



COMMONWEALTH of VIRGINIA

Office of the Attorney General

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Mr. David K. Paylor
Director, Virginia Department of Environmental Quality
629 East Main Street
Richmond, Virginia 23219

Dear Director Paylor:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issues Presented

You ask what would constitute compliance with the following statutory provision when a proposed wind project will be located in state waters or on state-owned submerged lands:

The conditions for issuance of the permit by rule for small renewable energy projects shall include: ... [a] 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.^[1]

You also inquire which entity or entities, if any, have jurisdiction to provide the Department of Environmental Quality (DEQ) with this statutorily-required certification in such circumstances.

In addition, you pose three sub-questions:

- a) Do local governments have land use jurisdiction over renewable energy projects located in state waters or on state-owned submerged lands? If so, how would the boundaries of such jurisdiction be identified so as to assure that the correct local government was providing the "local government certification" for a particular project?
- b) If such authority does not rest with local governments, is there another entity (or entities) with land use jurisdiction over renewable energy projects located in state waters or on state-owned submerged lands that may be identified to provide "certification" that such project will comply with "all applicable land use ordinances"?
- c) If no entity currently has authority to provide DEQ with the required certification, how should DEQ address this statutory requirement in the proposed regulations for wind energy, in light of the fact that the General Assembly has directed that the regulations must be effective no later than January 1, 2011?²

¹ VA. CODE ANN. § 10.1-1197.6(B)(2) (Supp. 2010).

² Section 10.1-1197.6(A).

Response

It is my opinion that Virginia localities do not have the authority to extend the application of their land use ordinances to state-owned submerged lands; and that therefore, for small renewable energy projects located on or in the waters above state-owned bottomland, there are no “applicable land use ordinances” for purposes of the certification requirement of § 10.1-1197.6(B)(2). Because DEQ is directed to assess whether a submitted application meets the requirements of “the applicable permit by rule regulations,” it is further my opinion that DEQ may treat the certification requirement of § 10.1-1197.6(B)(2) as inapplicable in this circumstance and may authorize a project if the agency determines that the project applicant has met all other applicable requirements.

Background

You note that, in 2009, the General Assembly adopted legislation establishing a “Permit by Rule” process for “the construction and operation of small renewable energy projects, including such conditions and standards necessary to protect the Commonwealth's natural resources.”³ The enacted “Small Renewable Energy Projects” legislation⁴ authorizes DEQ to develop one or more permits by rule for renewable energy projects with a rated capacity of 100 megawatts and less. DEQ is to promulgate regulations concerning such permits by rule to be effective as soon as practicable but no later than January 1, 2011.⁵

The 2009 permit by rule statutes require an applicant seeking permit by rule authorization for a project to submit to DEQ fourteen specific application components. The application must include a “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.”⁶ You explain that DEQ formed a Regulatory Advisory Panel (Panel) in 2009 to assist the agency in developing draft permit by rule regulations, and that the Panel recommended that this statutory requirement appear verbatim in the proposed regulations.⁷

You observe, however, that DEQ and the Panel developed the draft regulations primarily with land-based wind projects in mind, and that during Panel discussions of the issue, local government certification was described as part of the “siting” phase of a project’s development. You note that the siting decision is a necessary prerequisite for DEQ to regulate the “construction and operation” phases of a project, as mandated by the 2009 PBR statutes.⁸

You explain that DEQ also established an Offshore/Coastal Wind Regulatory Advisory Panel (Offshore Panel) that began meeting in June 2010 to develop possible amendments to the original proposed permit by rule regulations and to address resource-protection issues related to wind projects in coastal land areas and in state waters. You describe that one issue the Offshore Panel faced was identifying the entity or entities that would provide the statutorily-required “local government

³ See 2009 Va. Acts chs. 808, 854; § 10.1-1197.6(A). A “permit by rule” is an expedited form of project permitting: a regulation sets forth the requirements that an applicant must meet, and if the applicant satisfies those requirements, the permitting agency authorizes the project according to the permit by rule regulations.

