

State Water Commission
Thursday, July 9, 2009, 10:00 a.m.
9th Floor Appropriations Room
General Assembly Building

Chairman Harvey Morgan began the meeting by discussing his hopes that the Commission could review important issues related to water supply and translate its efforts into meaningful legislation. Although Virginia has been a water-rich state, the preservation of the aquifers is critical for the state's future.

Staff then discussed the agenda and background materials provided to the members. Such materials included copies of the major water supply laws: the Ground Water Management Act, the Virginia Water Protection Permit Program (VWP), the Surface Water Withdrawal Permit, and § 62.1-44.38:1 of the Code of Virginia, which required the State Water Control Board to establish a comprehensive water supply planning process with stakeholders.

David Paylor, Director of the Department of Environmental Quality (DEQ), provided the Commission with an overview of the water supply planning efforts initiated by the drought that took place throughout the Commonwealth from 1999 through 2002. This drought was caused primarily by the lack of rainfall during the periods from October through March, which is the time of the year that precipitation recharges groundwater. Several dry winters and a very dry summer resulted in an exceptional drought in 2002. The drought was very severe and numerous systems were close to failure—public health was in danger and public water supplies were in complete crisis. In 2002 and 2003, executive and legislative responses led to the establishment of a Drought Response Technical Advisory Committee (TAC), local and regional water supply planning regulations, and changes to the VWP. The TAC included over 30 members from varied industries and met over a period of 18 months. Mr. Paylor stressed to the Commission that, in his opinion, the TAC represents one of the most successful efforts of stakeholder involvement with which he has participated. The TAC issued a consensus report that eventually resulted in regulatory changes to water supply planning and water withdrawal permitting. The water supply planning strongly encourages localities to work together. Mr. Paylor hopes that the plan, when completed, will be able to identify areas of conflict among localities. DEQ hopes to facilitate resolution of conflicts, but will not have regulatory oversight.

Delegate Morgan asked for clarification as to whether localities must coordinate or cooperate with each other. Mr. Paylor responded that cooperation was encouraged but not required. Senator Ruff asked if there were criteria to determine which uses take precedence over others. Mr. Paylor responded that the Ground Water Management Act included the policy that public drinking water took precedence over other uses, but agreed that this was a tough question and that the potential for conflict remains. Senator Ruff stated his concerns that rural areas would be overlooked in favor of high-growth areas. Mr. Paylor noted his sympathy with this concern and explained that, while the

riparian doctrine controlled uses of surface waters, the doctrine of prior appropriation would control withdrawals of groundwater. As a result, development in some areas could be limited. Senator Ticer expressed her hope that local government would consider the availability of water during zoning and redevelopment planning. Delegate Morgan expressed his hope that the Commonwealth would take advantage of water reuse and reclamation. Mr. Paylor agreed with both comments. Delegate O'Bannon agreed with the concerns of Senator Ruff and hoped that a hierarchy of uses could be developed so that the water supply issues could be adequately addressed. Delegate Wright asked about the interbasin transfer of water from John H. Kerr Reservoir between Virginia and North Carolina. Mr. Paylor responded that the TAC considered that issue to be a legal one and that negotiations were ongoing among members of a bi-state commission. Delegate Lohr asked for a characterization of the water supply planning in the Commonwealth relative to other states. Mr. Paylor responded that most states on the East Coast have been grappling with the same issues. Most states place most of the responsibility in localities. South Carolina attempted to create a more directive and centralized process that has not proven to be successful. Delegate Bulova brought up the division in interests between rural and urban areas. In particular, he noted the problem that might arise when localities project development too far out in the future and the ramifications if the locality were to downgrade such development. Mr. Paylor agreed that this issue was of concern and that localities would like clarification on this issue. Delegate O'Bannon asked if DEQ was comfortable with the efforts by the localities to monitor groundwater levels. Mr. Paylor responded that this is a real concern due to the technical difficulties to assessing aquifer levels west of I-95 (the nature of the geology in the Commonwealth provides more comfort east of I-95). This is an overriding theme and the state cannot assume that groundwater levels will remain available in perpetuity and should not be too optimistic. Mr. Icenhour responded back to the zoning issues that have been brought up by other members and noted that James City County may already be zoned to such an extent its water supplies are exhausted. He hoped that the political will would exist at the local level to deal with this issue. Senator Ruff stated that federal law would control interstate disputes and asked whether DEQ has coordinated with the federal government. Mr. Paylor agreed that there are many federal agencies with regulatory jurisdiction of water issues and that DEQ interacts with these agencies routinely. Delegate Saxman suggested that the Commonwealth look at the Great Lakes Compact as an example for a procedural approach.

