boards as well as staff of the Kaine administration, the Attorney General’s office and a recent director of DEQ. While the Kaine administration did not originally propose the bills, the Governor supported the bills during the 2007 session of the General Assembly. The Stakeholder Group included a broad range of stakeholder groups and people who supported, opposed and took no position on the legislation. The final Stakeholder Group members are listed in attachment 2.

No current or recent citizen Board members were included in the Stakeholder Group meetings. Instead, DEQ held a separate facilitated meeting with the Chair and Vice Chair of each of the three boards. This meeting covered the same discussion points that the Stakeholder Group addressed. The results of this meeting were generally summarized at the beginning of the first Stakeholder Group meeting, but there was never any direct discussion between the two groups.

The Stakeholder Group met on September 7, October 1, and October 15, 2007 to discuss how the legislation could be improved. Barbara Hulburt from the McCammon Group facilitated the meetings. Out of these efforts, many decision making models were discussed, specifically around the issues of whether a single Board, the three existing Boards, or the DEQ Director would make permit decisions. Other areas of decision-making authority (other than permitting) regarding enforcement, variances, revolving loan fund allocations, etc. were not discussed in detail. Of the many models raised as possibilities during the three meetings, only two were discussed in detail at the final meeting. These were referred to by the Stakeholder Group as the “Enhanced Water Board/8th Model” and the “Modified HB 3113/SB 1403 Model.” The significant difference between the two suggested approaches is that a Board(s) would remain the decision maker on certain significant permits in the former model and the Director, with the advice of a Board(s) for certain significant permits, would make all final permit decisions in the latter model. The names of these two models do not have any significance other than to identify them for purposes of the Stakeholder Group meetings and this report.

Straw polls were taken of the Stakeholder Group to gauge the potential level of support for these two models. The levels of interest were defined as follows:

- (5) Strongly support
- (4) Support
- (3) Could live with
- (2) Could not be supported now but could live with if concerns addressed and changes made
- (1) Serious concerns make it impossible to say it could be supported now
- (0) Under no circumstances could it be supported

The straw polls were non-binding and taken with the understanding that once the details of any particular model were worked out, any participant’s view could change. In considering the results of the straw polls, it is important to consider that while the make-up of the Stakeholder Group included many diverse stakeholder groups, it was not exactly equal between those supporting, opposing and taking no position on the proposed legislation. Moreover, it should be noted that not all members attended all meetings. Accordingly, the actual number of people responding in a particular way in a straw poll is less significant than the overall view of whether consensus could be obtained and the concerns expressed about why consensus could not be achieved.

III. Issues Identified

The Stakeholder Group identified a number of issues that should be addressed in any legislation including:

- There is a need for greater predictability, consistency, active and meaningful participation from permittees and advocates and affected parties;
- The lack of consistency should be avoided if at all possible;
- It is important not to make the process more time consuming or complicated; changes should result in greater efficiency while not reducing environmental protection.
- Changes to the process should encourage early collaboration and clarity to reduce bureaucracy and increase the chance of consensus solutions.

IV. Decision Making Models Discussed by the Stakeholder Group

Various decision making models were considered by the Stakeholder Group. The models included:

A. Status Quo – If the current system were retained, the three distinct Boards would have the following authorities and duties:

- The Waste Board would be authorized to promulgate regulations and would have no other duties. The Director would be vested with permitting and enforcement authority.
- The Air Board would be authorized to promulgate regulations and make enforcement and permitting decisions. The Air Board would exercise decision making authority on a case by case basis; all other decisions were delegated to the Director.
- The Water Board would be authorized to promulgate regulations and make enforcement and permitting decisions. The Water Board would exercise decision making authority over all enforcement matters and would hear permitting matters when a public hearing was requested by the public. The Water Board delegated all other permitting decisions to the Director.

