



# COMMONWEALTH of VIRGINIA

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The Honorable Thomas Davis Rust  
Member, House of Delegates  
Herndon Town Hall  
730 Elden Street  
Herndon, Virginia 20170

Dear Delegate Rust:

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 inquire whether a locality may institute a policy or plan mandating that compensatory mitigation for impacts to wetlands or streams occurring within the locality be performed within the boundaries of the locality. You also ask whether a locality may accept a voluntary proffer from an applicant requiring that compensatory mitigation occur within the boundaries of that locality and incorporate the proffer into the locality's zoning ordinance.

## Applicable Law and Discussion

Environmental impacts to streams and wetlands within the Commonwealth are subject to regulation under the federal Clean Water Act<sup>1</sup> as well as Virginia's State Water Control Law.<sup>2</sup> Both laws generally prohibit the disturbance of a wetland or stream without first obtaining a permit from the U.S. Army Corps of Engineers and the State Water Control Board ("Board").<sup>3</sup> All permits issued must contain "requirements for compensating impacts on wetlands."<sup>4</sup> These requirements are intended to offset the adverse effects of human activity and development on streams and wetlands. Every permit holder is required to meet all applicable federal and state mitigation requirements.

Your inquiry involves state mitigation requirements. State law provides a number of different mechanisms for satisfying mitigation requirements.<sup>5</sup> They include "(i) wetland creation or restoration, (ii) purchase or use of mitigation bank credits pursuant to § 62.1-44.15:23, (iii) contribution to the

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<sup>1</sup> See 33 U.S.C. § 1344 (2012) (part of the Clean Water Act).

<sup>2</sup> See VA. CODE ANN. §§ 62.1-44.15:20 through 62.1-44.15:23.1 (2014).

<sup>3</sup> Section 62.1-44.15:20(A) (providing it is unlawful to disturb a wetland except "in compliance with an individual or general Virginia Water Protection Permit" issued by the Board); see also 33 U.S.C. § 1311(a) (2012).

<sup>4</sup> Section 62.1-44.15:21(B); 33 C.F.R. § 332.3.

<sup>5</sup> Section 62.1-44.15:21(B).

Wetland and Stream Replacement Fund established pursuant to § 62.1-44.15:23.1 . . . , or (iv) contribution to a Board-approved fund dedicated to achieving no net loss of wetland acreage and functions.”<sup>6</sup>

With respect to the location of mitigation efforts, the State Water Control Law places certain geographic requirements on the use of mitigation bank credits.<sup>7</sup> Moreover, any mitigation effort performed under § 62.1-44.15:21(B)(i) must generally be sited within the same watershed as the impacted site.<sup>8</sup> However, nothing in state law or regulation requires that mitigation be performed within the particular locality affected by the adverse impacts.

Indeed, the General Assembly has passed legislation prohibiting localities from intruding upon the Board’s oversight of mitigation activities. As originally enacted, § 62.1-44.15:20(E) provided that “[n]o locality may impose wetlands permit requirements duplicating state or federal wetlands permit requirements.”<sup>9</sup> In 2010, the General Assembly clarified the scope of the restriction by stating that the prohibition extends to the location of mitigation efforts.<sup>10</sup> In its current form, § 62.1-44.15:20(E) now provides that:

[N]o locality shall impose or establish by ordinance, policy, plan or any other means provisions related to the location of wetlands or stream mitigation in satisfaction of aquatic resource impacts regulated under a Virginia Water Protection Permit or under a permit issued by the U.S. Army Corps of Engineers pursuant to § 404 of the Clean Water Act.<sup>11</sup>

In analyzing this limitation, I note that Virginia follows the Dillon Rule, which “provides that municipal corporations have only those powers that are expressly granted, those necessarily or fairly

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<sup>6</sup> *Id.*

<sup>7</sup> Section 62.1-44.15:23 (providing generally that mitigation bank credits may only apply when the “bank is in the same fourth order subbasin, as defined by the hydrologic unit boundaries of the National Watershed Boundary Dataset or by the hydrologic unit system or dataset utilized and depicted or described in the bank’s approved mitigation banking instrument, as the impacted site, or in an adjacent subbasin within the same river watershed as the impacted site”).

