

Stormwater Stakeholder Advisory Group (SAG)

October 19, 2015
Final Meeting Notes²

Location: DEQ Piedmont Regional Office
Training Room
4949-A Cox Road, Glen Allen, VA

Start: 10:10 a.m.
End: 2:15 p.m.

SAG Members Present:

Jim Filson, Dewberry
Michael L. Toalson, HBAV
Philip F. Abraham, VACRE
Bart Thrasher, VDOT
Peggy F. Sanner, Chesapeake Bay Foundation
Chris Pomeroy, Aqua Law
Rick Parrish, formerly SELC/concerned citizen
Larry J. Land, VACO
Lewie Lawrence, MPPDC
Joe Lerch, VML

Whitney Katchmark, HRPDC
L. Eldon James, Jr., Rappahannock River
Austin R. Mitchell, Amherst County
Adrienne Kotula, James River Association
Katie Frazier, Va. Agribusiness Council
Jimmy Edmonds, Loudoun County
Elizabeth A. Andrews, DEQ
James Golden, DEQ
Melanie Davenport, DEQ

SAG Members Absent:

Ann Germain, Paciulli Simmons Associates
Douglas Beisch, Stantec

Facilitator: Mark Rubin, VCU

Recorder: Debra Harris, DEQ

Guests and Public Attendees:

Richard Street, Spotsylvania County
Lisa Turner, CBF
Jack Miller, Middlesex County
Ann Jennings, Chesapeake Bay Commission
Barbara Brumbraugh, City of Chesapeake
Joe Wood, CBF
Jason Ericson, Dominion

Carla Pool, DEQ
Shannon Varner, Troutman Sanders
Debbie Byrd, Goochland County
Chris French, Contech/SWEMA
Fred Cunningham, DEQ
Vivian Giles, Cumberland County
Drew Hammond, DEQ

I. Agenda Item: Welcome and Introductions

Discussion: Mr. Rubin welcomed all to the October 19th meeting of the SAG¹ and asked each attendee to provide a short introduction. After the introductions, Mr. Rubin provided a brief overview of the topics to be discussed today.

II. Agenda Item: Ultra Lite Draft

Discussion: Elizabeth Andrews provided an overview of the draft for the ultra-lite VESMP option that the SAG was considering. For the ultra-lite option, the DEQ would provide the locality with technical assistance plan review and also provide assistance with BMP maintenance and enforcement. This concept was discussed at the last meeting and the localities' SAG representatives took this to their constituencies for discussion. It was reported that the ultra-lite VESMP option was discussed but it was not received well by the current VSMP opt-out localities. In fact, these localities have sent in petitions requesting that the current alternative to opt-out of the stormwater management program, with the DEQ running the VSMP on their behalf, be retained as it is. Copies of the petitions received from about 21 current opt-out localities were distributed to the SAG and an example is provided in Attachment B. DEQ has continued its outreach efforts with opt-out local governments to explain what was going on with the SAG and what the goals of this SAG are in regards to the consolidation effort of the SWM and ESC programs. It was noted that the opt-out localities remain concerned about taking on any further obligations under the consolidated program as it is a resource issue for them. In fact, there was a special meeting of the VACO environment and agricultural steering committee last week attended by DEQ's James Golden and Elizabeth Andrews. VACO values the opt-out alternative that was granted by the 2014 General Assembly and has adopted a statement which was read by Mr. Land. This statement says, "VACO strongly opposes any legislation by the 2016 General Assembly that would amend any or all components of

¹ See Attachment A for Acronym Definitions.

² Finalize 11/24/15

the stormwater management laws that don't fully satisfy the resource and funding needs of the Department of Environmental Quality to administer, enforce and maintain the stormwater management laws. VACO further opposes any legislation that is in conflict with House Bill 1173 and Senate Bill 423 that passed the 2014 GA that would impose any additional mandates or financial burdens on local governments." A concern was raised that the original letter discussing this SAG's goal did not discuss eliminating the VSMP opt-out alternative. In response to this, it was explained that the SAG had discussed having an opt-out option for the consolidated program; however, in order to consolidate the two laws and also allow localities to retain control of their ESC programs, as many localities wished to do, the SAG moved forward with just two options - opt-in and opt-in lite alternatives for the VESMP. In order to retain their local ESC program, localities would need to retain some obligations under the consolidated VESMP which is why the opt-in lite alternative was developed and now to further address the opt-out localities' concerns, the ultra-lite option was developed. Mr. Lewis said that, as noted previously, the current opt-out localities are not likely to accept any option that requires them to do anything more than they currently do.