B. HB 3113/SB 1403 Model - A unified Board would be authorized to promulgate air, water and waste regulations. The Director would be vested with all permitting and enforcement authority. The permitting decisions of the Director could be appealed to a citizen appeals board. The appeals board would make non-binding recommendations to the Director and the Director would be the final decision maker.

C. Water Board Model - Regardless of whether the three Boards were kept distinct or combined, uniform procedures would be required comparable to the current Water Board procedures noted above in the status quo section.

D. Waste Board Model - Regardless of whether the three Boards were kept distinct or combined, uniform procedures would be required comparable to the current Waste Board procedures noted above in the status quo section.

E. Enhanced Water Board Model - Regardless of whether the three Boards were kept distinct or combined, uniform procedures would be required comparable to the current Water Board procedures noted above in the status quo section with the following modifications:

- Staff articulates reasons for its recommendations to the Board
- Office of the Attorney General makes a determination as to legality

- The Board, as the final decision maker, articulates its reasons for adopting or not adopting staff's recommendations

F. Director Decision for Certain Decisions Model - The Director would be the decision maker unless the case falls within certain pre-defined criteria.

G. Director Decision Model - The Director decides in 100% of cases; right of appeal/rehearing in certain cases.

H. Enhanced Water Board/8th Model - The Enhanced Water Board/8th Model incorporates the following principles:

- The public would receive notice of permit applications and would have an opportunity to provide comment. This would be in addition to the current practice of providing a notice and comment period for draft permits but would not extend the time for consideration.
- The Board would only issue those permits which are "significant permits." Board action would no longer be predicated on a request for a public hearing as is the current practice. All other permits would be issued by the Director.
- There would be a prescribed window within which the Board would have to decide if it was going to take the permit or not.
- For significant permits, the Director would prepare a written recommendation to the Board as to whether a permit should be issued and, if a permit is to be issued, the appropriate conditions for the permit. The Director's recommendation would include the basis for such recommendations.
- In reaching a decision with respect to the issuance of a significant permit, the Board would consider the Director's recommendations and set forth in writing the bases for its decision to issue or deny the significant permit, including the bases for adopting or ignoring each recommendation by the Director. The Board's decision-making process would be done in open meeting (transparent).

A straw poll was taken concerning this model and no consensus was obtained. A majority of members indicated that serious concerns would keep them from supporting the model as proposed (their level of support was a 2 or less). Other members indicated the extremes of "(5) strongly support" and "(0) under no circumstances could it be supported."

Some of the concerns expressed were:

- The Director, not the Board, should determine what cases are elevated for Board scrutiny.
- Resource issue (more meetings, more staff time required).
- More litigation-prone.
- Decisions should be based on specific criteria identified by technical staff, not by public policy "art" of the citizen Boards.
- Could lead to two (conflicting) decisions, which could be problematic if litigation results.
- The Board should have to give deference to DEQ's decisions.
- Boards create policy and staff implements; Boards shouldn't create policy through permitting decisions.
- Need to establish the criteria.

- Process is too lengthy as it is; should create a time schedule within which applications will be addressed.

I. Modified HB 3113/SB 1403 Model

The Modified HB 3113/SB 1403 Model incorporates the following principles:

- The Director would issue all permits.
- The Director would be required to take significant permits before the Board.
- The Board would hear public comment on the draft permit at a public meeting and would consider those comments plus the written comments received and the analysis of the DEQ staff.
- The Board would make recommendation(s) to the Director.
- The Director would be required to actively consider the recommendation(s) and either incorporate them into the permit or explain on the record why he or she did not do so.
- Failure to consider the recommendations of the Board and/or explain the rationale for going another way would not be considered “harmless error” at the point of judicial review.

A straw poll was taken concerning this model and no consensus was obtained. A majority of members indicated that they could live with the proposal as it was. Others indicated strong support and still others indicated serious concerns.

