When the Chesapeake Bay Preservation Act Fails:
A Suffolk Case Study

Scott Van Der Hyde
Third Year Law Student
Virginia Coastal Policy Clinic
at William & Mary Law School

Mark Badanowski
Third Year Law Student
Virginia Coastal Policy Clinic
at William & Mary Law School

WILLIAM & MARY
Law School

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Contact Us

Please contact Shana Jones at scjones@wm.edu if you have comments, questions, or suggestions.

About the Authors

Scott Van Der Hyde, J.D. forthcoming, is a third-year student at William and Mary Law School and a former member of the Virginia Coastal Policy Clinic. Mr. Van Der Hyde currently serves on the *William & Mary Environmental Law and Policy Review*. He has served as a policy analyst with the Virginia State Board of Elections and previously worked for International IDEA in Kathmandu, Nepal. He graduated from Radford University in 2010 with a Bachelors of Science in Political Science.

Mark Badanowski, J.D. forthcoming, is a third- year student at William & Mary Law School and a former member of the Virginia Coastal Policy Clinic. Mr. Badanowski currently serves on the *William & Mary Environmental Law and Policy Review* has a background in healthcare IT. He graduated from Georgetown University in 2011 with a Bachelors of Science in Finance and Marketing.

About the Virginia Coastal Policy Clinic

The Virginia Coastal Policy Clinic (VCPC) at William & Mary Law School provides science-based legal and policy analysis of environmental and land use issues affecting the state's coastal resources and educates the Virginia policy making, non-profit, military, legal and business communities about these subjects.

Working in partnership with Virginia scientists, law students in the clinic integrate the latest science with legal and policy analysis to solve coastal resource management issues. Examining issues ranging from property rights to federalism, the clinic's activities are inherently interdisciplinary, drawing on scientific, economic, and policy expertise from across the university. VCPC has a strong partnership with the Virginia Institute of Marine Science (VIMS) and Virginia Sea Grant.

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A Note from the VCPC Director

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Executive Summary

The Nansemond River, which flows into the Chesapeake Bay, is at risk in Suffolk, Virginia. Non-compliance with the Chesapeake Bay Preservation Act (Bay Act) or (CBPA), including land clearings, destruction of vital wetlands, and degradation of important natural shorelines, is a contributing factor.

This paper tells the story of the recent Hillpoint residential development in Suffolk, where a developer cleared vegetation and graded 2,000 feet of undeveloped shoreline inside a 100-foot buffer protected under the CBPA. Understanding how and why this happened illustrates how the CBPA is failing to protect some of Virginia's most precious natural resources. It also reveals ways in which concerned citizens, community and business leaders, and government officials and employees can better ensure the CBPA is implemented successfully.

The CBPA is a land management act intended to protect the Chesapeake Bay and its tributaries from nutrient and sediment pollution.[1] One of the Act's features is the creation of a buffer area that generally denies the right to build any structure or modify the land inside the buffer. In the City of Suffolk, the local ordinance complies with the language of the CBPA, adopting the model provided by the Commonwealth of Virginia—yet the violation occurred anyway and 2,000 feet of valuable shoreline has been lost. The following chart provides a snapshot of what happened.

What Suffolk's CBPA Ordinance Requires	What Happened
1) Developer sends a written application to the Planning Commission to modify the buffer. This must include detailed drawings and a water quality impact assessment.	1) Developer did not send a written application to the Planning Commission. Developer clear-cut the buffer without local approval.
2) Public notice is given of proposed modification and a public hearing is held to consider the proposed exception.	2) The public only became aware of any buffer modification after the bank clearing had taken place.
3) Planning Commission makes final determination based on findings specified by state regulations, public comment, and overall compliance with the goals of the Bay Act.[2]	3) No public notice was given. No hearing held. The public became aware of the modification after the developer cleared the bank.

To better ensure the CBPA works as intended in Suffolk, we recommend:.

1. □ e City of Su□blk Should Employ a Uni□ed Approach to Meeting CBPA Goals, Modeled on Neighboring Jurisdictions. One of the issues with implementing of the CBPA in Suffolk is jurisdictional confusion between the various boards in the city—namely, the Planning Commission and the Wetlands Board. Neighboring jurisdictions employ a unified Chesapeake Bay Board involving all relevant parties.[3] The City of Suffolk should consider this approach as a potential way to avoid such problems. In the alternative, we recommend that representatives from each board are involved in the discussions and decisions of the other boards that review building in and around buffer areas. This will result in a better understanding of the impact of projects and decisions outside the particular board's jurisdiction. Since completing the research for this white paper, the City of Suffolk has made progress towards the unified board concept of neighboring localities. The Wetlands Board requested that a representative

from the Department of Public Works attend Wetlands Board meetings on an as needed basis. In addition, the City Attorney required that an Assistant City Attorney attend all Wetlands Board meetings and encourage attendance from the Department of Public Works. These are valuable first steps.

