

## VIMS flooding report makes a splash

By David Malmquist

### Workshop participants cite document as blueprint for state action

(September 17, 2013) Sea-level rise is an incremental process with major long-term impacts. Heavy turnout at a September 13 conference on coastal flooding suggests that Virginia's outlook on the issue is taking a similar trajectory, with years of local meetings and projects now building to the groundswell needed to initiate a state-level response.

The daylong conference, *Adaptive Planning for Flooding and Coastal Change*, drew a capacity crowd of more than 230 elected and military officials, attorneys, scientists, legal scholars, business leaders, and concerned citizens to William & Mary's School of Education. It was organized by the Virginia Coastal Policy Clinic, a partnership between the W&M Law School and the Virginia Institute of Marine Science, with funding from the Virginia Environmental Endowment and Virginia Sea Grant.

State senator and conference speaker John Watkins, a long-time advocate for a statewide response to coastal flooding, noted that an earlier conference on the issue drew a much smaller crowd. Now, he says, "It is time for state government to say there is a problem, and that we need to address it."

Dr. Carl Hershner, conference co-host and Director of the Center for Coastal Resources Management at VIMS, echoes those sentiments. "We were very pleased with the outcome of the conference," he says. "It provided the background—and we hope motivation—needed for state engagement in these issues."

Virginia Secretary of Natural Resources Doug Domenech, who introduced the Conference and its goals, says, "Sea level is rising at 8 inches per century globally, and in Virginia we have to add subsidence. Our coastal communities are feeling the problem, and the administration is ready to be a partner with the General Assembly in what comes out of this workshop."

One of those outcomes, announced by Watkins, is a plan to establish a joint legislative sub-committee of representatives from around the Commonwealth—urban, rural, Hampton Roads, southwestern and Northern Virginia—to draft "a comprehensive plan for how we address this going forward."

Watkins and numerous other conference speakers praised VIMS' 2013 report to the General Assembly—*Recurrent Flooding Study for Tidewater Virginia*—as a bellwether for informing legislators and priming action in



*Tort Claims: Chris Olcott, Virginia Sea Grant Summer Legal Fellow, discusses tort claims with conference attendees. Photo by David Malmquist.*

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future assembly sessions. Watkins says the report and a subsequent visit to Tangier Island by the Senate Finance Committee, “really brought the problem home for me.”

### The most pressing issue

Bringing the problem home to conference participants were a flood of speakers from throughout Tidewater Virginia, including Delegate Chris Stolle of the 83rd District, mayors Paul Fraim of Norfolk, Will Sessoms of Virginia Beach, and Molly Ward of Hampton, and a host of city and emergency managers.

Noting that flooding is now a regular rather than episodic event in his city, Fraim says sea-level rise and coastal flooding is the “most pressing issue for Norfolk and coastal Virginia in the 21 century.”

“Of the 7 major flooding events that have affected Norfolk in the last 80 years,” says Fraim, “4 have occurred in the last 10 years. We now regularly experience flooding during lunar high-tide cycles, which was unheard of just a few years ago... The problem is real, well-documented, and we have to deal with it.”

Sessoms says “It’s a major issue for all of us.” Given the long-term planning horizons needed to elevate roads, electrical and sewer systems, storm-drains, and other municipal infrastructure, he says “we have a relatively short window of opportunity, 20 to 30 years,” in which to act.

Conference speaker David Bailey, former chief of climate policy for ExxonMobil and now a partner in Element VI Consulting, put that time frame in perspective, noting that one of Europe’s largest flood-control projects—the Thames Barrier near London—was begun in response to a catastrophic 1953 flood but not completed until 1982.

Several other speakers made calls for action as well. David Hansen, Deputy City Manager for Virginia Beach, says “the citizens can not wait, will not wait. Our citizens are already kicking [us] to get [stuff] done. It is past time to transition words to deeds.”