Some of the concerns expressed were:

- Process is more unwieldy.
- More litigation-prone.
- Don’t see it as any improvement over current system.
- Greater deference should be given to the recommendations of the Board; as it stands, this is no different from the weight given to any other public comment.
- This diminishes public participation.
- The permit process should be approached from a more holistic perspective, incorporating both the specific criteria identified by the technical staff and the public policy “art” of the citizen Boards.

In order to try to increase the likelihood that concerns could be addressed and consensus could be achieved around this model, the following issues were discussed by the Stakeholder Group.

- **Deference** - There was a great deal of discussion about the issue of deference, largely centered on the degree of deference to which a Board’s recommendations would be entitled under this model. One suggestion was that there be a rebuttable presumption that the Board’s recommendations would be followed (and that it would be up to the Director to demonstrate that there was not “clear and convincing” evidence to support it, if he or she chose not to follow it). Another thought was that as long as the recommendation by the Board was within the Board’s jurisdiction or authority and was supported by facts in the record, it would be given deference. To address these issues, one suggestion discussed by the Stakeholder Group was to incorporate the following language:

The Director shall incorporate conditions in the permit based upon recommendations adopted by the Board unless he finds that such additional conditions are not within the statutory and regulatory authority of the Department, that such conditions would not provide substantial additional protection to the environment, public health or natural resources, that such conditions would not be consistent with the statutory program under which the permit is issued, that such conditions are not technologically and economically feasible, or that such conditions would unfairly or unreasonably burden the applicant with costs or delays that would, in the Director's judgment, be disproportionate to the benefits reasonably to be expected from them. The Director's findings shall be set forth in the record of decision.

- **Article XI of the Constitution of Virginia** - There was also discussion about the role of Article XI and a desire by some to make sure that the decisions of the Director were always guided by the fundamental principles set forth in Article XI. While there were a number of concerns expressed about the utility of such an approach, one suggestion was to require the Director, in the record of decision, to articulate how the decisions he or she is making further the specific goals set forth in Article XI. Several members agreed to try to come up with language in this section to address the interests of all.
- **Board Consolidation and Size** - There was also discussion about the consolidation of the Boards and the desire to see the Boards achieve consistency in size, review authority, and procedures. It was suggested that three Boards be maintained, that all go to seven members (increasing the number of the Air Board from five to seven), but that the effective date of the change to the Air Board be after January 1, 2010 (the next administration).

An additional straw poll was taken to gauge the degree of support that the Stakeholder Group had for the Modified HB 3113/SB 1403 Model that incorporated the "package" of ideas described above – to give greater deference to the Board, to incorporate into the record of decision clear statements about how the decisions support the standards listed in Article XI of the Constitution, and to delay the effective date of increasing the number of Board members on the Air Board to seven until after January 1, 2010. Again, no consensus was obtained. A majority of members indicated that their level of support was a 3 or above with no members indicating the extremes of "(5) strongly support" and "(0) under no circumstances could it be supported." While fewer members indicated the highest and lowest level of support, fewer members indicated a negative sentiment of (2) or (1) than in previous straw polls. There continued to be serious concerns preventing consensus from being reached, however. Some of the concerns expressed were:

- Unclear about how the language from Article XI would actually help.
- Unclear about how the deference to be given to the Board's recommendations might affect possible Board membership under the Clean Water Act.
- Would strongly prefer to see one consolidated Board.

- Tying the deference and decision-making issues to the Board composition issues makes the package less acceptable.

V. Unresolved Issues

There are a number of unresolved issues, which, when addressed, may allow for or jeopardize the potential for support under either model. Foremost among them is what constitutes a “significant permit.” Under either the Modified HB 3113/SB 1403 Model or the Enhanced Water Board/8th Model, only “significant permits” would be referred to the Boards. It was clearly expressed that there is a great need to establish some kind of standard or criteria for what constitutes a significant permit going forward.

