

02-052

**CONSERVATION: CHESAPEAKE BAY PRESERVATION ACT.**

**Amendments to Chesapeake Bay Preservation Area Designation and Management Regulations, allowing encroachments into 100-buffer areas for agricultural and silvicultural activities conducted in accordance with best management practices related to improving water quality and protecting Chesapeake Bay and its tributaries, do not violate Equal Protection Clause of U.S. Constitution. Such practices.**

Mr. W. Leslie Kilduff, Jr.  
County Attorney for Northumberland County  
October 30, 2002

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

**Issue Presented**

You ask whether the recent amendments to the Chesapeake Bay Preservation Area Designation and Management Regulations, limiting encroachment upon the 100-foot resource protection area for development purposes, but allowing some encroachment for agriculture and silviculture activities, violate the Equal Protection Clause of the Constitution of the United States.

**Response**

It is my opinion that the amendments by the Chesapeake Bay Local Assistance Board to its Chesapeake Bay Preservation Area Designation and Management Regulations do not violate the Equal Protection Clause of the United States Constitution.

**Facts**

The Chesapeake Bay Preservation Act<sup>1</sup> creates the Chesapeake Bay Local Assistance Board.<sup>2</sup> The Act requires the Board to adopt regulations designed to protect the Chesapeake Bay, primarily through regulation of land use in Tidewater Virginia designed to protect water quality.<sup>3</sup> Localities in Tidewater Virginia<sup>4</sup> must adopt zoning ordinances consistent with the Act and Board regulations.<sup>5</sup> The Board is responsible for ensuring that local zoning ordinances comply with the Act.<sup>6</sup>

The Chesapeake Bay Local Assistance Board has adopted comprehensive amendments to the Chesapeake Bay Preservation Area Designation and Management Regulations.<sup>7</sup> Among other revisions, the Board adopted amendments to the regulation setting forth the development criteria for Resource Protection Areas.<sup>8</sup> The buffer area requirements adopted by the Board provide for 100-foot buffer areas landward of areas designated as Resource Protection Areas.<sup>9</sup> Buffer areas are intended to minimize the adverse effects of human activities on Resource Protection Areas,<sup>10</sup> as well as on state waters and aquatic

life.<sup>11</sup> The regulations allow encroachments into buffer areas for agricultural and silvicultural activities when the latter are conducted in accordance with best management practices.<sup>12</sup> The provisions allowing encroachment upon the 100-foot buffer area for agriculture and silviculture are not new. Before the amendments were adopted, the regulations allowed encroachments upon the 100-foot buffer area for agriculture and silviculture activities under certain conditions while limiting encroachments for certain other types of activities or development.<sup>13</sup> The amendments did not substantively change what activity or development is allowed within the 100-foot buffer area.

Best management practices<sup>14</sup> generally involve the use of nutrient management plans, including soil tests, and erosion and pest chemical control practices, to achieve stated acceptable levels of water quality protection.<sup>15</sup>

### **Applicable Law and Discussion**

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides that states cannot "deny to any person ... the equal protection of the laws." Often, a decision made by a governmental agency or official affects some group at the expense of another or creates one or more classifications. The Supreme Court of the United States and the Supreme Court of Virginia have established judicial standards for gauging the proper limits on governmental-established classifications, and have recognized that these standards must grant the wide latitude needed for the daily management of effective government while prohibiting illegal discrimination, the effects of which fall too heavily on individuals or identifiable groups of individuals.<sup>16</sup> The Equal Protection Clause does not require government to refrain from making classifications. "[A] statutory classification that neither employs inherently suspect distinctions nor burdens the exercise of a fundamental constitutional right will be upheld if the classification is rationally related to a legitimate state interest."<sup>17</sup>

The Equal Protection Clause was intended as a restriction on state legislative action inconsistent with elemental constitutional premises.<sup>18</sup> The Equal Protection Clause directs that "all persons similarly circumstanced shall be treated alike."<sup>19</sup> But so, too, "[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same."<sup>20</sup> "A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality."<sup>21</sup> It is not uncommon for "regulations [to] define groups to which they apply or to which benefits are conferred and when any such group is defined, of necessity, the regulation favors or disadvantages other groups."<sup>22</sup> When a classification is challenged upon equal protection grounds, "if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed."<sup>23</sup> An equal protection analysis "does not demand for purposes of rational basis review that a legislature or governing decision-maker actually articulate at any time the purpose or rationale supporting its classification."<sup>24</sup> The party challenging such a classification "must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary."<sup>25</sup>

