Improving Water Quality at the Local Level: Possibilities under Existing and Proposed Legislation

Remarks for the
HRPDC Joint Environmental Meeting
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WATERSHED IMPLEMENTATION PLANS: CRAFTED BY THE STATES

PHASE I WATERSHED IMPLEMENTATION PLAN

- Roadmap for how and when a jurisdiction plans to meet its pollutant allocations under the TMDL.
  (TMDL, ES-8)

PHASE II WATERSHED IMPLEMENTATION PLAN

- Moving to the local scale (how will it be accomplished)
- Draft Dec. 15, 2011; Final March 30, 2012

VIRGINIA RELIES ON PDCs

- Seminars
- Local Engagement
- "Ground-truthing" Assumptions

Clarification of Phase II WIP Goals

EPA's October 5, 2011 letter to Virginia

- **Reaffirmed deadlines for Phase II WIPs**
- **Clarified deliverables**
  - **Ensure local partners are aware of role in meeting state's allocations**
  - **Identify local targets or actions**
  - **Express local targets as programmatic actions (i.e., adoption of ordinances).**

THE DILLON RULE
Municipal Corporations (1st ed. 1872)

Locality possesses the following powers and no others:

- Those granted in **express words;**
- Those **necessarily or fairly implied**
- Those **essential to the declared objects and purposes** of locality, indispensable
- Any reasonable doubt resolved against locality.

City of Winchester v. Redmond, 93 Va. 711, 713-14 (Va. 1896)

General Powers and Procedures of Counties
Article I: Miscellaneous Powers

§ 15.2-1200. General Powers of Counties.

Any county may adopt such measures as it deems expedient to secure and promote the health, safety, and general welfare of its inhabitants which are not inconsistent with the general laws of the Commonwealth. Such power shall include, but shall not be limited to, the adoption of quarantine regulations affecting both persons and animals, the adoption of necessary regulations to prevent the spread of contagious diseases among person or animals and the adoption of regulations for the prevention of the pollution of water which is dangerous to the health or lives of persons residing in the county.

Elements of Va. Code 15 .2-1200

1. Not inconsistent with general laws
2. Focus on inhabitants' health, safety and general welfare
3. Focus on water pollution dangerous to the health or lives of county residents
4. Not limited to statute's recited possibilities ("power shall include, but shall not be limited to")

Element One: Ordinances under 15.1-1200 may not be inconsistent with Virginia's General Laws

In *Old Dominion Land Co. v. Warwick Co*., 172 Va. 160 (Va. 1939), the Va. SCt. held:

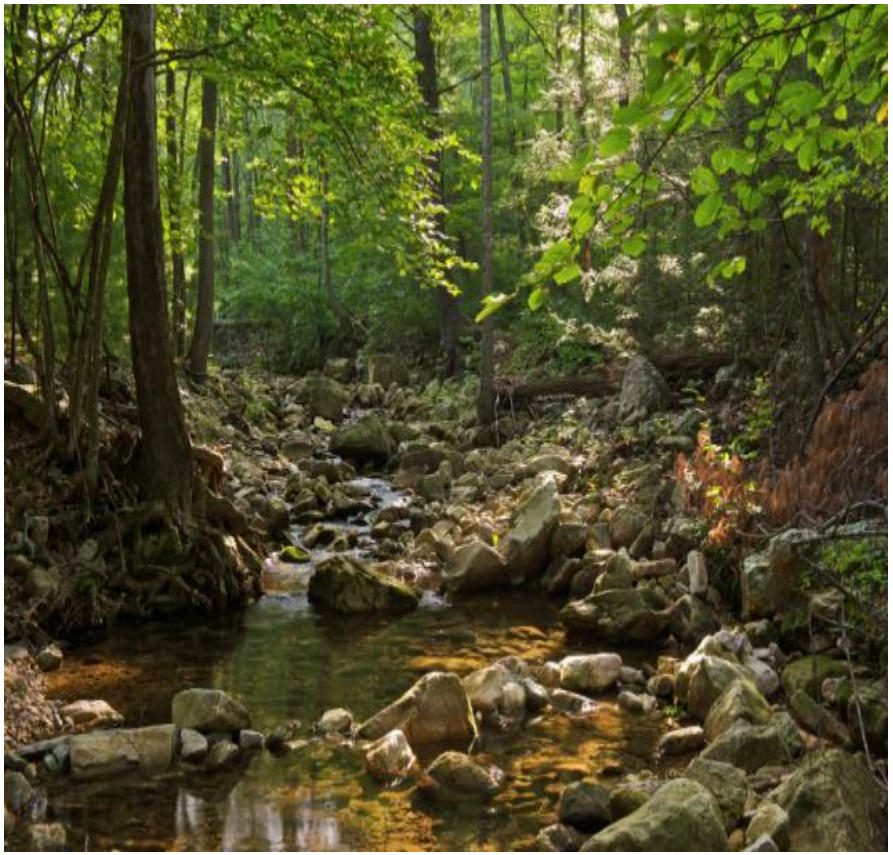
County may not prohibit dumping raw or untreated sewage into tidal waters under 15.2-1200. *Such prohibition would be inconsistent with general laws.*