⁴ These statutes are codified, in relevant part, at §§ 10.1-1197.5 through 10.1-1197.11.

⁵ *Id.*

⁶ Section 10.1-1197.6(B)(2).

⁷ See 9 VA. ADMIN. CODE § 15-40-30(A)(2) (2010).

⁸ Section 10.1-1197.6(A).

certification” when the wind project is located in state waters or on state-owned submerged lands. You further convey that the Offshore Panel ultimately recommended that the language requiring local government certification remain unchanged until this question can be resolved.

Applicable Law and Discussion

I. Ownership and Regulation of Uses of Submerged Lands by the Commonwealth

Federal law establishes that “[t]he seaward boundary of each original coastal State is approved and confirmed as a line three geographical miles distant from its coast line.”⁹ Within this three-mile boundary, the Commonwealth owns the submerged lands under the water up to the mean low water mark.¹⁰ Although localities in the Commonwealth may establish territorial boundaries that extend over waters of the Commonwealth, the Commonwealth retains ownership of the submerged lands under those waters.¹¹

⁹ 43 U.S.C. § 1312 (2006) (part of the Submerged Lands Management Act, 43 U.S.C. §§ 1301 through 1315).

¹⁰ See VA. CODE ANN. § 1-302 (2008), which provides, in part, that: “A. The jurisdiction of the Commonwealth shall extend to and over, and be exercisable with respect to, waters offshore from the coasts of the Commonwealth as follows:

1. The marginal sea and the high seas to the extent claimed in the Virginia Constitution of 1776 and not thereafter ceded by action of the General Assembly.

2. All submerged lands, including the subsurface thereof, lying under the waters listed in subdivision 1 of this subsection.

B. The ownership of the waters and submerged lands enumerated or described in subsection A of this section shall be in the Commonwealth unless it shall be, with respect to any given parcel or area, in any other person or entity by virtue of a valid and effective instrument of conveyance or by operation of law.” See also VA. CODE ANN. § 28.2-1200 (2009): “All the beds of the bays, rivers, creeks and the shores of the sea within the jurisdiction of the Commonwealth, not conveyed by special grant or compact according to law, shall remain the property of the Commonwealth and may be used as a common by all the people of the Commonwealth for the purpose of fishing, fowling, hunting, and taking and catching oysters and other shellfish.” See also § 28.2-1202(A) (2009): “Subject to the provisions of § 28.2-1200, the limits or bounds of the tracts of land lying on the bays, rivers, creeks and shores within the jurisdiction of the Commonwealth, and the rights and privileges of the owners of such lands, shall extend to the mean low-water mark but no farther, except where a creek or river, or some part thereof, is comprised within the limits of a lawful survey.” Please note that there are instances when courts have found that riparian land owners possessed property rights in subaqueous lands that were conveyed by specific deed language, usually created during the Commonwealth’s colonial period, and often granted by a royal decree (known as “king’s grant” property rights). This Opinion does not address these rare situations.

¹¹ VA. CODE ANN. § 2.2-408 (2008) charges the Secretary of the Commonwealth with responsibility for collecting from governmental subdivisions of the Commonwealth information relevant to their boundary changes, and disseminating such information to state government departments. Pursuant to VA. CODE ANN. § 15.2-207 (2008), the charter of any municipal corporation shall not contain the metes and bounds of the municipal corporation, but the boundaries shall be incorporated therein by reference to the recordation of the final decree or order of the court establishing such boundaries or the act of the General Assembly by which they are defined. See also § 15.2-3108 (2008), which establishes the procedure for localities to petition the circuit court to change a common boundary line, including a requirement that the Clerk send a court order setting forth the new boundary line to the Secretary of the Commonwealth.

See also § 15.2-3105 (2008), which states that the boundary of every locality bordering on the Chesapeake Bay, including its tidal tributaries, or the Atlantic Ocean “shall embrace all wharves, piers, docks and other structures, except bridges and tunnels” that are erected along the waterfront of such locality and that extend into those waters to the extent such structures lie within the territorial jurisdiction of the Commonwealth.