2. Suffolk Should Encourage Compliance by Including Civil Penalties in the Local CBPA Ordinance. The lack of civil penalties as a means of enforcement when violations occur is another issue in Suffolk. Even though it is advisable to work with violators to mitigate problems, some form of penalty is needed to encourage compliance so that violations do not happen in the first place. Under the CBPA, additional civil penalties are an enforcement option for the localities.[4] Where utilized, the civil penalties can be imposed in one of two ways: upon the finding of a violation by a circuit court, a civil penalty of up to $5,000 per day of violation can be imposed. Alternatively, a one-time penalty of up to $10,000 imposed with consent from the violator.[5] Suffolk has not incorporated the civil penalties into its ordinance, and is therefore unable to use this enforcement tool. A law without a serious means of enforcement is more likely to be ignored and its deterrent effect is diminished. Civil penalties for CBPA violations have been adopted in neighboring jurisdictions successfully.[6]

3. Citizen Groups, such as the Nansemond River Preservation Alliance, Should Continue to Play an Educational and Oversight Role. NRPA and other citizen groups help ensure compliance with environmental laws by 1) Citizen groups in the Tidewater area of Virginia have been successful in regards to CBPA enforcement in both Portsmouth and Charles City County, and 2) performing a watchdog function ensuring localities are implementing and enforcing the CBPA,

   In addition to continuing to its efforts to raise concerns about CBPA implementation in Suffolk with local government decision-makers, NRPA should take advantage of the fact that Suffolk is due for its five-year CBPA Compliance Review by the Department of Environmental Quality (DEQ). NRPA has a valuable opportunity to use the timing to press for changes to made in how Suffolk implements and enforces the CBPA.[7]

The Story:

A developer cleared land inside a 100-foot buffer protected under the CBPA at the Hillpoint development in Suffolk, Virginia. The Nansemond River flows through Suffolk and into the Chesapeake Bay, making Suffolk subject to the CBPA and its 100-foot buffer requirement. In order to modify the buffer, prior approval must be received from the local government responsible for implementing the Act. In Suffolk, this requires an application in writing to the Suffolk Planning Department.[8]

Sometime between January and March, a developer cleared 2,000 feet of undeveloped, natural, vegetated shoreline at Hillpoint development.[9] The developer failed to request an excption or authorization from the Suffolk Planning Department before clearing the shoreline, which is in direct violation of local city ordinances.[10] Many of the deep-rooted, stabilizing features of the bank were removed, making it susceptible to both collapse and run-off. Clear cutting and the resulting impact directly undermines the intent the intent of the CBPA.[11]

On March 12, 2012, the developer applied for a permit to modify the buffer, after completing the clearing.[12] This permit application was actually a proposal by the developer to the Wetlands Board and Planning Department to remediate the damage done.[13] As such, the application failed to meet the requirements set forth by the Virginia Riparian Buffers Guidance Manual and the City of Suffolk, and it had to be amended on April 25, 2012.[14]

Between April and October 2012, the Wetland Board, the Virginia Institute of Marine Science (VIMS) and the Nansemond River Preservation Alliance (NRPA), a local non-profit preservation group, conducted site visits at Hillpoint to provide feedback on the mitigation plan, which was included as part of the developer's permit application.[15] Despite complaints from the organizations that the permit was insufficient, the Planning Department approved it in February 2013.[16] The limitations of use of the land and mandatory vegetation re-planting were effectively Suffolk's only penalty assessment to the developer for violating the CBPA and local ordinances. A $300,000 performance bond from the developer was required as well as monthly updates, for the first six months and every six months thereafter, from the developer to the City regarding the progress. Unfortunately, according to VIMS wetlands expert Pam Mason, neither the science[17] or the guidance manual supported the site plan.[18] In other words, the approved plan was inadequate to combat the damage to the buffer area, the projected increased runoff, and the ground stabilization issues.[19]

As justification for the clearing, the developer claimed he was removing diseased vegetation.[20] While removing diseased vegetation is permitted under the CBPA, it requires prior approval and pruning rather than clearing.

The typical process for building near the buffer zone or entering into the buffer is well documented. It involves a site plan, environmental impact study, water quality impact study, and a permit application to the City of Suffolk's Planning Department, including a site visit.[21] The standard for encroachment into the buffer area is the "minimum necessary to afford relief"[22] from a hardship imposed by the CBPA. This did not happen at the Hillpoint development in Suffolk. Rather, the only thing submitted was a mitigation plan, which was found inadequate to remedy the damage that had been done.

Non-Profit Case Study: NRPA

The Nansemond River Preservation Alliance (NRPA), a non-profit group dedicated to educating and preserving the Nansemond River, discovered, from citizens, the actions of the developer in mid-May 2012.[23] Unfortunately, the damage had already occurred. NRPA has been working with the City of Suffolk on the rehabilitation plans for the site. Additionally, NRPA has been observing and making sure the plan is being followed and the city is enforcing the rules as necessary.

Applicable Law

There are three primary laws responsible for protecting the 100-foot buffer along the Nansemond River in Suffolk: the Chesapeake Bay Preservation Act,[24] the Chesapeake Bay Preservation Area Designation and Management Regulations,[25] and Suffolk's Chesapeake Bay Preservation Overlay District.[26] These three laws set detailed standards for protecting water quality by defining requirements for the Resource Protection Areas and 100-foot buffers, outlining permitted exceptions to these requirements, and explaining the role and authority of the state and localities in implementing and enforcing those requirements.