Thomas Botkins, a representative of the Virginia Manufacturer's Association (VMA) and member of the TAC, spoke to the Commission on a stakeholder's view of the TAC process. The TAC was professionally facilitated and included participants from conservation interests, agriculture, trade organizations, power generation, regional interests, local and regional utility managers, the Army Corps of Engineers, U.S.G.S., and academia. VMA began the process with concerns as to whether the water supply planning process would threaten ongoing water usage needs and supported the final regulation. Concerns remain that final water supply plans will overextend available supply. VMA hopes that all will have a reasonable and sustainable water supply and that any changes are publicly vetted.

Scott Kudlas, Director of the Office of Surface and Groundwater Supply Planning at DEQ, spoke to the Commission on the specifics of program implementation and emerging needs. Also, in response to earlier discussion, Mr. Kudlas noted that the Commonwealth (i) has entered into compacts for interstate water use; (ii) is a member of bi-state commissions for shared water supplies; and (iii) adopted a cooperative and consensus-building process for water supply planning. Mr. Kudlas emphasized that the State Water Resources Plan will not resolve conflicts among users or determine who gets a permit for withdrawal. Furthermore, localities do not need to include project alternatives in the approved plan in order to be permitted.

Senator Ticer asked if Planning District Commissions participated in water supply planning. Mr. Kudlas responded that there was no direct participation (although many plans are indeed regional efforts), but results are sent to such organizations. Staff asked how the state plan, which will contain all of the local plans, will address conflicting demands to a waterway. Mr. Kudlas responded that DEQ does not have the authority to resolve conflict among the plans and that the permit process stands alone to control water withdrawals. Mr. McEvoy stated that the Commonwealth should take the responsibility to resolve the conflicts discussed earlier between rural and urban areas. Staff further asked for clarification between planning and permitting. Mr. Kudlas and Mr. Paylor stated that the State Water Control Board cannot use the water supply plan as justification to deny a permit. Delegate Morgan stated that, under current law, permits cannot be equitably denied if all formalities have been met. Delegate Bulova asked how other states have dealt with conflicts and whether a mediation process would be appropriate. Mr. Kudlas responded that the State Water Control Board could require mediation in certain instances such as water supply conflict. Furthermore, all parties should be aware that the courts could ultimately enter to resolve any outstanding conflicts.

Mr. Kudlas continued and noted that the statewide planning effort is a shift from strictly local planning to regional interdependence. It is a data-intensive process that requires in excess of \$1 million for adequate completion. Those funds have been cut to less than \$400k. The local plans have a number of strengths, but weaknesses remain. Localities may not be comfortable with their new role and may not have the capacity to collect the necessary data. Furthermore, as the de facto vendors of drinking water, localities may equate "water conservation" with "lost revenue."

Delegate Morgan expressed his concern that the desire to sell water might interfere with the resource planning process.

Mr. Kudlas further pointed out a number of policy limitations in the Commonwealth. First, unlike other neighboring states, Virginia has not had a stated policy to promote and facilitate the development of basic data to characterize water resources to determine surface and groundwater resource availability statewide. Second, water supply is a state and local responsibility—there are no federal mandates for this effort and funding is solely state general fund money. Third, state budget cuts have a greater impact on water resource programs than programs with federal funding or mandates. Finally, there is no

clear legislative policy to manage the relationships among the several agencies with jurisdiction over resource data.