Section 28.2-1203(A) restricts the enjoyment of state-owned submerged lands to the uses it explicitly enumerates and to those authorized by Virginia Marine Resources Commission (VMRC).¹² Pursuant to § 28.2-1204, the VMRC is authorized to issue permits for all reasonable uses of state-owned submerged lands, “including but not limited to, dredging, the taking and use of material, and the placement of wharves, bulkheads, and fill by owners of riparian land in the waters opposite their lands, provided such wharves, bulkheads, and fill do not extend beyond any lawfully established bulkhead lines...” With the approval of the Attorney General and the Governor, the VMRC also is authorized to “grant easements over or under or lease the beds of the waters of the Commonwealth outside of the Baylor Survey.”¹³ Although VMRC has been granted this authority, it is an agency of the Commonwealth. It is not the governing body of a locality, the entity responsible for providing the certification described in § 10.1-1197.6(B)(2). Therefore, the VMRC cannot fulfill this statutory requirement.¹⁴

¹² See § 28.2-1203(A) (2009): “It shall be unlawful for any person to build, dump, trespass or encroach upon or over, or take or use any materials from the beds of the bays, ocean, rivers, streams, or creeks which are the property of the Commonwealth, unless such act is performed pursuant to a permit issued by the [Virginia Marine Resources] Commission or is necessary for the following. . . .”

¹³ Section 28.2-1208(A) (2009). The statute was amended in 2009 to incorporate renewable energy projects, and now provides that the VMRC “may” enter into offshore renewable energy leases that authorize a lessee to “generate electrical energy from wave or tidal action, currents, offshore winds, or thermal or salinity gradients, and transmit energy from such sources to shore.” *Id.*

¹⁴ When deciding whether to issue permits for the use of state-owned bottomlands, the VMRC “shall be guided in its deliberations by the provisions of Article XI, Section 1 of the Constitution of Virginia[,]” and it shall “consider the public and private benefits of the proposed project and exercise its permitting authority consistent with the public trust doctrine as defined by the common law of the Commonwealth ... in order to protect and safeguard the public right to the use and enjoyment of the subaqueous lands of the Commonwealth held in trust by it for the benefit of the people as conferred by the public trust doctrine and the Constitution of Virginia.” Section 28.2-1205(A) (2009). The VMRC also shall consider a proposed project's effect on other reasonable and permissible uses of state waters and state-owned bottomlands; marine and fisheries resources of the Commonwealth; tidal wetlands; adjacent or nearby properties; water quality; and submerged aquatic vegetation. *Id.* A prior opinion of the Attorney General interpreted this statutory provision to mean that the VMRC is authorized to consider “only the direct physical effects of proposed projects upon adjacent or nearby properties and is not authorized to consider broad questions of land use policy and planning.” 1972-1973 Op. Va. Att’y Gen. 188, 189-190. Since that Opinion was issued, the General Assembly has not amended § 28.2-1205(A) to require the VMRC to consider more than the direct, physical effects of proposed projects upon adjacent or nearby properties. Therefore, during its permit review process, VMRC would evaluate a proposed offshore wind energy project’s impact on adjacent or nearby properties, but not impacts on property owners that typically are addressed in local land use ordinances, such as impeded sight lines, height and noise restrictions, etc.

In addition, in accordance with § 28.2-1208(E), the VMRC in coordination with other state agencies maintains a State Subaqueous Minerals and Coastal Energy Management Plan that includes provisions for the preparation of an environmental impact statement) when an applicant is seeking a lease of bottomlands for a proposed project. Pursuant to that Plan, the lease applicant must prepare and submit to DEQ an environmental impact statement that includes a “description of the environmental impact of the proposed activities, methods, or plans, ... including but not limited to... [t]he nature and expected duration of any activity that will produce noise levels which could reasonably be expected to have an adverse impact upon people or wildlife” and “[t]he nature and size of any operation that will be visible from any present public roadway or from any major public-use area or viewpoint”; and a “description of mitigating measures proposed to minimize the adverse impact of the proposed activities.” State Minerals Management Plan (Rev. Aug. 2004), Section III(D) at 11-12. The Plan requires that no lease be awarded until DEQ, in cooperation with “the responsible agency” (VMRC, for offshore wind projects), determines that the