Chesapeake Bay Preservation Act

Background

The Virginia General Assembly passed the Chesapeake Bay Preservation Act (Bay Act) or (CBPA) in 1988 with the purpose of improving the health of the Bay by managing non-point source pollution in its tributaries.[27] As of July 2013, it resides in the Water Control Law and is administered by the State Water Control Board.[28]

The CBPA requires localities to protect lands within their jurisdictions in order to protect Bay water quality. To do so, jurisdictions must enact zoning and subdivision ordinances that provide restrictive criteria for land use and development in areas known as Chesapeake Bay Preservation Areas.[29] The regulations, which were promulgated later to provide detailed requirements on implementing the Bay Act, divide the Chesapeake Bay Preservation Areas into Resource Protection Areas (RPAs) and Resource Management Areas (RMAs).[30] RPAs consist of lands that abut the water making them directly connected to water quality.[31] The importance of these areas require waterfront landowners to maintain a vegetated buffer reaching inland 100 feet from the water.[32] RMAs consist of lands that reach further inland from the boundary of the RPA, such as a flood plain.[33] If improperly managed, these lands have the potential to decrease water quality by limiting the functional value of the RPA.[34] The primary focus of this paper is Suffolk's RPA buffer management process, which is described in detail later in this section.

Duties of Localities

A key feature of the CBPA is the creation of a cooperative state-local program, defining separate roles and authority for the state and localities in implementing its requirements. The localities are required to play the primary role in implementing the Bay Act by incorporating general water quality protection measures into their comprehensive plans, zoning ordinances, and subdivision ordinances, and by defining and protecting lands designated as Chesapeake Bay Preservation Areas.[35]

Local Enforcement Authority

Localities have the authority and duty to enforce the requirements of their local programs by requiring remedial action be taken when violations occur.[36] Localities also have the authority to impose civil penalties on anyone who violates the ordinance.[37] These additional civil penalties are an enforcement option for the localities, but are not required by the Bay Act.[38] The civil penalties must be incorporated into the local ordinance to be enforceable in localities that choose to use them.[39] Where utilized, the civil penalties can be imposed in one of two ways: upon the finding of a violation by a circuit court, a civil penalty of up to $5,000 per day of violation can be imposed; or with the consent of the violator, a one-time penalty of up to $10,000 per violation can be imposed.[40] Suffolk has not incorporated the civil penalties into its ordinance, and is therefore unable to use this enforcement tool.

Additional Civil Penalties

Similar civil penalties may be imposed pursuant to Virginia's Erosion and Sediment Control Law for disturbing more than 2,500 square feet of soil within a Chesapeake Bay Preservation Area. VA. CODE § 62.1-44.15:54. Such penalties, like the optional CBPA penalties, would likely apply to the present case but they are not included in Suffolk's sediment control ordinance.

Duties of the State Water Control Board

The State Water Control Board (SWCB) plays a supportive role by providing oversight for the local programs, establishing criteria for developing local programs, and providing necessary resources to carry out and enforce the provisions of the Bay Act.[41] The local program criteria are required to encourage and promote:

- protection of existing high quality state waters and restoration of all other state waters;
- safeguarding the clean waters of the Commonwealth from pollution;
- prevention of any increase in pollution;
- reduction of existing pollution; and
- promotion of water resource conservation in order to provide for the health, safety, and welfare of the present and future citizens of the Commonwealth.[42]

State Enforcement Authority

In order to perform its oversight function, the SWCB is required to conduct periodic local program compliance reviews with the option of conducting more frequent reviews where necessary.[43] Where deficiencies exist, the SWCB must specify what is deficient, provide recommendations for corrective action, and provide a schedule for the action to be taken.[44] If these recommendations are not implemented in 30 days, the SWCB may issue a special order imposing a civil penalty on the local government of up to $5,000 per day with a maximum of $20,000.[45] Finally, in addition to these administrative actions, the SWCB has the authority to take legal action against the local government to ensure compliance.[46]

These oversight duties were originally given to the Chesapeake Bay Local Assistance Board, and have passed to the SWCB as the new state body in charge of administering the Bay Act.[47]

Chesapeake Bay Preservation Area Designation and Management Regulations

The Chesapeake Bay Preservation Area Designation and Management Regulations were promulgated in 1989 for the purpose of setting standards for the local programs.[48] These regulations fulfill the Bay Act requirement of establishing criteria for developing the local programs. The State Water Control Board is responsible for maintaining these regulations and ensuring that the localities abide by them.[49]

For the purposes of this case study, the two most important parts of these regulations are:

1. The designation of the buffer area within the Resource Protection Area (RPA); and
2. The elaboration on the state's role in ensuring compliance.

RPA Buffer Areas

The regulations require localities to designate RPAs, which are defined as lands adjacent to water bodies of perennial flow that perform ecological and biological processes that are connected to water quality.[50] These processes include "the removal, reduction or assimilation of sediments, nutrients and potentially harmful or toxic substances in runoff entering the bay and its tributaries, and minimize the adverse effects of human activities on state waters and aquatic resources."[51] In order to ensure these functions, an RPA is required to contain a buffer area.[52]

The buffer area must extend at least 100 feet landward from the water and achieve a 75% reduction in sediment and a 40% reduction in nutrient runoff.[53] These reductions are achieved by placing particular emphasis on maintaining diverse vegetation with preference being given to trees and woody shrubs.[54] These buffers must not be entered or modified unless the landowner is granted an exception by the local government.[55]

