

INTRODUCTION

DEQ's Local Government Outreach for Renewable Energy

April 4, 2012

Virginia's Statutory & Regulatory Framework for Renewable Energy Projects

In 2009, Virginia's General Assembly enacted the "Small Renewable Energy Projects Act"¹ consistent with the Commonwealth's policy to promote renewable energy. The 2009 statute directed the Department of Environmental Quality (DEQ) to develop "permits by rule" for the construction and operation of renewable energy projects, including standards necessary to protect the Commonwealth's natural resources. In adopting the "permit by rule" (PBR) format, the General Assembly required DEQ to develop streamlined regulations that state "up front" the specific requirements that every project must meet to address likely significant adverse impacts, particularly to wildlife and historic resources. The renewable energy projects addressed by DEQ's 2009 statute include those that generate electricity from wind, solar, biomass, energy from waste, and municipal solid waste.

The 2009 statute articulates DEQ's role in regulating renewable energy projects at the state level; however it also references the important role of local governments in approving renewable energy sites within their jurisdictions. One of the statutory prerequisites for a developer to receive DEQ's PBR approval is "*certification by the governing body of the locality or localities wherein the small renewable energy project will be located that the project complies with all applicable land use ordinances.*" Thus, the General Assembly left authority over land use, health, safety, nuisance, and siting issues where these issues traditionally reside – in the hands of local government. Clearly, the *role of local governments is critical in Virginia's development of renewable energy.*

In addition to the 2009 PBR statute, both state agencies and local governments in Virginia are subject to the statutory requirements of the Commonwealth's Energy Policy when considering renewable energy projects.² In pertinent part, this law provides that it shall be the policy of the Commonwealth to "support research and development of, and promote the use of, renewable energy sources."³ It is incumbent upon local governments and state agencies to act in conformity with this law: "All agencies and political subdivisions of the Commonwealth, in taking discretionary action with regard to energy issues, shall recognize the elements of the Commonwealth Energy Policy and where appropriate, shall act in a manner consistent therewith."⁴ Amendments to the Energy Policy enacted by the General Assembly in 2011 re-emphasized local governments' obligation to conform to the Policy when enacting wind and solar ordinances and stipulated that such ordinances must include provisions addressing setbacks, noise, and decommissioning.⁵ Thus, with respect to local renewable energy ordinances, Virginia law appears to indicate that local governments have a choice whether or not to enact an ordinance. If, however, a local government chooses to enact a wind or solar

¹ §10.1-1197.5 et seq. of the Code of Virginia

² §67-102 et seq. of the Code of Virginia

³ §67-102.A.1 of the Code of Virginia

⁴ §67-102.C of the Code of Virginia

⁵ §67-103 of the Code of Virginia

ordinance, then the Energy Policy provides that the ordinance must promote the development of wind and/or solar energy and must include provisions addressing setbacks, noise, and decommissioning.

DEQ worked with stakeholder groups, termed Regulatory Advisory Panels (RAP's), beginning in the summer of 2009, to develop the state renewable energy PBR regulations. The RAP's included state government agencies, local government representatives, federal/military representatives, industry representatives, environmental advocates, and academics. The major thrust of the regulatory process was to develop regulations that **appropriately balanced** the statutory **goals of protecting natural resources** and of **promoting renewable energy**, as required by the 2009 Small Renewable Energy Projects Act and by the Commonwealth's Energy Policy.

Questions and comments from RAP members during this regulatory process, as well as from local government officials and members of the general public, indicated a desire for local governments to have more information and guidance available as they considered the "local land use ordinances" applicable to proposed renewable energy projects, which are referenced in DEQ's 2009 statute. As articulated by some, local governments shoulder a responsibility somewhat analogous to DEQ's, in that local governments are called upon to **appropriately balance** the **goal of protecting health and safety and general welfare** of local citizens with the **goal of promoting renewable energy** when local governments enact wind and solar ordinances. Localities may be called upon to balance their traditional police powers and other mandated authorities on the one hand, with the requirements of the Commonwealth's Energy Policy to promote renewable energy on the other.

DEQ Director & LOG Chairman David Paylor addressed LOG members at their inaugural meeting on 3/31/11:

- For all of DEQ's renewable energy permit regulations, the role of local government is critical.
- Numerous stakeholders requested that DEQ undertake this stakeholder endeavor.
- General purposes :
 1. Facilitate local/state coordination in permitting
 2. Make resources & assistance available to local governments considering renewable-energy facilities, including model ordinances
- With your help, we can carry out Virginia's policy to encourage renewable energy – and do so in balanced and appropriate ways, with respect for the roles of all levels of government, for the Commonwealth's natural resources, and for the health, safety, and welfare of local citizens.