II. Local Regulation of State-Owned Lands

Your questions raise the issue of whether a local government has land use jurisdiction over projects and facilities in state waters or on state-owned submerged lands, even though the Commonwealth owns the underlying bottomland. In general, Virginia follows the Dillon Rule of strict statutory construction, which provides that “municipal corporations have only those powers expressly granted, those necessarily or fairly implied therefrom, and those that are essential and indispensable”¹⁵ and its corollary that “[t]he powers of county boards of supervisors are fixed by statute and are limited to those powers conferred expressly or by necessary implication.”¹⁶ Therefore, to have the power to act in a certain area, local governments must have express enabling legislation or authority that is necessarily implied from enabling legislation.¹⁷

The General Assembly has not granted specific authority to localities to extend their land use regulations to projects located on state-owned bottomlands or the waters above them. Section 15.2-2280 does provide a locality with the authority to zone the territory under its jurisdiction,¹⁸ but absent a situation where the Commonwealth has conveyed ownership or control of specific areas of bottomland,¹⁹ submerged lands beyond the mean low water mark belong to the Commonwealth and thus are not within any locality’s jurisdiction.²⁰ In light of this conclusion, DEQ need not amend the proposed regulations for wind energy to address this situation further.

environmental impact statement and required public hearings have been completed “to the satisfaction of the state” and the Governor has approved the lease. *Id.*, Section III(C), at 10. Thus, when developing an environmental impact statement as part of the VMRC’s leasing process for an offshore wind project, DEQ could address some of the issues typically covered by the permit by rule local government certification requirements. Nonetheless, such action would not constitute the certification by the governing body of a locality that is required by § 10.1-1197.6(B)(2). In addition, the VMRC is not required to enter into a lease for a proposed offshore wind project. The statutory language is permissive, so it may elect to issue only a permit for such a project.

¹⁵ *Bd. of Supvrs. v. Countryside Inv. Co.*, 258 Va. 497, 503, 522 S.E.2d 610, 613 (1999) (quoting *Bd. of Supvrs. v. Horne*, 216 Va. 113, 117, 215 S.E.2d 453, 455 (1975)).

¹⁶ *Cnty. Bd. v. Brown*, 229 Va. 341, 344, 329 S.E.2d 468, 470 (1985); *accord Gordon v. Bd. of Supvrs.*, 207 Va. 827, 832, 153 S.E.2d 270, 274 (1967).

¹⁷ Any doubt as to the existence of such power must be resolved against the locality. *See City of Richmond v. Bd. of Supvrs.*, 199 Va. at 684, 101 S.E.2d at 645; 2009 Op. Va. Att’y Gen. 41, 42.

¹⁸ Section 15.2-2280 (2008) (“Any locality may, by ordinance, classify *the territory under its jurisdiction* or any substantial portion thereof into districts of such number, shape and size as it may deem best suited to carry out the purposes of this article, and in each district it may regulate, restrict, permit, prohibit, and determine the following: 1. The use of land, buildings, structures and other premises for agricultural, business, industrial, residential, flood plain and other specific uses; 2. The size, height, area, bulk, location, erection, construction, reconstruction, alteration, repair, maintenance, razing, or removal of structures; 3. The areas and dimensions of land, *water*, and air space to be occupied by buildings, structures and uses, and of courts, yards, and other open spaces to be left unoccupied by uses and structures ... ; or 4. The excavation or mining of soil or other natural resources”) (emphasis added).

¹⁹ Examples of such a situation would be when the VMRC has granted a[n easement or] lease pursuant to § 28.2-1208(A), or where private ownership is claimed pursuant to a “king’s grant” as discussed *supra* note 9.