RPA Buffer Exceptions

Exceptions may be granted for creating reasonable site lines, building access paths, removing dead or diseased trees and noxious weeds, and to control shoreline erosion.[56] In cases where exceptions are granted, preference is given to pruning rather than removing vegetation to achieve the desired goal. Where vegetation must be removed, it must be replaced with new vegetation that is equally effective at achieving reductions in sediment and nutrients.[57]

The regulations also lay out five specific findings that must be made by the local government to grant an exception. Local governments must ensure the desired exception:

- is the minimum necessary to achieve the desired purpose;
- will not confer special privilege on the landowner that is denied to others;
- water quality will not be substantially damaged, and is in harmony with the purpose and intent of the regulations;
- is not based on circumstances that are self-imposed or self-created; and
- reasonable and appropriate actions are taken to protect water quality.[58]

As part of this determination process, the local government must require a water quality impact assessment that identifies possible impacts to land and water, and specifies measures for mitigating these impacts.[59] The regulations require the assessment be of sufficient specificity to demonstrate compliance with the local program while leaving the design of the exception process to localities. The Board provided further guidance on developing the local exception process in the Riparian Buffers Modification & Mitigation Guidance Manual, which was published in 2003.

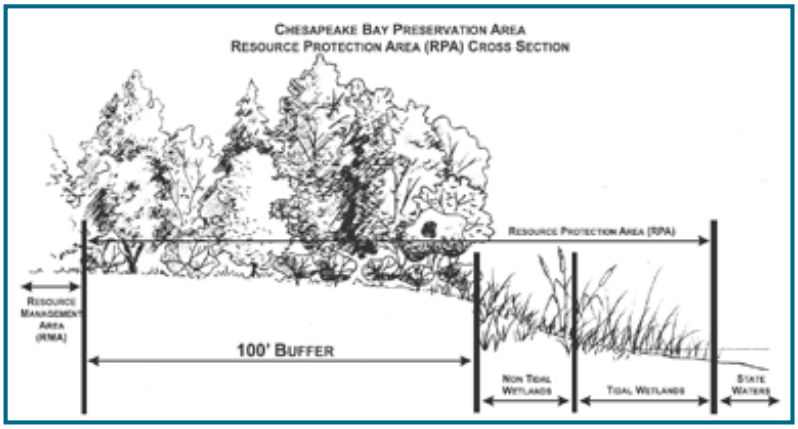
State and Local Compliance

The second important part of these regulations is that they detail the power of the state and the localities to ensure compliance with the Bay Act and the regulations. The regulations incorporate the sections of the Bay Act that allow localities to bring civil penalties as a means of enforcing compliance with their local ordinances.[60] The

regulations also detail the ability of the state to enforce compliance with the Bay Act and the regulations on the localities through administrative and legal proceedings.[61] The administrative proceedings include the compliance review process required by the Bay Act, but sets the review for every five years with the possibility of more frequent review where needed.[62] This process looks at both the implementation and enforcement of the local programs, and allows the state to require changes to deficient local programs and impose civil penalties.[63] In cases where localities refuse to make the required changes, the Board may also request the Attorney General to bring legal proceedings to enforce compliance.[64]

Suffolk's Local Program: Chesapeake Bay Preservation Overlay District

Each locality developed their own local program to meet the requirements of the Bay Act and the regulations. Suffolk developed its program as the Chesapeake Bay Preservation Overlay District within their local zoning law. This overlay district designates the RPA and the 100-foot buffer, establishes the reduction requirements of the buffer, provides for exceptions to modify the buffer, and details the process for applying for an exception as is required by the Bay Act and the regulations.[65] This section will focus on the process for granting exceptions, as this is the primary issue in the case at hand.



Suffolk: Granting Exceptions in the RPA Buffer

In Suffolk, applications for exceptions must be sent in writing to the Planning Commission, and must identify the water and land quality impact of the proposed exception through completion of a water quality impact assessment.[66] The process requires public notice of any proposed exception and the exception must be considered at a public hearing.[67] In determining whether an exception will be granted, the Planning Commission must make the five findings detailed in the above regulations.[68] In instances where the exception is refused, the applicant has the opportunity to appeal the decision to the City Council, which must consult with the Planning Commission before affirming, reversing, or modifying its decision.[69]

One of the most important parts of this process is the water quality impact assessment, which is necessary for the Planning Commission to consider the impact of a proposed exception.[70] The two types of water quality assessment, minor impact assessment and major impact assessment, are based on the size of the proposed project.[71] Generally, these assessments must include a site drawing identifying where the project will be, what vegetation will be removed or modified, and what actions will be taken to mitigate damage.[72] They must also include acceptable calculations showing that the remaining buffer will prevent runoff and filter nonpoint pollution equivalent to the full-undisturbed 100-foot buffer.[73] All of this must demonstrate that the proposed exception will not have a substantial negative effect on water quality.[74]

Suffolk Case Study: Compliant Ordinance, Poor Enforcement

Suffolk presents a case where the ordinance is compliant with the CBPA, but poor implementation and enforcement of the ordinance have rendered it unable to achieve the goals of the Act. The above section shows that Suffolk's Chesapeake Bay Preservation Overlay District meets all of the requirements for local programs set out in the Bay Act and regulations.[75] Despite being compliant on paper, the Hillpoint case shows that there are significant deficiencies in the way the ordinance and exception review process are carried out in practice. The following chart demonstrates these deficiencies:

What Suffolk's CBPA Ordinance Requires	What Happened
1) Developer sends a written application to the Planning Commission to modify the buffer. This must include detailed drawings and a water quality impact assessment.	1) Developer did not send a written application to the Planning Commission. Developer clear-cut the buffer without local approval.
2) Public notice is given of proposed modification and a public hearing is held to consider the proposed exception.	2) The public only became aware of any buffer modification after the bank clearing had taken place.
3) Planning commission makes final determination based on findings specified by state regulations, public comment, and overall compliance with the goals of the Bay Act.[2]	3) No public notice was given. No hearing held. The public became aware of the modification after the developer cleared the bank.