Local Government Outreach: Establishing DEQ's Informal Stakeholder Group (LOG)

In response to these questions and requests, and with support from the Office of the Secretary of Natural Resources and the Governor's Chief Energy Advisor, DEQ's Director appointed a number of knowledgeable individuals/entities to an informal stakeholder group in February 2011. Members were drawn from local government, industry, environmental advocacy groups, academia, and state government. This informal group became known as the Local Government Outreach Stakeholder Group (LOG). The group began meeting in March 2011 under the aegis and chairmanship of DEQ's Director, David Paylor, with facilitation provided by DEQ staff.

The purposes of the LOG include (1) to facilitate communication and coordination between state and local governments concerning renewable energy, (2) to consider and recommend measures such as model ordinances that can assist local governments and communities in determining if and under what conditions they might wish renewable energy facilities to locate in

their jurisdictions,⁶ (3) to facilitate technical and educational assistance to local governments and other stakeholders concerning the workings of DEQ's permit by rule and other renewable-energy issues, and (4) to provide a forum in which local government representatives and other stakeholders can communicate freely concerning renewable energy issues.

The LOG is an informal group and not a formal public body.⁷ Although the LOG is not required to do so, the LOG and DEQ staff attempt to include input from the general public in the LOG process as fully as practicable. LOG meetings are noticed on the Regulatory Town Hall and open to the public, and emails concerning major LOG activities are circulated to individuals who have asked to be on the "interested persons" list. Members of the interested public regularly attend LOG meetings. Oral and electronic comments received from interested parties are considered by the LOG and included or referenced to the extent appropriate and practicable.

The LOG's efforts, however, are not intended to be the equivalent of a formal public process. As stated, the LOG is an informal group of persons with knowledge and experience in renewable energy and/or local ordinances – in Virginia or other states – who work cooperatively to formulate suggestions, frameworks, guidance, options, and "models" that they hope will be helpful resources to local governments and others.

Drafts of the LOG's work products are continually revised after discussions at LOG meetings and circulation to LOG members for review and comment. The provisions in LOG documents reflect the agreed-upon views of the group as fully as possible. Although the provisions represent the suggestions and consensus of a significant number of LOG members, they do not imply endorsement by every LOG member. In some cases, LOG members may not choose to comment on provisions, particularly those outside their areas of expertise (e.g., local government attorneys may not always weigh in on technical provisions suggested by engineering experts, and vice versa). In other cases, an individual LOG member may raise concerns or questions about a provision that are not shared by a significant number of other LOG members. In such cases, DEQ staff attempts to register that information in commentary. LOG documents are the product of collegial, cooperative efforts but not an expression of unanimous consensus.

Local governments and the public are invited to consult and consider LOG materials as suggestions in how localities may conform to statutory requirements regarding renewable energy. As the LOG reaches a stopping point on work products, those documents will be posted on DEQ's Renewable Energy web pages at www.deq.virginia.gov. Virginia's experience with renewable energy will grow over time, and some documents may be viewed as "works in progress," to be revisited in the future by the LOG and agency staff.

These documents represent a great deal of time and hard work expended by LOG members, which they have generously offered at the request of DEQ's Director in the spirit of public service. DEQ thanks all members of the LOG, as well as members of the interested public, who contributed to these documents.

⁶ Please note: The model ordinances that appear on DEQ's website address local governments' traditional areas of responsibility – public health, safety, and welfare – as they relate to renewable energy projects. The model ordinances do not address protection of natural resources. As stated in this Introduction, in Virginia the Department of Environmental Quality (DEQ) regulates impacts of renewable energy projects on wildlife and historic resources pursuant to the Small Renewable Energy Projects Act of 2009 (§10.1-1197.5 et seq. of the Code of Virginia) and regulations which implement that statute. Other natural resources are regulated via other permitting programs administered by DEQ and other agencies or levels of government (e.g., air, water, waste, erosion and sediment control), pursuant to a variety of state and federal laws.

⁷The LOG is significantly different from DEQ's Regulatory Advisory Panels (the "RAP's" referenced above), which operate formally pursuant to the meeting and notice requirements of the Administrative Process Act (APA) and Freedom of Information Act (FOIA), and which strive to reach consensus recommendations that, if approved by a citizen board or the Director, are subject to Executive Review and formal public comment before a formal legal standard is established. These formal requirements do not apply to informal groups like the LOG.