There are no suspect classes or fundamental rights affected by the amendments made by the Chesapeake Bay Local Assistance Board to its regulations. Therefore, a rational basis analysis is appropriate in reviewing the amendments. Under Virginia law, regulations, like statutes<sup>26</sup> and ordinances,<sup>27</sup> carry with them a presumption of validity that courts are required to recognize.<sup>28</sup> As noted, an

analysis under the Equal Protection Clause does not require specific findings by the Board that the best management practices of one form of economic activity are inferior to another form of activity. Under a rational basis review, as long as there is a conceivable set of facts to support the classifications of a statute or regulation that are rationally related to a legitimate state interest, the challenged statute or regulation does not violate the Equal Protection Clause.

You question whether the amendments to the regulations violate the Equal Protection Clause since the Board has made no findings that best management practices for residential development within the Resource Protection Areas are inferior to best management practices employed for agricultural and silvicultural development within those areas. It is not difficult to discern a legitimate state interest to which the amendments relate. Environmental protection in the form of improving water quality, particularly as it relates to the Chesapeake Bay, is a vital and legitimate interest of the Commonwealth. The Act's purpose is protecting the water quality of the Chesapeake Bay and its tributaries.<sup>29</sup>

The amendments adopted by the Chesapeake Bay Local Assistance Board appear to be related to the purpose of protecting the water quality of the Chesapeake Bay and its tributaries. The amendments make a distinction between more permanent development and agricultural and silvicultural development of property located in the 100-foot buffer within a Resource Protection Area. The Board might have considered any number of factors for making a distinction between the two forms of development. There is no requirement that the Board make a specific finding that the best management practices for agricultural and silvicultural activities are superior to best management practices for residential development. As long as the factors are rationally related to improving water quality, the differences between agricultural or silvicultural activities and more permanent development are sufficient to permit the differing treatment with respect to encroachments into the buffer area.<sup>30</sup> For example, while construction generally results in permanent and impervious coverage of the land, agriculture and silviculture are ongoing, renewable economic activities that generally result in temporary land disturbance. In addition, implementation of best management practices for agricultural and silvicultural development on such lands may accomplish more pollution reduction than would a full 100-foot buffer area. Consequently, there appears to be a cognizable basis for the differing treatment of the two activities. As such, the differing treatment appears to be rationally related to the legitimate interest of improving water quality and protecting the Chesapeake Bay.

### **Conclusion**

Accordingly, it is my opinion that the amendments by the Chesapeake Bay Local Assistance Board to its Chesapeake Bay Preservation Area Designation and Management Regulations do not violate the Equal Protection Clause of the Constitution of the United States.

<sup>1</sup>Va. Code Ann. §§ 10.1-2100 to 10.1-2116 (Michie Repl. Vol. 1998).

<sup>2</sup>Section 10.1-2102.

<sup>3</sup>Section 10.1-2107.

<sup>4</sup>The counties that comprise Tidewater Virginia include Northumberland County. Section 10.1-2101 (defining "Tidewater Virginia").

<sup>5</sup>Section 10.1-2109(C); see also § 10.1-2109(E) (authorizing localities to incorporate penalties into their zoning ordinances for violation of such ordinances).

<sup>6</sup>Sections 10.1-2103(8).

<sup>7</sup>See 18:9 Va. Regs. Reg. 1196 (Jan. 14, 2002) (effective Mar. 1, 2002) (codified at 9 VAC 10, ch. 20 (West Supp. 2002)).

<sup>8</sup>9 VAC 10-20-130.

<sup>9</sup>9 VAC 10-20-130(3).