This issue of enforcing local ordinances is a long-standing problem with the CBPA.[77] The Joint Legislative Audit and Review Commission noted this problem in a 2003 study on the implementation of the Bay Act.[78] Despite this ongoing problem, other localities, including those surrounding Suffolk, use different strategies for implementation and enforcement that might help minimize some of the issues that arose in this case. The following chart outlines some of these strategies.

Regulatory / Jurisdictional Body	Responsibilities / Jurisdiction	Statutory Implementation / Enforcement
VMRC	**REGULATES:** · Subaqueous Lands (state waters) · Vegetative lands[79] **JURISDICTIONAL BOUNDRIES:** · Mean Low Water Mark (inland) · Transition from State to Federal Waters (3 miles) · Land is owned in public trust for the benefit of the resident	**STATUTORY AUTHORITY:** · VA Code § 28.2 generally **ENFORCEMENT:** · Police force for violating fishing permits · Most building-related issues handed to localities for permitting & enforcement via wetlands boards[80]
Wetlands Boards	**REGULATES:** · Tidal and Non-Tidal Wetlands (also known as vegetative and non-vegetative) **JURISDICTIONAL BOUNDRIES:** · Mean Low Water Mark (water side) · 1.5x Mean Tidal Range (land side) · Function with local development board · Weighing economic development and protection of natural resources	**STATUTORY AUTHORITY:** · VA Code § 28.2-1302 · Function of Chesapeake Bay Act; delegation of power from state to local government[81] **ENFORCEMENT:** · Authority to issue stop work orders, civil penalties/ fines · Court System: Circuit Court can fine violator up to $25,000/day · Administrative: fix the damage and up to $10,000 fine per violation; performance bond often included

Virginia DEQ	**REGULATES:**
	· Chesapeake Bay Preservation Areas/RPAs
	  · Lands adjacent to water bodies of perennial flow[82]
	RESTRICTIONS:
	· 75% reduction in sediment; 40% reduction in nutrient runoff[84]
	· No building in buffer; minimal interference with buffer
	· Minimum necessary to achieve stated purpose
	· No special privileges
	· No substantial damage to water quality (harmonious with purpose/intent of the regulations)
	· Not based on self-imposed circumstances
	· Reasonably appropriate actions taken to prevent water quality degradation
		ENFORCEMENT:
		· Enforcement/Fines jurisdictionally dependent
		  · Max $5,000/day
		· Stop Work Orders
		· Remediation Settlements
		· Must be in accordance with master "comprehensive plan" created by locality
		· Guidance for informal enforcement/settlements rather than administrative fines or court proceedings.

Development Boards / Public Works	**REGULATES:** Non-resource protected areas; normal building/ development	**PURPOSE:** · Goal is to encourage development in the locality, increase tax baset **ENFORCEMENT:** · Typically require safety inspections · May issue stop work orders until violations are remedied

Neighboring Jurisdictions:

Suffolk's current CBPA ordinance is not getting the job done, at least in this case. Neighboring localities use a different organization structure and enforcement mechanism that may be useful in the City of Suffolk. Please refer to the following chart:

