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Re: Local Government and Water Quality Regulation (NSGLC-11-04-03)

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Dear Lewie,

Please find our analysis of local government regulation of water quality as you requested. The attached information is intended as advisory research only and does not constitute legal representation of the Middle Peninsula Planning District Commission or its constituents. It represents our interpretations of the relevant laws and regulations.

In your email, you asked for examples of local governments using regulations or other tools to protect water quality for aquaculture, specifically through requirements for septic systems and failing septic systems. First, I looked into the basic regulatory scheme regarding point source

and non-point source water pollution. Then, I looked at Virginia state laws regarding water quality and searched for any authorization or prohibition of local government action. And, finally, I looked for examples in other states of local governments using tools or ordinances to protect water quality by managing nonpoint source pollution, and especially faulty septic systems.

Pollution

Sewage treatment plants are point source pollution. The Clean Water Act (CWA) defines point source as “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural storm water discharges and return flows from irrigated agriculture.” CWA § 502 (14). The CWA established the National Pollutant Discharge Elimination System (NPDES), which regulates pollutant point source discharges into waters of the United States. The CWA authorizes states to control the NPDES program in their respective states and most have done so, including Virginia.

Nonpoint source pollution has been defined to include any source of water pollution that does not meet the above definition. It may include paved driveways and parking lots, agricultural uses, as well as faulty septic systems. These types of pollution are exempt from the NPDES permit program; however, the CWA requires states to monitor and reduce nonpoint source pollution. Many states have exercised their police power (the authority to enact regulations for the public health safety morals and welfare of society) to enact laws to protect water quality. States may do this by through a variety of tools, including land use controls, septic tank regulation, or water quality standards. Local governments may also have a role in regulation through their police powers.

Applicable Virginia Laws

Statutes

In Virginia, several state laws address nonpoint source water pollution.

- The Erosion and Sediment Control Law regulates projects resulting in soil disturbance. Va. Code Ann. § 10.1-560 et.seq. Pursuant to § 10.1-562, local governments may adopt and administer erosion and sediment control programs. Va. Code Ann. § 10.1-603.3 also provides for the establishment of stormwater management programs by localities to manage stormwater from earth disturbance activities.
- The Chesapeake Bay Preservation Act establishes a relationship between the state government and local governments for the purpose of water quality protection. § 10.1-2100 et.seq. The Act authorizes local governments “to exercise their police and zoning powers to protect the quality of state waters consistent with the provisions of this chapter.” Va. Code Ann. § 10.1-2108.

- The Virginia Department of Health is charged with septic tank regulation. Va. Code Ann. § 32.1-163-166. With regard of public health regulation in general, Va. Code Ann. § 32.1-34 states that no county, city or town ordinance or regulation shall be less stringent in the protection of the public health than any applicable state law or any applicable regulations of the Board. Emergency regulations enacted by the Virginia Department of Health for the alternative onsite sewage system require owners to “Comply with the onsite sewage system requirements contained in local ordinances adopted pursuant to the Chesapeake Bay Preservation Act (§ 10.1-2100 et. seq.) and the Chesapeake Bay Preservation Area Designation and Management Regulations (9VAC10-20) when an AOSS is located within a Chesapeake Bay Preservation Area.” 12 VAC 5-613-120.
- Va. Code Ann. § 62.1-44.19:3 allows local governments to enact ordinances for the testing and monitoring of the land application of sewage sludge within its boundaries, as well as specifically authorizes local governments to enact zoning ordinances regarding the storage of sewage sludge based on criteria directly related to the public, health, safety, and welfare of its citizens and the environment. Localities are also authorized to order abatement of violations of the above sections. Va. Code Ann. § 62.1-44.19:3.2
- The Water Quality Improvement Act of 1997 authorizes state agencies and local governments to develop a cooperative program to address nutrient reduction and other point and nonpoint source pollution. Va. Code Ann. § 10.1-2117 et.seq.
- Va. Code Ann. § 15.2-1200 authorizes counties to adopt regulations to prevent the spread of contagious disease and pollution of water. “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 persons 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.”
- Va. Code Ann. § 15.2-924.1(a) states that “No locality shall regulate the use, application, or storage of fertilizers, as defined in Chapter 36 (§ 3.2-3600 et seq.) of Title 3.2, except by ordinances consistent with the requirements of the Chesapeake Bay Preservation Act (§ 10.1-2100 et seq.), the Erosion and Sediment Control Law (§ 10.1-560 et seq.), the Stormwater Management Act (§ 10.1-603.1 et seq.) or other nonpoint source regulations promulgated by the Department of Conservation and Recreation or the Soil and Water Conservation Board.”