<sup>8</sup> With respect to compensatory mitigation performed under § 62.1-44.15:21(B)(i), the Board’s regulations require that the Board analyze whether off-site mitigation is appropriate. Such analysis must include a comparison of the impacted and preferred mitigation sites and must address certain criteria, including, but not limited to: water quality benefits; acreage of impacts; distance from impacts; hydrologic source and regime; watershed; functions and values; vegetation type; soils; constructability; timing of compensation versus impact; property acquisition; and cost. However, these criteria do not dictate that the compensatory mitigation site be located in a particular locality. *See* 9 VA. ADMIN. CODE § 25-210-116(B)(1)-(2); *see also* VA. DEP’T OF ENVRTL. QUALITY, GUIDANCE MEMO NO. 09-2004 – APPLYING COMPENSATORY MITIGATION PREFERENCES PROVIDED IN THE EPA MITIGATION RULE TO VA. WATER PROT. PERMITTING at 8 (March 19, 2004) (stating that Virginia Water Protection Permit Program staff should support a watershed approach which requires that compensatory mitigation generally be sited only within the same watershed as the impacted site). Similarly, federal regulations require only that compensatory mitigation be performed within the same watershed as the impacted site. *See* 33 C.F.R. 332.3(b)(1) and (c) (requiring that the U.S. Army Corps of Engineers utilize a watershed approach where the ultimate goal is to maintain and improve the quality and quantity of aquatic resources within watersheds through strategic selection of compensatory mitigation sites).

<sup>9</sup> Section 62.1-44.15:20(E) (2009) (previous version of statute).

<sup>10</sup> *See* 2010 Va. Acts ch. 233.

<sup>11</sup> Section 62.1-44.15:20(E) (2014).

implied from expressly granted powers, and those that are essential and indispensable.”<sup>12</sup> In addition, a corollary to the Dillon Rule restricts the powers of local governing bodies to those that are “fixed by statute,” and limits their powers “to those conferred expressly or by necessary implication.”<sup>13</sup> In keeping with the precepts of the Dillon Rule, where the General Assembly expressly limits the power of a locality, rather than enabling it, the express limitation must be given effect.<sup>14</sup>

Further, the language of the limitation in § 62.1-44.15:20(E) is plain. The statute clearly forbids a “locality,” by whatever means, from establishing the “location” of any required mitigation activities.<sup>15</sup> Where a statute is unambiguous, courts will hold that the plain meaning of the statute controls. Stated differently, “[t]he manifest intention of the legislature, clearly disclosed by its language, must be applied. There can be no departure from the words used when the intention is clear.”<sup>16</sup> Here, the restrictive language in the statute, coupled with the powers granted to the Board to oversee mitigation projects, makes clear the General Assembly’s intent that the comprehensive regulatory scheme established by the State Water Control Law cannot be intruded upon by localities. Accordingly, it is my opinion that localities are prohibited from requiring that mitigation efforts for impacts to wetlands or streams be performed within the boundaries of the locality.

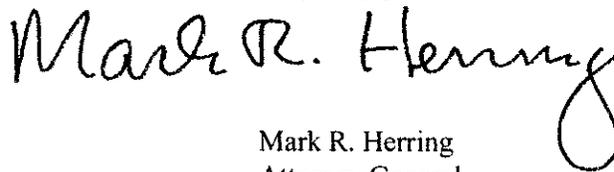
This prohibition extends to voluntary proffers as well. Proffers, once accepted by a locality, “become conditions of the rezoning and, once entered into law, the conditions become zoning regulations.”<sup>17</sup> In other words, by accepting the proffer, the locality effectively adopts an “amendment to the zoning ordinance” incorporating the proffer into the ordinance.<sup>18</sup> Thus, the proffer adoption would constitute establishment “by ordinance” of provisions related to the location of wetlands or stream mitigation prohibited by the provisions of § 62.1-44.15:20(E).

#### Conclusion

Accordingly, it is my opinion that § 62.1-44.15:20(E) prohibits a locality from instituting a policy or plan mandating that mitigation for impacts to wetlands or streams occurring within that locality be performed within the boundaries of the locality. This prohibition includes acceptance of a voluntary proffer from an applicant relating to the location of compensatory mitigation.

With kindest regards, I am

Very truly yours,



Mark R. Herring  
Attorney General

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<sup>12</sup> See, e.g., *Bd. of Zoning Appeals v. Bd. of Supvrs.*, 276 Va. 550, 553-54 (2008).

<sup>13</sup> *Bd. of Supvrs. v. Horne*, 216 Va. 113, 117 (1975) (citations omitted).

<sup>14</sup> See *The Lamar Co., LLC v. City of Richmond*, 287 Va. 348, 352 (2014) (“[R]estrictive legislation limits the power of local governments.”).

<sup>15</sup> Section 62.1-44.15:20(E).

<sup>16</sup> *Barr v. Town & Country Props., Inc.*, 240 Va. 292, 295 (1990) (citations omitted).

<sup>17</sup> *Town of Leesburg v. Long Lane Assocs. Ltd. P’ship*, 284 Va. 127, 137 (2012).

<sup>18</sup> *Id.* at 136.