- Tidal waters are owned and controlled by the state ;
- "Natural office" of streams and sea to carry off impurities and "off-scourings."
- Landowner may throw refuse into waters absent nuisance, injury to inhabitants' health.

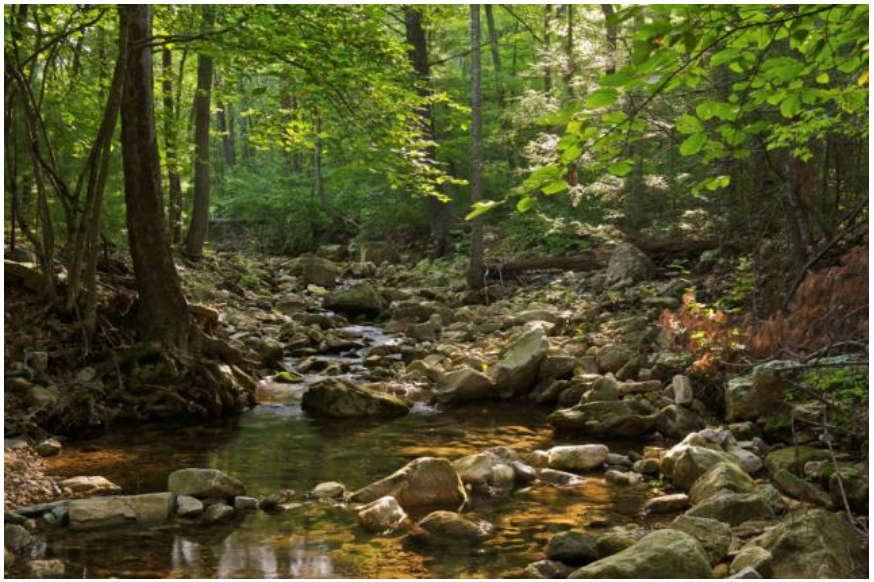
But, the effect of *Old Dominion Land Co*. is limited. *See, e.g., Moore v. Hampton Roads Sanitation District Commission*, 557 F. 2d 1030 (4th Cir. 1976). The "general laws" it cited have significantly changed.

Consistent with Dillon Rule, ordinances promulgated under the statute still must meet the statute's elements:

- Not inconsistent with other general laws
- Focus on inhabitants' health, safety and general welfare
- Focus on water pollution dangerous to the health or lives of County residents
- Not limited to statutory examples



Element Two: Focus on health, safety and general welfare
15.1-1200 supports myriad ordinances consistent with this focus.