Delegate Morgan asked for clarification on the conflicts of data management among agencies. Mr. Kudlas noted that well construction data in particular has been difficult to obtain. The data is maintained on paper in local health departments and he hopes that the data could be automated. The Department of Health has not had the resources to compile, automate, or transfer the documents to DEQ.

Mr. Kudlas continued his presentation and stated the importance of the question "how much groundwater do we have?" It is a question that cannot be clearly answered anywhere in Virginia. Groundwater monitoring capability peaked in the 1980s and has been limited ever since by dwindling investment and out-of-date modeling tools. The data is critical to avoid subsidence. (Subsidence is the non-reversible collapse of an aquifer from excessive water extraction.) Future issues for ground water planning might include (i) the unregulated withdrawals from domestic use; (ii) the conflicts between states; and (iii) the need to develop dynamic regional flow models.

Delegate Morgan asked whether the inadequate data collection has resulted from a lack of resources or policy. Mr. Kudlas responded that there is both a clear need of funding and statutory responsibility. For example, DEQ has entered all of the data obtained prior to 1991, which covered 38,000 wells. There are at least two million wells in the Commonwealth and DEQ has not been able to access subsequent records from the Department of Health. The information is important to establish the extent of the aquifer and identify subsidence risk.

Mr. Kudlas also stated the importance of answering the question "how much surface water do we have?" The answer to this question is better known than with groundwater, but surface water monitoring capability has also been in decline since the 1980s. There is a limited understanding of agricultural uses and a lack of certainty on the amount of water taken by grandfathered withdrawals. Agricultural use can be difficult to measure because farmers are generally not forthcoming. While it is unlikely that there will be a conflict with agricultural use, more information is needed to ensure adequate minimum flows in most years. Furthermore, there is a great lack of certainty in the quantity of withdrawals from grandfathered uses. DEQ has asked the grandfathered users (all users prior to 1989) to report on their maximum capacity, but response has been disappointing. Future issues for surface water planning might include (i) the need to better understand agricultural use; (ii) the balancing of water supply among uses; and (iii) the need to improve water withdrawal reporting to include return flows sales, and transfers and real measurements. Mr. Kudlas added that, for all the areas where data is incomplete, resource managers are forced to be over cautious to preserve the resource.

Delegate Bulova asked whether there were legislative issues that the Commission might consider and hoped that the members would be able to examine a matrix of initiatives and accompanying costs. He also hoped that the Commission could consider the costs of capital infrastructure needed to improve water quality at future meetings. Delegate

Morgan concurred and hoped that the Commission could discuss legislative initiatives, whether for the 2010 or 2011 Session of the General Assembly. The Water Commission will meet again at least once during the current interim. Delegate O'Bannon asked about the grandfathered users and expressed concern that so few had responded to the request for further information. He asked whether the TAC has considered bringing such users back under regulation. Mr. Kudlas responded that there was not significant support for such an effort. Staff offered to provide the members with a list of grandfathered users in the near future.

Andrea Wortzel of Hunton & Williams provided the Commission with a review of concerns held by stakeholders. First, the priority of uses found in statute and at common law is not clear and may be in conflict. Second, the impacts of water supply planning on permitting should be identified. Third, water reuse and the distinction between consumptive and nonconsumptive uses should be taken into greater consideration. Finally, the planning process itself should be reviewed to ensure seamless implementation and coordination among partners. Ms. Wortzel suggested that it might be helpful to have a joint meeting between the Water Commission and the State Water Control Board and hoped that the Commission would utilize stakeholder committees to review potential actions.

Delegate Morgan thanked Ms. Wortzel for her comments and assured her that the Commission would be taking the needed actions to resolve the problems brought to its attention. Delegate Bulova also thanked Ms. Wortzel and noted that the time is ideal for synergies between water supply planning and stormwater regulation. Delegate Morgan thanked the Commission for its attendance and adjourned the meeting.