Locality	Board Structure	Penalty Available	Level of Development, Infrastructure	Online Database Research Accessibility / Clarity	Program Administration	Enforcement
Suffolk	**Separated:** Multiple boards, each with specific but confusing jurisdiction over shorelines. Confusion is due to the definition of the water line	**No civil penalty** in ordinance	**Low to medium level of development:** Developing area as a result of urban sprawl from neighboring communities. The median price for a home is $247,200, up almost double from ten years ago.[84] This indicates a greater demand for land in Suffolk. The trend indicates the supply of homes is less than the demand. With a higher median income than the average Virginian, Suffolk is going to be a target for future development.[85]	**Poor:** The Suffolk CPBA ordinance meets the minimum requirements under the CBPA, but it does not include the optional enforcement sections. However, it is difficult to find within their overall code in comparison to other localities. Furthermore, there is no clear remedy provided in Suffolk's CBPA ordinance.	Multiple boards, including competing interests with wetland protection and development, no centralized authority, not much communication and coordination between boards, very recent encouragement to have a public works member sit in on wetlands board/ Chesapeake Bay board meetings.	**Poor:** So far the Suffolk record has not been one of aggressive enforcement of the CBPA; instead, the Hillpoint development appears to reflect a history of reacting to problems and violations instead of preventing them in the first place. Also, enforcement actions, even informal ones, are not part of the searchable public record.
James City County	**Combined:** Chesapeake Bay Board members are responsible for both CBPA compliance and Wetlands Board Issues[86]	**Civil penalties in ordinance:** presumption of fining & fixing the problems	**Medium to high level of development:** James City County is an established community in Virginia. The median income is almost $10,000 more than the median in Virginia and housing prices are almost $100,000 more than average.[87] This makes James City County an attractive investment for large development as the economics support development.	**Very good:** James City County is very specific in their code about the consequences of not complying with the CBPA. They parse relevant sections and show exactly what the risk is if there is a violation. The administrative procedures are clear, the court procedures are clear, and the educational message is clear.[88]	Integrated in the engineering and resource protection division: includes erosion, storm water management, Chesapeake Bay Board and Wetlands Board.	**Strong:** James City County has a fast-track fining scheme. The public record indicates that, in the event of violation, there is a presumption of a fine and then working with the landowner until the damage has been mitigated, or the violation ends. It is not an either/or but both: the violator must fix his/her problem and pay a fine.[89]
Norfolk	**Semi-combined:** board with oversight[90]	**Civil penalties available:** a chart is available online to show expected penalties, based on severity of violation & intent of non-compliance	**High level of development:** Norfolk is a largely military town and, while both median income and median house values are less than the Virginia median, it is highly developed. Many government contractors and the high level of government employees make it an ideal place for commercial development.	**Acceptable – Good:** Norfolk's code is not as easy to parse as James City County's but they do offer homeowners pictographic "how-tos" on effective management and compliance with the CBPA.	Multiple boards, but seem to have better communication and coordination among the Chesapeake Bay Board, Wetlands & Erosion/ sediment Board, and beach management board.	**Strong:** Norfolk has a clear definition of penalties for wrongful actions under the CBPA. There is disclosure of violations and a varying rate based on the level of violation. Furthermore, there are clear resources and pictures of what the shore should look like made available to land-owners.
Portsmouth	**Combined:** Board under the planning department[91]	**Civil penalties in code:** presumption of no permits issued to build in buffer.	**Low level of development:** Portsmouth, relative to the other localities in this study, appears to struggle with attracting development. It has a substantially lower than median household income and property values are about 40% lower than the average in Virginia.[92]	**Very good:** Portsmouth's code provision related to the CBPA includes pictorial expectations of compliance, providing good and bad examples. Portsmouth's history of violations probably spurred the effort to make the code very easy to understand. At one point, Portsmouth was forced by the state to pay fines and revise its procedures after a citizen-organization got involved in a city-approved project.	Integrated boards in the planning department, including the Chesapeake Bay Board and the Wetlands board.	**Very strong:** There is a presumption of no permitting within the 100ft RPA buffer. A condo development in early 2000 was issued a permit for building with the 100ft RPA buffer, approximately 50ft from the shoreline. Various groups got involved and petitioned the state for enforcement actions, which eventually occurred. After this experience, Portsmouth has revised its process, making it clear and stronger.[93]

Board Structure: This category is a spot-overview of the administrative agencies involved in building in or near buffers or on land subject to the CBPA. Neighboring localities use a more combined approach as compared to the multiple boards in Suffolk.

Civil Penalties: This category is a spot-overview of whether civil penalties have been expressly adopted in the localities' codes. Suffolk is the only city compared without authorization to use civil penalties as a means of enforcement of the CBPA.

Level of Development: This is an important metric since it is the basis for future development. Factors such as available land suitable for development, population density, and overall economic development are all considered. Furthermore, areas of significant development have likely had experience with large-scale development projects, such as 100+ home plats or substantial commercial real-estate. High average income or property value indicate a thriving market that would be attractive for larger developments.

Online Database Research Accessibility/Clarity: Of significant concern is the ease of use of Suffolk's code system. It is poorly organized and categorized making it difficult, even for those experienced in reading regulations. By making the regulations difficult to find, the certainty of following the code becomes degraded. If the attitude or desire is for the regulations to be followed, they should be easily accessible, clearly understandable, and obviously applicable. Suffolk fails to do this in regards to the Chesapeake Bay Preservation Act since it is buried within the larger database.

Program Administration: One of the problems uncovered during research about Suffolk is the clear delineation of jurisdiction between development boards and resource protection boards. There is a line in the sand mentality that neither is willing or able to cross, even though the regulation supports over-reaching boundaries in certain scenarios.[94]

Enforcement: An environmental protection system without enforcement is equivalent to talking about a problem and not doing anything about it. Virginia DEQ guidance and the Virginia model guidance are not clear on enforcement regimes, saying either to avoid litigation with informal enforcement or leaving the means of enforcement up to the municipality.[95]

Citizens Can Make Things Happen:

NRPA and similar citizen groups serve an essential function, acting as a watchdog for CBPA compliance. Citizen groups have been successful at requiring local governments to act. They do this either through bringing violations to the attention of the local government and if this fails to elicit action, involving either the public or the State.