As a Dillon’s Rule state, Virginia courts have held that local governments “have only those powers which are expressly granted by the state legislature, those powers fairly or necessarily

implied from expressly granted powers, and those powers which are essential and indispensable. Where the state legislature grants a local government the power to do something but does not specifically direct the method of implementing that power, the choice made by the local government as to how to implement the conferred power will be upheld as long as the method selected is reasonable. Any doubt in the reasonableness of the method selected is resolved in favor of the locality.”¹

It appears as though several of the above provisions would give local governments in Virginia authority to protect water quality. For example, Va. Code Ann. § 32.1-34 states that no county, city or town ordinance or regulation shall be less stringent in the protection of the public health than any applicable state law or any applicable regulations of the Board. This law appears to give local governments authority to enact ordinances to protect public health. And, as you mentioned in your initial inquiry, Va. Code Ann. § 15.2-1200 authorizes counties to adopt regulations to prevent the spread of contagious disease and pollution of water.

In *Old Dominion Land Co. v. Warwick County*, 172 Va. 160 (Va. 1939), a court held that a county ordinance prohibiting the discharge of sewage into a certain river or any of its tributaries unless that sewage had been treated to be invalid. The court noted specific acts passed by the legislature prohibiting the emptying of sewage into certain tidal waters and reasoned that the legislature had intended to retain all authority to prevent the pollution of those waters. The court ruled that if the acts do not constitute a nuisance or are not injurious to the health of the community, the county does not have authority to pass laws prohibiting an owner of the property from dumping sewage into state waters. In general, a nuisance is defined as an activity that arises from unreasonable, unwarranted, or unlawful use by a person of his own property which causes injury to another or the public.

State laws have changed since the *Old Dominion* decision. State law now prohibits the discharge of raw sewage into the waters. Va. Code Ann. § 62.1-44.5. In addition, several laws, such as Va. Code Ann. § 15.2-1200, specifically authorize counties to adopt regulations to prevent the spread of contagious disease and pollution of water.

Although I was unable to find examples of how other local governments have protected water quality for aquaculture purposes, I have included cases below in which local governments have enacted ordinances to protect water quality. In general, the ordinances exercising the localities’ police power were upheld when not preempted by state law. Today, a court would not likely cite the

Alabama

Peak v. City of Tuscaloosa, 2011 Ala. Crim. App. LEXIS 23 (Ala. Crim. App. Apr. 29, 2011).

After plaintiff was convicted for failure to register a septic tank under a municipal ordinance he filed suit claiming that the city did not have the authority to enact the ordinance. The court ruled that the city’s ordinance was within its statutory police powers. Further, the court ruled

¹ *City of Virginia Beach v. Hay*, 518 S.E.2d 314, 316 (Va. 1999).

that the legislature did not intend to preempt the entire field of wastewater regulation by providing a comprehensive scheme for the regulation of septic tanks by the Alabama Onsite Wastewater Board and by the State Board of Health. The registration requirement under § 13-51(3) was rationally related to protecting a lake within the city's jurisdiction from contaminants from leaking septic tanks and did not violate principles of due process or equal protection. The disclosure risks of § 13-51 did not pose a substantial hazard of self-incrimination as the registration requirement itself did not require defendant to admit to anything inherently criminal.

California

Water Quality Ass'n v. City of Escondido, 53 Cal. App. 4th 755 (Cal. App. 4th Dist. 1997).

The state statute preempted the subject of water softeners and the city ordinance that conflicted with the state statute by banning the water softeners approved by the state statute was voided.

Idaho

Idaho Dairymen's Ass'n v. Gooding County, 148 Idaho 653 (Idaho 2010).

An ordinance in Gooding County, Idaho, regulated water quality at confined animal feeding operations (CAFOs). In addition to requiring the CAFOs to comply with federal or state regulation implementing the CWA, the ordinance prohibited CAFOs from being located within one mile of certain river canyons and from being located within a certain distance of a Zone A flood plain. The court found that it did not violate the Idaho constitution, which states that counties may make and enforce local police, sanitary, and other regulations not in conflict with other laws. The court also found that regulation of water quality by a local government was not preempted the state, citing state statutes allowing such regulation.

New York

Parsons v. Smithtown, 160 Misc. 103 (N.Y. Sup. Ct. 1936).

A town enacted an ordinance prohibiting the discharge of sewage into a river. The court found that state law authorized the town board to enact ordinances for the promotion of the health of the community. The court concluded that the ordinances were “clearly within the purposes specified by the Legislature, and constitute a valid exercise of the power invested in the town board.”

In conclusion, although local governments in Virginia may not have express authority to enact ordinances for the express purpose of protecting aquaculture, it seems as though local governments could enact ordinances to protect water quality in general. A local municipality could conceivably adopt an ordinance that specifically addresses the issues of septic system and sewage runoff, so long as their ordinance is no less stringent than existing regulations of the Virginia Department of Health. I hope you find this information helpful. If you would like additional information, please let me know.

Sincerely,

Terra Bowling
Research Counsel