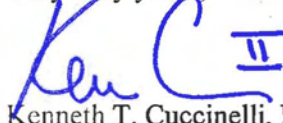
²⁰ The concept that localities do not have authority over the use of offshore waters and state-owned bottomland within their boundary lines is upheld by § 29.1-744.4, which provides localities with authority, after providing notice to the state Department of Game and Inland Fisheries (DGIF), to establish by ordinance “‘pass-through’ zones in any portion of a waterway within its territorial limits where congestion of watercraft traffic routinely poses a significant safety risk to persons in such designated area.” Logic dictates that such an explicit grant of authority, subject to a state agency’s approval, would not be necessary if localities had general authority over activities in the waters within their drawn territorial boundaries. The same argument applies to § 29.1-744, which provides that any

Conclusion

Accordingly, it is my opinion that Virginia localities do not have the authority to extend the application of their land use ordinances to state-owned submerged lands; and that therefore, for small renewable energy projects located on or in the waters above state-owned bottomland, there are no "applicable land use ordinances" for purposes of the certification requirement of § 10.1-1197.6(B)(2). Because DEQ is directed to assess whether a submitted application meets the requirements of "the applicable permit by rule regulations," it is further my opinion that DEQ may treat the certification requirement of § 10.1-1197.6(B)(2) as inapplicable in this circumstance and may authorize a project if the agency determines that the project applicant has met all other applicable requirements.

With kindest regards, I am

Very truly yours,


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Attorney General

political subdivision of the Commonwealth may apply to the Board of Game and Inland Fisheries for special rules and regulations concerning the safe and reasonable operation of vessels on any water within its territorial limits; any county, city or town may enact ordinances which parallel general law regulating the operation of vessels on any waters within its territorial limits, including the marginal adjacent ocean, and the conduct and activity of any person using such waters; and any county, city or town may, by ordinance after providing notice to DGIF, establish "no wake" zones along the waterways within the locality in order to protect public safety and prevent erosion damage to adjacent property. In addition, § 29.1-748.1 authorizes the City of Virginia Beach to regulate, in any portion of a waterway located solely within its territorial limits, the minimum distance that personal watercraft may be operated from the shoreline in excess of the slowest possible speed required to maintain steerage and headway. These laws concern limited delegations of authority to regulate an activity (boating) that generally is the state's responsibility (see Chapter 7, Boating Laws, of Title 29.1 of the *Code of Virginia*), not a broad grant of authority to localities to extend their land use regulations to facilities and activities in their territorial waters. In addition, a prior opinion of the Attorney General noted that "the State's use of State-owned bottom is not subject to local regulation, but the exercise of a riparian landowner's property rights which encroach on State-owned bottom is validly subject to local regulation" because of riparian owners' common law right to construct a pier or wharf opposite his riparian lands, subject to reasonable regulation by the state. See 1985-1986 Op. Va. Att'y Gen. 108, 111 n.5. In that instance, the riparian owners' common law right to construct a pier or wharf over state-owned bottomland had been codified as subject to local regulation (see § 28.2-1203(A)(5)); there is no comparable requirement in the 2009 permit by rule statutes.

The Virginia Supreme Court has held that private telecommunications companies' proposal to build telecommunications towers on land within a Virginia Department of Transportation (VDOT) right of way pursuant to a lease with VDOT placing primary use and control of the land with the lessees had to be submitted to the local planning commission for approval because § 15.2-2232(A) requires that no "public utility facility or public service corporation facility other than a railroad facility or an underground natural gas or underground electric distribution facility of a public utility ..., whether publicly or privately owned, shall be constructed, established or authorized, unless and until the general location or approximate location, character, and extent thereof has been submitted to and approved by the [local planning] commission as being substantially in accord with the adopted comprehensive plan or part thereof." See *Bd. of Spvrs. of Fairfax Cnty. v. Washington, D.C. SMSA L.P.*, 258 Va. 558, 565-66, 522 S.E.2d 876, 880-81 (1999). That case is distinguishable, however, because the state-owned right of way was onshore, within Fairfax County's territorial jurisdiction; state-owned bottomlands beyond the mean low water mark are not. In addition, § 15.2-2232 provided specific statutory authority for the County to require planning commission approval for such projects.