For example, in Portsmouth, Citizens United to Save Our Buffers raised awareness to state officials when Portsmouth's Chesapeake Bay Local Assistance Board (CBLAB) reduced the 100-foot RPA buffer to 50 feet to accommodate a condominium development, River Point Drive.[96] The DEQ now implements the Bay Act in Portsmouth instead of CBLAB, and Portsmouth no longer grants exceptions to the 100-foot buffer.[97] A similar result occurred in Charles City County after the Attorney General, at the request of the local CBLAB, filed a complaint seeking the county's

compliance with the Bay Act, alleging that the county was permitting development within the 100-foot buffer. Charles City County ultimately passed new legislation in compliance with the Bay Act.[98]

Understanding NRPA's Education and Oversight Role:

The Nansemond River Preservation Alliance is doing a very good job protecting the Nansemond River, the Chesapeake Bay, and stakeholders. NRPA should continue the work they are presently doing: both acting in an education and a watchdog role. The education role creates citizen involvement and buy-in, bringing CBPA and environmental concerns to the attention of local citizens and government decision-makers.

As a watchdog, NRPA is on the lookout for violations of the CBPA and local ordinances, ensuring government accountability so damage to the environment is minimized and land is responsibly developed. NRPA's actions should bolster future CBPA compliance, as their work better ensures that CBPA violations will be reported to city officials. Meanwhile, Suffolk's five-year compliance review by the DEQ is imminent; NRPA has a valuable opportunity to use the timing to press for changes to made in how Suffolk implements and enforces the CBPA.[99]

Conclusion

This case study in Suffolk demonstrates the problem with the implementation of the Chesapeake Bay Preservation Act. The City of Suffolk has an ordinance that is in compliance with the language of the CBPA. However, it is implemented and enforced in such a way that the goals of the CBPA are not fully met. Changing the language in the local ordinance to include civil penalties will be a first step in sending a stronger message that protecting valuable shoreline along the Nansemond River is a priority for Suffolk—and that a situation such as Hillpoint will never happen again without serious consequences.

In addition, unifying the various boards involved with land use and environmental protection would reduce confusion and better ensure that developers understand and abide by the CBPA. Since the initial research on this white paper, the City of Suffolk has made progress towards the unified board concept of neighboring localities. The new City Attorney has asked that representatives from each board (Wetlands, Planning, and VMRC) be present at Wetlands Board meetings. This is a valuable first step.

Finally, the Nansemond River Preservation Alliance and other similar citizen-groups have a valuable place in Suffolk and localities like it. NRPA has been invaluable in the Hillpoint situation, providing comments and research for the City to make better decisions.

Notes

1 "The Bay Act Program is the only program in Virginia state government that deals comprehensively with the relationships between water quality, and land use planning and development. It is also the only program that assists local governments with land use planning needs to meet water quality goals: the development of land use regulations, ordinances and comprehensive plans." Virginia Department of Environmental Quality, Chesapeake Bay Preservation Act, http://www.deq.virginia.gov/Programs/Water/ChesapeakeBay/ChesapeakeBayPreservationAct.aspx.

2 Suffolk Zoning Code § 31-415(f)(5).

3 See, e.g., Portsmouth Planning Department, http://www.portsmouthva.gov/planning/.

4 VA. CODE § 62.1-44.15:74(E)(1)-(2) (The statute uses the phrase "may be incorporated" rather than "shall be incorporated" indicating that these are voluntary methods of enforcement).

5 Id.

6 This is further discussed on page 14 of this white paper.

7 Additionally, NRPA and similar citizen groups have the opportunity to notify VDEQ if there are violations of the CBPA and force a state investigation. A "compliant finding will be valid for a five-year period unless DEQ becomes aware of programmatic deficiencies through a complaint investigation or some other means." Virginia Department of Environmental Quality, Local Program Compliance, http://www.deq.virginia.gov/Programs/Water/ChesapeakeBay/ChesapeakeBayPreservationAct/LocalProgramCompliance.aspx.

8 See http://www.suffolkva.us/files/1013/5837/1093/CBPA_Encroachment_and_Exception.pdf.

9 Letter from NRPA to Selena Cuffee-Glenn, Suffolk City Manager Dec. 18, 2012.

10 See Suffolk Unified Building Ordinance § 31-415, available at http://library.municode.com/index.aspx?clientId=14461.

11 The Chesapeake Bay Act has a sediment reduction goal but it is up to the localities on how to meet that goal; by creating an unstable bank situation, run-off will take a greater amount of sediment into the Chesapeake Bay versus leaving the shoreline alone. The "natural" shoreline proposed by the developer and currently approved by the Planning Commission and Development/Wetlands Boards will not be sufficient to mitigate the problems created according to Pam Mason at the Virginia Institute of Marine Science (VIMS). Furthermore, NRPA has given evidence of the problems of development within the RPA, most specifically unstable ground, from a 2008 development that was given a 50ft right-of-way in the buffer (Riverside Estates).

12 NRPA provided resource, "Jurisdictional Boundaries Map + NRPA Timeline."

13 NRPA letter to Suffolk, Dec. 18, 2012.

14 Id.

15 Id.

16 NRPA letter to City of Suffolk, Oct. 1, 2012.

17 Pam Mason, VIMS.

18 Riparian Buffers Modification & Mitigation Guidance Manual, Chesapeake Bay Local Assistance Department (2013).

19 Pam Mason, VIMS.

20 NRPA letter to City of Suffolk, Oct. 1, 2012.

21 See http://www.suffolkva.us/files/1013/5837/1093/CBPA_Encroachment_and_Exception.pdf (stating the requirements for an application for a CBPA encroachment (<50ft into the buffer area) or an exception (>50ft into the buffer area)).