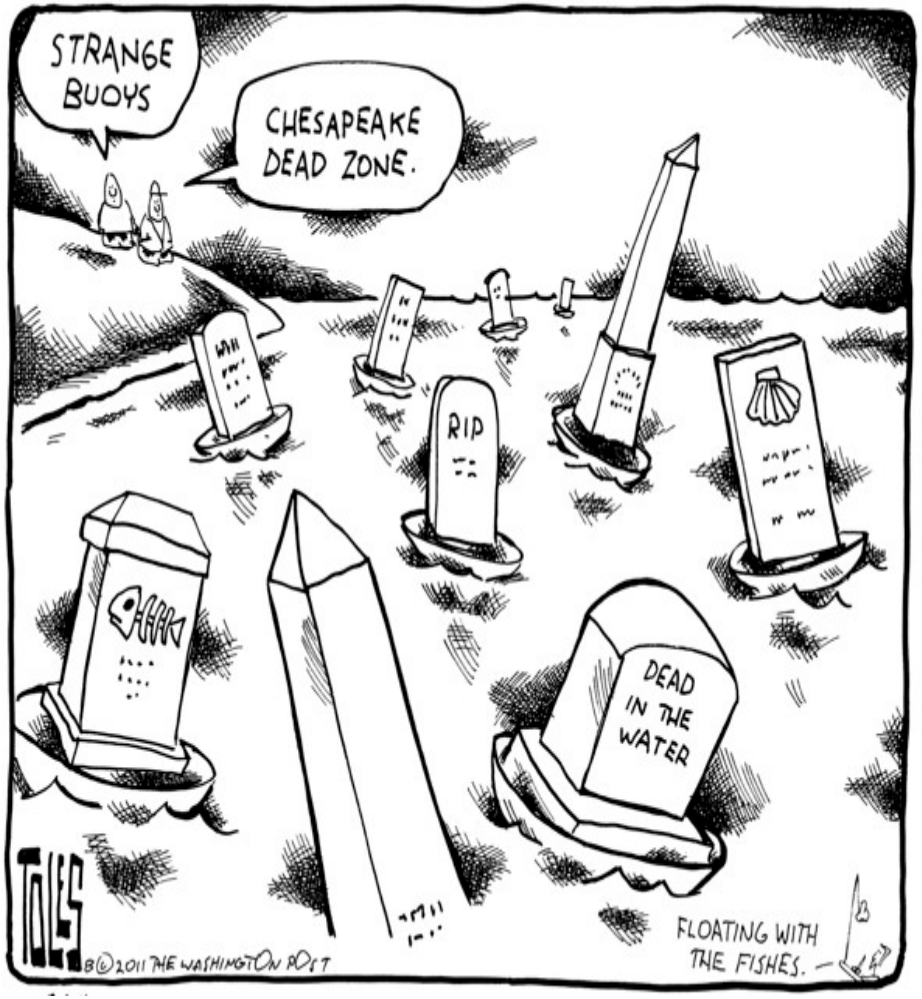


Spotsylvania §3-27, Regulation of Outdoor Music Festivals

. . . providing necessary regulation for the conducting of musical or entertainment festivals conducted in open spaces not within an enclosed structure and of any gathering of groups of individuals for the purpose of listening to or participating in entertainment which consists primarily of musical renditions conducted in open spaces not within an enclosed structure in the interest of the public health, safety and welfare of the citizens and inhabitants of the county.

Element Three: Focus on water pollution dangerous to the health or lives of county residents

15.1-1200 authorizes a variety of ordinances consistent with this focus.



No person shall bathe or wash any dog, other animal, vehicle or clothing in any stream, lake or other water of any park, or throw, cast, lay, drop, discharge, direct, deposit or abandon into any stream, lake or other water of any park, or in any storm sewer or drain flowing into such water, any substance, matter or thing, in whatever form, which may directly or indirectly result in the pollution of such waters.

HENRICO COUNTY § 14-39
Miscellaneous Pollutants

CHESTERFIELD COUNTY § 12-26
Sludge Disposal

No person shall dispose of . . . material removed from septic tanks except . . . into a sewerage system or sewage treatment plant . . . under such conditions as may be approved by the health department. All persons who engage in the business of cleaning septic tanks shall provide the health department with the name, address and location of the site where the sludge and other material will be disposed. The county health department shall approve the disposal site before any disposal takes place.

The sludge or other material shall be carefully deposited and the surface of the ground, manholes and tanks into which the deposit is made shall be maintained in a sanitary condition. Any sludge or other material that is spilled shall be promptly and completely removed.

CHESTERFIELD COUNTY
Fish Disposal

It shall be unlawful for any restaurant, fish market, food store or other retail or wholesale establishment to dispose of fish, shellfish, other forms of marine life or any portions thereof, whether from salt or fresh water, except by bagging such waste and storing the bags in cold storage until the waste is removed and placed immediately in refuse vehicles. The removal shall take place in the rear of the establishment on an asphalt or concrete surface, and the refuse vehicle must immediately remove the waste from the vicinity of the establishment.