Based on the discussions, Mr. Rubin noted that the ultra-lite VESMP alternative does not resolve the opt-out localities' concerns and, therefore, it will not be included in the SAG's proposal for draft legislation.

III. Agenda Item: Other Ideas

Discussion: Mr. Rubin asked the SAG to consider other options or ideas on how to consolidate the statutes but that also consider the concerns voiced over the budget issues and the position of the VSMP opt-out localities.

The ideas proposed were:

- Keep the new consolidated VESMA statute but also keep the current articles (SWMA and ESCL), and harmonize them where needed for the opt-out alternative.
- Do not consolidate the articles - just align and harmonize them.
- Keep the consolidated statute but in it, provide an opt-out alternative for localities and have the DEQ implement the VESMP (ESC and SWM) for these localities.
- Deal with the budget issues.
- Keep the consolidated VESMA with opt-in and opt-in lite and also provide an opt-out of the VSMP provision alternative for localities wishing to retain ESC responsibilities.
- Table this issue for a year or two and let the localities and DEQ gain some more experience on how to best implement the requirements of both programs.

During the discussion of these ideas, it was noted that:

- There is a difference of opinion regarding what the law says re: the entity that is responsible for implementing the requirements for the under an acre land disturbance activities in areas that are subject to the CBPA.
- There were concerns with the idea of having an opt-out alternative where DEQ implements the VSMP and the locality implements the VESCP and CBPA provisions. Land disturbing activities align more with planning activities. Planning is accomplished by the local government and many localities want to continue to control these types of programs that have such an effect, including economic effects, on the locality. DEQ does not look at zoning, plats, or local land use issues as those are local concerns.
- Localities need to be involved. Their staff know the contractors and have that local area knowledge which make them the best suited to enforce the requirements because of their proximity to the projects and ability to address problems that may arise in a quicker fashion than the state.
- In order to encourage localities to eventually "opt-in", the opt-in lite alternative should be retained in the consolidated VESMA. In this alternative, DEQ will assist those localities that have little development by providing technical review of the plans while allowing the locality control over providing the final land disturbance approval.
- Developers noted that the concept of "one stop shopping" was a main interest of theirs along with the elimination of duplicative provisions in the law. This interest is shared by localities who were seeking increased economic development by making the land disturbance/development process clearer by harmonizing the stormwater management and erosion and sediment control programs.

- While many localities want to retain control of programs that have an economic impact, some of the localities that have chosen to opt out of implementing a VSMP do not share that same interest. These localities wish to preserve the opt-out alternative.
- Locality representatives also voiced concerns that localities have with the word “authority” when it is used in the context of the stormwater program (i.e., VSMP authority or VESMP authority). The concern with “authority” relates to the idea that EPA could somehow take action directly against the locality that is the stormwater management authority. It was explained that the VSMP is a state program, not a federal program, and the proposed VESMP is also a state program. EPA’s involvement is related to the permitting requirements under the CWA and those are addressed by the permits issued by DEQ (e.g., the construction general permit). When EPA has questions, it is DEQ that they go to as it is DEQ that issued the permit.

The SAG focused on an option that would retain the consolidated VESMA for the current opt-in VSMPs and MS4s and also retain the status quo for the current VSMP opt-out localities, noting that to do so would likely require that the SWMA and the ESCL be retained as separate laws.

The SAG broke for lunch from 12:17 p.m. and reconvened at 1:26 p.m.

III. Agenda Item: Consolidated Article & Opt-Out Alternative Status Quo

Discussion: After lunch, Mr. Rubin summarized the morning discussion. The SAG was discussing the idea of having a consolidated article for MS4s and current VSMP opt-in localities but also retaining the status quo for the current opt-out localities. The SAG was asked to provide comment on this idea.