22 Troutman Sanders Environmental Law Handbook, 11-10.

23 Supra note 9.

24 Chesapeake Bay Preservation Act, VA. CODE § 62.1-44.15:67 et seq.

25 Chesapeake Bay Preservation Area Designation and Management Regulations, 9 VAC 25-830.

26 Suffolk Chesapeake Bay Preservation Overlay District, Suffolk Zoning Code § 31-415.

27 See supra note 1.

28 Since originally being passed, the Bay Act moved to several different places in the code and has been administered by several state departments. Virginia Department of Environmental Quality, Water Laws, Regulations, and Guidance, http://www.deq.virginia.gov/Programs/Water/LawsRegulationsGuidance.aspx.

29 VA. CODE § 62.1-44.15:67(A).

30 9 VAC 25-830-70.

31 9 VAC 25-830-80.

32 Id.

33 9 VAC 25-830-90.

34 Id.

35 VA. CODE § 62.1-44.15:67(A).

36 VA. CODE § 62.1-44.15:74(E)(1)-(2).

37 Id.

38 Id. (The statute uses the phrase "may be incorporated" rather than "shall be incorporated" indicating that these are voluntary methods of enforcement.)

39 Id.

40 Id.

41 VA. CODE § 62.1-44.15:67(A).

42 VA. CODE § 62.1-44.15:72(B).

43 VA. CODE § 62.1-44.15:71.

44 Id.
45 Id.
46 Id.
47 See Water Laws, Regulations, and Guidance, supra note 28.
48 9 VAC 25-830-30.
49 See Water Laws, Regulations, and Guidance, supra note 28.
50 9 VAC 25-830-80.
51 Id.
52 Id.
53 9 VAC 25-830-140(3).
54 Riparian Buffers Modification & Mitigation Guidance Manual, Chesapeake Bay Local Assistance Department (2013), at 17.
55 9 VAC 25-830-140(5).
56 Id.
57 Id.
58 Id.
59 Id.
60 See 9 VAC 25-830-240(4).
61 9 VAC 25-830-260.
62 Id.
63 Id.
64 9 VAC 25-830-270.
65 Suffolk Unified Development Ordinance § 31-415(d), (f)(5).
66 Id. § 31-415(f)(5).
67 Id.
68 Id.
69 Id.
70 Suffolk Unified Development Ordinance Appendix B, § 13(a).
71 Id. § 13(b)-(c).
72 Id.
73 Id.
74 Id.
75 Virginia Department of Environmental Quality, Locality Compliance, http://www.deq.virginia.gov/Portals/0/DEQ/Water/ChesapeakeBay/LocalBayActContacts.pdf.
76 Suffolk Unified Development Ordinance § 31-415(f)(5).
77 Joint Legislative Audit and Review Commission, Implementation of The Chesapeake Bay Preservation Act (January 2003).
78 Id at iv-vi.
79 Supra note 19 at 11-20.
80 VA. CODE § 28.2-1302.
81 Id.
82 Chesapeake Bay Preservation Area Designation and Management Regulations, Volume 29, Issue 4, Virginia Register of Regulations 791 (2012), http://register.dls.virginia.gov/vol29/iss04/v29i04.pdf.
83 Id. at 797
84 http://www.city-data.com/city/Suffolk-Virginia.html
85 Id.
86 http://www.jamescitycountyva.gov/resourceprotection/wetlands.html.
87 http://www.city-data.com/county/James_City_County-VA.html.
88 http://www.jamescitycountyva.gov/pdf/devtmgmtpdfs/Environmental/Policies-all/CBPA_only.pdf.
89 http://www.jamescitycountyva.gov/pdf/county_code/chp23.pdf at 23-20.
90 http://www.norfolk.gov/index.aspx?NID=1518.
91 http://www.portsmouthva.gov/planning/chesapeake_bay.aspx.
92 http://www.city-data.com/city/Portsmouth-Virginia.html.
93 Judith Haynes, Land-Buffer Issue Dominates Hearing, DAILY PRESS (Nov. 17, 2000), http://articles.dailypress.com/2000-11-17/news/0011170060_1_local-lawmakers-sierra-club-management-regulations.
94 See generally chapter 4, http://www.cbf.org/Document.Doc?id=150.
95 Virginia Department of Environmental Quality, Enforcement, http://www.deq.virginia.gov/Programs/Enforcement.aspx.
96 See supra note 93; Robert E. Baute, Jr., Adrift Without a Paddle: The Future of the Chesapeake Bay Preservation Act, 26 WM. & MARY ENVTL. L. & POL'Y REV. 441, 454 (2001) available at http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1200&context=wmelpr.
97 Ida Kay Jordan, Winning Formula: Mix Demands, Solutions, The Virginian-Pilot (Feb. 25, 2001), available at http://www.highbeam.com/doc/1G1-71024034.html.
98 See Baute, supra note 96, at 453.
99 Additionally, NRPA and similar citizen groups have the opportunity to notify VDEQ if there are violations of the CBPA and force a state investigation. A "compliant finding will be valid for a five-year period unless DEQ becomes aware of programmatic deficiencies through a complaint investigation or some other means." Virginia Department of Environmental Quality, Local Program Compliance, http://www.deq.virginia.gov/Programs/Water/ChesapeakeBay/ChesapeakeBayPreservationAct/LocalProgramCompliance.aspx.

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