While the Stakeholder Group seemed to agree that a permit would be deemed to be significant (and thus heard by the Board) only in rare circumstances, the definition of what constitutes a “significant permit” was discussed without resolution at all three meetings. Per the discussion of the Stakeholder Group, a significant permit could be defined based upon: (1) permits authorizing a major activity; (2) a certain number of petitions received requesting Board review; (3) the applicant’s request; or (4) significant public interest and substantial disputed issues or if a public hearing is required by statute (the current Water Board method). No consensus was obtained on whether the Board or the Director would determine whether a permit is significant. Under current practice, the Director determines whether a permit goes to the Water Board based on certain criteria. This is in contrast to the Air Board where the Board decides which permits to hear.

There was discussion about how to define a “major activity” and the fact that “major” is already in the permitting process as referring to specific amounts (i.e. gallons of water, tons of waste). A question was raised as to whether this would be for a “major facility” or for a “major modification.” Concerns were expressed that any objective standard could lead to people trying to craft applications at just under the standard to avoid more public scrutiny; others were concerned that sometimes small projects that would not be captured by an objective standard have the potential to have significant impacts that might be missed in this system. Also, some of the largest projects are not controversial at all (this could be dealt with by the fact that the Board would not be obligated to take all “major” projects, but it would be a threshold).

It was suggested that “significant” should be based more on public concern than on environmental impact. That led to discussion about how to gauge legitimate, germane public concern. At a minimum, the idea was put forward that it should require more than one signature on a petition for hearing. However, a hypothetical was posed in which only one person knew about an endangered species in the area leading to the conclusion on the part of at least one member of the Stakeholder Group that finding a purely objective standard that would work in every case was probably not possible. Another hypothetical was posed demonstrating how easy it is to obtain a requisite number of signatures from disinterested or uninformed individuals.

Some thoughts were put on the table as to how to determine what constitutes “significant” for the purposes of going to a Board hearing:

- Issues raised are within the jurisdiction of the Board (are germane and are something the Board could deal with, not zoning issues, for example).
- Should have some number of signatures (greater than one) – or some other way to judge the magnitude of the public’s concern.
- Concerns would have to be raised by people who are “identifiably affected by the project” (although it was immediately recognized that this would be difficult, if not impossible, to determine).
- Some or all of the above, plus “or upon the recommendation of the Director.”

A few additional issues which were identified by the Stakeholder Group, but left unaddressed were:

- Enforcement decisions
- Revolving Loan Fund decisions
- Variance decisions
- General permit decisions
- Special order decisions
- The role of an Environmental Appeals Board
- Whether Federal conflict of interest rules would prohibit certain persons from serving on the Board(s) under any model discussed.

VII. Summary

Straw polls were taken of the Stakeholder Group to gauge the potential level of support for the two models that were discussed in detail at the final meeting. In the straw poll taken of the Stakeholder Group concerning the Enhanced Water Board/8th Model, a majority of members indicated a level of support of (2) or less with some members indicating the extremes of “(5) strongly support” and “(0) under no circumstances could it be supported.” In a straw poll taken concerning the final version of the Modified HB 3113/SB 1403 Model (when considered with certain amendments offered by a Stakeholder Group member and described in detail above), a majority of members indicated a level of support of (3) or better, although there continued to be a significant number who indicated that they had serious concerns and could not support the proposal without having those concerns addressed. There were no members indicating the extremes of “(5) strongly support” and “(0) under no circumstances could it be supported.”

Thus, while there was some progress in working toward compromise on the issues discussed and in establishing good will among the Stakeholder Group members, no consensus was obtained on any model and no agreement was reached on any specific language for draft legislation. Moreover, there are a number of unresolved issues which, when addressed, could either lay the foundation for consensus or further jeopardize it. For example, under either model, only “significant permits” would be referred to the Boards. It was clearly expressed by the Stakeholder Group that there is a great need to establish some kind of standard or criteria for what constitutes a significant permit going forward. This was discussed without resolution during all three meetings. Some Stakeholder Group members expressed a willingness to continue working to try to reach a compromise on a particular model.