

Electronic Meetings Subcommittee of the FOIA Council
Meeting Summary
June 9, 2008
House Room C, General Assembly Building
Richmond, Virginia

The Electronic Meetings Subcommittee held its first meeting on June 9, 2008.¹ This meeting was called to study changes made by the 2008 Session of the General Assembly that would allow members of the State Air Pollution Control Board (Air Board) and the State Water Control Water Board (Water Board) to meet via teleconference under certain circumstances (HB 1332 (Landes)/SB 423 (Puckett)). While this issue was not the central thrust of HB 1332/SB423, these specific provisions conflicted with the FOIA provisions for teleconferences and electronic meetings. Delegate Landes and Senator Puckett were invited to attend today's meeting, but neither was able to do so.

The meeting opened with a brief presentation by staff contrasting the electronic meetings requirements set forth in the Virginia Freedom of Information Act (FOIA) with the changes made by HB 1332/SB 423. Generally, electronic meetings held under § 2.2-3708 require that all locations from which members participate must be open to the public. By contrast, provisions in HB 1332/SB 423 provide that either Board, when holding an electronic meeting, "shall have at least one forum open to the public and individual Board members may participate from any location regardless of whether it is open to the public."² FOIA also requires that "a quorum of the public body is physically assembled at one primary or central meeting location" in order to hold an electronic meeting. In contrast to this FOIA requirement, provisions of HB 1332/SB 423 would allow public hearings to be held by "less than a quorum of [each] Board," which may be interpreted to imply that these Boards may hold electronic meetings without first physically assembling a quorum.³

Cindy Berndt, representing DEQ, presented a brief history regarding these bills. She indicated the original version would have entirely removed permitting authority from the Air and Water Boards, as well as the Virginia Waste Management Board (Waste Board). The version that passed is a compromise agreed to by the various interested parties. The meetings provisions at issue⁴ were only meant to apply to a review of a

¹ Chairman Edwards, and Msrs. Axelle, Miller, and Fifer were present; Senator Houck was absent.

² Subsection D of § 10.1-1322.01, regarding the State Air Pollution Control Board, and subsection D of 62.1-44.15:02, regarding the State Water Control Board (both "subsection D" hereinafter). Both use identical language, which reads in full as follows: *Either the Director or a majority of the Board members, acting independently, may request a meeting of the Board to be convened within 20 days of the Director's decision pursuant to subsection C in order to review such decision and determine by a majority vote of the Board whether or not to grant a public hearing or Board consideration, or to delegate the permit to the Director for his decision. For purposes of this subsection, if a Board meeting is held via electronic communication, the Board shall have at least one forum open to the public and individual Board members may participate from any location regardless of whether it is open to the public.*

³ Subsections J, M, and O of § 10.1-1322.01 (regarding the State Air Pollution Control Board) and subsections J, M, and O of 62.1-44.15:02 (regarding the State Water Control Board).

⁴ Note that these provisions apply only to the Air and Water Boards, not the Waste Board.

decision whether to hold a public hearing made by the Director of DEQ. These meetings are not intended to address any other business of the Boards. Ms. Berndt indicated that the law requires such decisions to be reviewed within 20 days, and that five days notice is required before the review, making scheduling difficult. Additionally, members of the Air and Water Boards are located all over the state and these review meetings may only last for a brief time, making it wasteful for members to travel for hours for what may be only a ten-minute meeting. In response to questions from the Subcommittee, Ms. Berndt also clarified that it is a typical procedure, based on current regulations, for public hearings to be held by a single member who takes comments from the public and then later presents the findings to a full Board for a final decision (members of the public also have the opportunity to address the full Board). The "less than a quorum" language in the bills is meant to reflect this practice, not to imply that the Boards would hold electronic meetings with less than a quorum present. In response to questions from the Subcommittee, Ms. Berndt also indicated it may be possible to have members participate from regional offices that are equipped with the necessary electronic communications technology and may be opened to the public. Staff pointed out that the confusing language is the reference to "regular or special meetings" in the context of these public hearings, as set forth in subsection J of § 10.1-1322.01 and subsection J of 62.1-44.15:02 (both "subsection J" hereinafter).⁵ Ms. Berndt indicated that the intent was not to imply that a single member could hold a Board meeting; the Subcommittee agreed that that language could be fixed.

Next, Alexander Macaulay, Esq., on behalf of the City of Alexandria and several environmental groups, pointed out several concerns addressed in the negotiations that led to this legislation: maintaining the rights of the Boards to vote on controversial permits while recognizing that many permit decisions are routine and do not require a vote by the respective Board; that the law would be over-inclusive resulting in too many public hearings by the Boards on routine permits; and that the Director may be given too much discretion in deciding whether a permit should have a public hearing. Thus the intermediate step was added allowing the Boards to review the Director's decisions, with the 20-day time limit to address concerns over timeliness. He further indicated that his clients would not oppose having these be public meetings.

Joe Tannery, Virginia Deputy Director and Staff Attorney of the Chesapeake Bay Foundation (CBF), next presented a brief description of how the new law differs from the old system. Under the old system, in the water context, there would be a 30-day public comment period, then the Director would decide whether to have a public hearing. If a public hearing was held, it would be held by one Board member and staff who would receive public comment. Subsequently that member would present the results of the public hearing to the full Board, which would then vote on

⁵ Both subsections use identical language which reads, in full, as follows: *Public hearings held pursuant to these procedures may be conducted by the Board at a regular or special meeting of the Board and shall be presided over by a member of the Board. Public hearings may be held before less than a quorum of the Board.*

the permit at a public meeting of the Board. The new legislation changes the process by allowing the Board to review the Director's decision whether to hold a public hearing. CBF supported this legislation in part because it adds this step, providing for additional public participation that did not exist under the old system.