Joseph Maroon, Executive Director of the Virginia Environmental Endowment, compares the situation to parents buying a college plan for their newborn. “With so much at stake here—public safety, infrastructure, tourism, the military, housing, insurance—we’ve got to get started now.” “Everyone’s interests are served by helping those communities that are in the crosshairs,” says Maroon.

David Bookbinder, the other partner in Element VI Consulting and former chief climate counsel for the Sierra Club, says, “Alarmism and complacency both breed inaction. We have room for neither.”

### Legal Issues

Joining the elected representatives at the conference were a number of practicing attorneys and legal scholars, who identified the potential issues involved in local and state-level responses to sea-level rise and coastal flooding—with Dillon’s Rule and the idea of “takings” dominating the discussion.



*A Locality Perspective: Skip Stiles of Wetlands Watch (L) introduces session panelists. From L: Jim Redick, CEM Director, Norfolk Emergency Preparedness and Response; Joseph DuRant, Deputy City Attorney, Newport News; David Hansen, Deputy City Manager, Virginia Beach; and Lewie Lawrence, Executive Director, Middle Peninsula Planning District Commission. Photo by David Malmquist.*

Professor Ron Rosenberg of the W&M Law School says the central point of Dillon's Rule is that local governments—cities and counties in Virginia—“derive their governing power from delegation by the General Assembly.” Thus, steps a locality might take in response to flooding—building a new pump station or widening a resource protection area, for instance—may be vulnerable to legal challenge unless the authority for the action can be shown to flow directly or indirectly from that body.

“Having a clear assessment of the limits of planning and regulatory authority is indispensable to effective action,” says Rosenberg. “For good policy ideas to become effective legislative proposals, they need to be very clear about who does or can do what.”

Shana Jones, Director of the Virginia Coastal Policy Clinic and conference co-host, says, “Local governments have significant existing authority to address current flooding problems, and to establish comprehensive plans and zoning ordinances. But more research is needed to determine to what extent they may act based on projected levels of sea-level rise.”

The discussion of “takings” was led by Lynda Butler, Chancellor Professor at W&M Law School, and Sharon Pandak of Greehan, Taves, Pandak & Stoner, PLLC. The concern is whether restrictions on rebuilding in a flood-prone area following a storm could be construed as the unconstitutional taking of a private landowner's property without just compensation.

Butler says that recent case law indicates government “cannot use the permitting process to demand a property interest for free.” A better approach, she says, is “to consider rolling development restrictions triggered by recurring flooding that substantially interferes with customary use, or to offer economic incentives to stop development sooner rather than later.” Another option, says Butler, is to “remove public subsidies when the flooding significantly raises the cost and danger of providing public services.”

Jones adds, “While many adaptation measures are likely to be constitutionally sound, localities are still likely face the threat of takings claims from private property owners. A 2012 Virginia Supreme Court case may place localities at increased risk for takings liability when private property is damaged due to their failure to maintain a public improvement. We need more research to determine which adaptation measures pose the least and greatest risk for takings liability for localities.”

### **Complex, costly, and important**

Despite the diversity of opinions expressed during the conference, the speakers did agree on at least three things—the complexity, cost, and value of a state-level response to coastal flooding and rising seas.

Fraim says that Norfolk already spends \$7 million each year to address flooding concerns, with a long-term estimated cost of \$1 billion to significantly reduce their vulnerability. “That's more than the city can bear alone,” he says. “We need a full commitment from state and federal partners.”

“Local government can not solve this problem on its own,” echoes Hampton Mayor Molly Ward. “We need to support local politicians so they can go to Richmond, and help them implement change.”

“Fragmented efforts are unlikely to have the impacts necessary to deal with this issue,” adds Maroon. “It's better instead to collectively move forward. Standing still just makes the decisions harder and the options fewer.”

“Water is coming through our citizens' doors,” says Stolle. “The question now is what are we going to do about it.” “Our future does depend on the solutions we come up with to these problems,” says Fraim.