<sup>10</sup>"*Resource Protection Area*" means that component of the Chesapeake Bay Preservation Area comprised of lands adjacent to water bodies with perennial flow that have an intrinsic water quality value due to the ecological and biological processes they perform or are sensitive to impacts which may result in significant degradation to the quality of state waters." 9 VAC 10-20-40; see also 9 VAC 10-20-80.

<sup>11</sup>See 9 VAC 10-20-130(3).

<sup>12</sup>9 VAC 10-20-130(5)(b)(1)-(3).

<sup>13</sup>See 9 VAC 10-20-130(B) (Law. Coop. 1996).

<sup>14</sup>"*Best management practice*" means a practice, or combination of practices, that is determined by a state or designated area-wide planning agency to be the most effective, practicable means of preventing or reducing the amount of pollution generated by nonpoint sources to a level compatible with water quality goals." 9 VAC 10-20-40.

<sup>15</sup>9 VAC 10-20-130(5)(b)(1), (2).

<sup>16</sup>Although the Constitution of Virginia does not contain an equal protection clause similar to that found in the Fourteenth Amendment of the United States Constitution, the antidiscrimination clause in Article I, § 11 and the prohibition against special legislation in Article IV, § 14 of the Virginia Constitution provide analogous limitations on legislative authority. Neither of these constitutional provisions, however, provides broader rights than those guaranteed by the Fourteenth Amendment. See *Boyd v. Bulala*, 647 F. Supp. 781 (W.D. Va. 1986); *Archer and Johnson v. Mayes*, 213 Va. 633, 638, 194 S.E.2d 707, 711 (1973); see also 1987-1988 Op. Va. Att'y Gen. 397, 400 n.1.

<sup>17</sup>*Star Scientific Inc. v. Beales*, 278 F.3d 339, 351 (4<sup>th</sup> Cir. 2002).

<sup>18</sup>2000 Op. Va. Att'y Gen. 29, 30.

<sup>19</sup>*Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

<sup>20</sup>*Tigner v. Texas*, 310 U.S. 141, 147 (1940).

<sup>21</sup>*Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911).

<sup>22</sup>*Greenville Women's Clinic v. Bryant*, 222 F.3d 157, 172 (4<sup>th</sup> Cir. 2000), *cert. denied*, 531 U.S. 1191 (2001).

<sup>23</sup>*Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. at 78.

<sup>24</sup>*Nordlinger v. Hahn*, 505 U.S. 1, 15 (1992).

<sup>25</sup>*Lindsley*, 220 U.S. at 79.

<sup>26</sup>See, e.g., *Taylor v. Worrell Enterprises*, 242 Va. 219, 221, 409 S.E.2d 136, 137 (1991) (stating that presumption of validity that attaches to statute requires court to resolve any reasonable doubt as to its constitutionality in favor of its legality if possible).

<sup>27</sup> See, e.g., *Board of Supervisors v. Stickle*, 263 Va. 1, 6, 556 S.E.2d 748, 751 (2002) (according presumption of validity to action taken by county board of supervisors pursuant to its zoning ordinance); *Board of Tuckahoe Ass'n v. City of Richmond*, 257 Va. 110, 116, 510 S.E.2d 238, 241 (1999) (holding that tax classifications, like ordinance in which they are found, are presumptively valid).

<sup>28</sup> See *Water Control Bd. v. Appalachian Power*, 9 Va. App. 254, 259, 386 S.E.2d 633, 635 (1989) (stating that interpretation and enforcement of water quality standards and stream designation by Water Control Board are presumed valid), *aff'd*, 12 Va. App. 73, 402 S.E.2d 703 (1991) (en banc); see, e.g., *Virginia Real Estate Board v. Clay*, 9 Va. App. 152, 160, 384 S.E.2d 622, 626 (1989) (holding that regulations requiring real estate broker to disclose to prospective purchasers information affecting character or condition of property served statutory purpose of full disclosure when dealing with public and was proper exercise of Board's authority to regulate licensed brokers).

<sup>29</sup> See § 10.1-2100(A).

<sup>30</sup> Although your request appears to treat the regulations as providing differing treatment between groups of property owners, it is clear from the language of 9 VAC 10-20-130(3) and 5(b) that they are based not on the identity or any characteristic of the individual owner but entirely on the type of activities to be conducted on the land.

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