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15.2-1200 Used
In Combination With Other Statutes

New Kent County §38-72 et seq.
Septic Tank Contractors and Cleaners

Isle of Wight County, Article XIV, Chap. 14
Biosolids

Henrico County § 24-106.2
Chesapeake Bay Preservation Act
Tree cover, buffers, etc.

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Element Four: Counties' "power shall not be limited to. . .".

15.2-1200 as Authority for local TMDL initiatives?

- Restricting water pollution practices with clear local health connection (Henrico, Chesterfield)
  - Pet waste disposal (education, prohibition, signage, bags)
- Other local TMDL actions may be authorized by 15.2-1200's "general welfare" clause
  - Prohibit use of storm drains for grass clippings, yard debris
  - Promote rain barrels, rain gardens
  - Use of MS4 BMPs in non-MS4 areas

But, does 15.2-1200's grant of authorization to counties to promote the "general welfare of its inhabitants" limit its utility for TMDL purposes?

What about cities?

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POTENTIAL LEGISLATIVE CHANGES AFFECTING LOCALITIES' ABILITY TO ADDRESS TMDL

- Proposal to "integrate" Stormwater Management Act, Erosion and Sediment Control Act, and Chesapeake Bay Preservation Act
  - Enhanced local responsibilities, statewide standards
  - "One-stop shopping," reduced local variations

- Effect on existing "more stringent" ordinances
  - Possible grandfathering for stormwater, E&S
  - Possible "cessation" for CBPA (CBF, others oppose)

Integration bill, more

- Localities may have enhanced rights to enact more stringent ordinances to:
  - Comply with TMDL
  - Protect exceptional state waters

- Possible amendment of ESCA, from SMA, of requirement that localities jump additional preliminary hurdles for more stringent E&S ordinances.
  - studies
  - fact finding

§ 10.1-603.7. More Stringent Ordinances (possible amendment?)

Localities are authorized to adopt more stringent stormwater management ordinances than necessary for compliance with minimum regulations, provided . . .

- Based upon factual findings
  - by local or regional comprehensive watershed management studies or
  - developed through implementation of MS4 permit or
  - locally adopted watershed management study an
- Determined by the locality to be necessary
  - To prevent further degradation to water resources or
  - To address specific existing water pollution including nutrient and sediment loadings, stream channel erosion, depleted groundwater resources, or excessive localized flooding within the watershed
  - **TO ADDRESS TMDLs, PROTECT EXCEPTIONAL WATERS**
- Before adoption, public hearing after giving due notice.

Should localities support integration bill ?

- Extremely positive grant of authority for more stringent TMDL-related ordinances. Could "fill in the gaps," resolved questions regarding TMDL authorities
- Note potential problems (e.g., issues regarding CBPA ordinances)
- Query how burdensome would new study, factfinding hurdles be?
- Even if integration bill is not submitted, is modified, or fails to pass, localities should consider its premises -- studies, fact finding to support TMDL ordinances--- when enacting ordinances under 15.2-1200 or otherwise

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Conclusions and Suggestions re 15.1-1200

15.2-1200 can potentially support counties' efforts to combat water quality problems, especially where health of residents is a concern.

- E.g., prohibiting disposal of pet waste where it can enter waterways

15.2-1200's "general welfare language" suggests it could also support efforts to reduce N & S pollution under WIP 2

- Ordinance focus should be on local water quality, health
- Ordinance terms should avoid conflict with other state laws (Ag, SMA, ESCA)
- Ordinances under this law could work to strengthen other related programs (e.g., CBPA, especially if CBPA authority is weakened by GA)

Regardless of legislative changes, 15.2-1200-based WQ ordinances will be strengthened by specific local studies, findings showing need for the contemplated action to meet WIP 2

For the 2012 Session and thereafter, consider asking legislators

- Provide clear, explicit authority to enact TMDL ordinances tailored to your locality, in integration bill or otherwise

- Ensure adequate local authority to enact ordinances more stringent than required by state standards (retained, in the case of SMA; added, in the case of E&S ordinances)

- Avoid burdensome hurdles to local decision making on TMDL-related ordinances

Thank you!