Subcommittee member Bill Axelle indicated that he was on the other side of the negotiations on this issue, but that Mssrs. McCauley and Tannery had summarized it well. From a business and agriculture perspective, for example, if 25 letters from citizens are received by DEQ, it indicates public interest, but leaves the question whether that interest is in the permit itself or other issues. Having the intermediary review by the Board provides a safeguard for both sides.

Ginger Stanley, Executive Director of the Virginia Press Association, pointed out that the bills had several last minute changes with insufficient time to work through all the concerns. While better understanding the intent of this legislation, Ms. Stanley expressed remaining concerns, particularly that this legislation codified a regulation and that others will seek to follow suit, and that an exception was just made last year to the quorum requirement for electronic meetings held in response to an emergency as declared by the Governor, and that the quorum requirement remains a huge issue.

Peter Easter, on behalf of the Virginia Association of Broadcasters, expressed his concern that this legislation may set a precedent that will lead to future problems.

In response to further questions from the Subcommittee, Ms. Berndt clarified that DEQ has eight regional offices from which members might participate in electronic meetings.⁶ She further clarified that under this process, if 25 requests from the public are received and the Director recommends a hearing be held, there are three possible outcomes: (1) the Board may agree (in which case, generally, one Board member holds a public hearing to be followed by a public meeting of the full Board where the Board votes), (2) the Board may agree and have the Director hold a public hearing, or (3) the Board may disagree, deciding that a public hearing is unnecessary (but in her experience this is never the result). As a practical matter, this is a process by which the Board decides whether the public hearing will be held by the Board or by the Director. Ms. Berndt further stated that while the existing regulation was used as a basis for the legislation, the legislation was not specifically intended to codify that regulation. The Subcommittee then discussed with Ms. Berndt how the compromise was reached that resulted in passage of this legislation, and discussed possible alternative language that might better match the requirements of FOIA while still allowing the intended review process.

The Subcommittee decided first to address the "less than a quorum" language used in subsection J in reference to the public hearing procedure.⁷ Staff proposed amended

⁶ The eight regional offices identified are located in Richmond, Glen Allen, Virginia Beach, Abingdon, Roanoke, Lynchburg, Harrisonburg, and Woodbridge.

⁷ See n. 5, *supra*.

language for subsection J that would clarify that the "public hearing" held is not the same as a "public meeting" under FOIA. In response to questions, Ms. Berndt indicated that there could be a public hearing only, at which no action is taken and where a quorum of the Board is not required, or there could be a Board meeting with a public hearing, where action might be taken (which would require a quorum of the Board). The Subcommittee expressed concern that there would be confusion between the public hearing and public meeting provisions. Mr. Fifer moved to suggest language referring to "one or more members of the Board" without mentioning any quorum requirement; Mr. Axselle seconded the motion and suggested adding language clarifying that the public hearing requirements are not the same as public meeting requirements under FOIA. The Subcommittee then voted unanimously to recommend amending subsection J to read as follows: "Public hearings held pursuant to these procedures may be conducted by (i) the Board at a regular or special meeting of the Board or (ii) one or more members of the Board. A member of the Board shall preside over the public hearing."

The Subcommittee then discussed the language of subsection D regarding the procedure for the Board to review the Director's decision whether to hold a public hearing.⁸ Mr. Axselle suggested two changes: (1) the locations should be open to the public, and (2) the language should be amended to clarify that this procedure is only for review of an administrative decision, and no other purpose. Chairman Edwards identified two issues of concern: (1) the deviation from the quorum requirements of FOIA, and (2) that remote locations could be closed to the public. Further discussion among the Subcommittee and with Ms. Berndt clarified that while the wording of subsection D does not specifically refer to any quorum requirements, it was intended that a Board meeting under subsection D would not require a physically-assembled quorum. Mr. Fifer indicated that this is the same challenge faced by other public bodies, and he was unsure that the circumstances here are any more compelling than those facing other public bodies. Mr. Edwards expressed that public meetings are for the public, not for the convenience of public officials. Mr. Fifer moved to remove the final sentence of subsection D. Mr. McCauley indicated his clients would reserve the right to oppose that motion out of concern that DEQ would re-open the entire issue. Mr. Fifer indicated his motion was intended to be consistent with other policy decisions of the FOIA Council, and that politically it might be better to present separate amendments regarding the quorum issue and the issue of remote locations. Mr. Axselle, who had indicated his support for having remote locations open to the public but not for the physically-assembled quorum, suggested having staff work with Ms. Berndt, Ms. Stanley, and other interested parties to try to come up with amended language for this section. Chairman Edwards stated that the Subcommittee was not ready to make a recommendation on subsection D at this time, and so placed the issue on the table until the next Subcommittee meeting. Staff inquired whether the Subcommittee would like to move the amendment to subsection J; this was also held until the next meeting, so that all recommendations can be presented to the full FOIA Council at one time.

⁸ See n. 2, *supra*.

The next meeting of the Subcommittee will be held in House Room D of the General Assembly Building on Tuesday August 5, 2008, following immediately upon adjournment of the FOIA Council meeting.