A main concern with the new proposal was how or if it would address the “donut hole” for the CBPA localities. Prior to discussing this concern, the DEQ staff explained that there are actually two donut holes: (i) in areas subject to the CBPA, the donut hole pertains to those land disturbing activities that are greater than 2,500 ft² and less than 1 acre (1 acre is the permitting criterion); and, (ii) in areas not subject to the CBPA, the “other” donut hole pertains to those land disturbing activities that are greater than 10,000 ft² and less than 1 acre. In accordance with HB1173, land disturbing activities subject to the CBPA that are greater than 2,500 ft² and less than 1 acre are required to comply with erosion and sediment control provisions and the water quantity and water quality technical requirements; and land disturbing activities outside the CBPA that are greater than 10,000 ft² and less than 1 acre are required to comply with erosion and sediment control provisions and the water quantity technical provisions. The opt-in lite alternative of the consolidated VESMA was the “fix” for the donut hole issue as it would assist localities by using DEQ to provide the technical reviews (i.e., review of compliance with the water quantity and, if applicable, water quality technical criteria) of their plans including for those land disturbing activities in the donut hole. With the opt-in lite alternative, the localities do not need to figure out how to address the technical criteria for land disturbing activities as DEQ will do that for them. Mr. Rubin asked the SAG if the opt-in lite provisions of the consolidated article should, therefore, be retained. Most agreed that it provides the main incentive to resolve the donut hole issue created by the 2014 legislation. The developers’ SAG representatives did qualify their agreement that if opt-in lite is retained along with the new status quo opt-out, then the allowance provided for localities to reconsider every five years which VESMP alternative they would implement should be removed and “sliding back” from opt-in to opt-in lite should only be allowed under the proposed emergency situation (e.g., a fiscal crisis).

The next concern addressed was again the concern over EPA’s involvement when a locality is a stormwater “authority.” It was noted that, as previously stated, what the locality is responsible for is the implementation of a state program under state law – it is not the federal program. It was further explained that the word “authority” that is used in the SWMA and the VESMA is not the same as the “delegation of authority” which EPA provides to states that implement its programs. EPA’s delegation of authority is provided under the CWA and is the authority EPA delegates to the states in order to allow the states to issue permits in lieu of EPA. It does not pertain to the locality becoming a VSMP authority under SWMA or a VESCP authority under the ESCL or, possibly, a VESMP authority under the consolidated VESMA. Clarification of this concern will be provided by the DEQ to the SAG members representing the localities.

An issue with the donut hole and the interpretation of who does what was discussed. Some counties do not agree with the DEQ’s statutory interpretation regarding the requirements of the CBPA donut hole. DEQ has noted that it is the locality that is to implement the CBPA or ESCL requirements as is explained in HB1173. However, some counties have argued that by opting out of implementing a

VSMP, they have completely opted out of implementing any stormwater management criteria including those required under the CBPA and the ESCL. As program reviews have not yet been performed, this interpretation issue was only recently discovered and there has been no resolution beyond agreeing to disagree.

There was concern noted that the proposal being discussed would now require three separate programs: (i) VESMP for the MS4s and current VSMP localities; (ii) VSMP for DEQ to implement on behalf of opt-out localities; and, (iii) VESCP to be implemented by opt-out localities. To do so, would likely require three separate articles and associated regulations. DEQ will need to evaluate this option and will need to consider its impact on program resources.

Based on the discussions, the proposed legislation to be drafted for the next meeting will include: (i) a consolidated VESMA for MS4s and the current VSMP localities without an opt-in "ultra-lite" VESMP alternative and deleting the five year schedule allowing localities to change how they implement the VESMP (i.e., opt-in or opt-in lite); (ii) maintaining the SWMA opt-out provisions provided by the 2014 legislation so DEQ will continue to implement the VSMP requirements for localities that had chosen to opt-out of the VSMP, but those localities will continue to regulate CBPA land disturbing activities; and, (iii) keeping the "status quo" VESCP responsibilities as provided under the ESCL for these opt-out localities.

The SAG members were asked to take this new approach back to their constituencies to provide feedback on its viability. Additionally, bullet points on what this proposed legislation will encompass will be provided to assist the SAG members with this effort. The SAG was asked to provide their comments on the consolidated VESMA that includes the opt-in and opt-in lite alternatives (no ultra lite) to Debra Harris within two weeks. The DEQ will continue to work on revising/drafting as noted above to include the opt-out alternative.

The meeting was then adjourned.

Attachment A List of Acronyms

Acronyms:

ACOE – Army Corps of Engineers
BMPs – Best Management Practices
CBPA – Chesapeake Bay Preservation Act
CWA – the Federal Clean Water Act
DEQ – Department of Environmental Quality
DPOR - Department of Professional and Occupational Regulation
ESC – erosion and sedimentation control
ESCL – Erosion and Sedimentation Control Law
EWG – Enforcement Work Group (a subgroup of the SAG)
IWG – Implementation Work Group (a subgroup of the SAG)
LDA – land disturbing activity
NWG – Nutrient Trading Work Group (a subgroup of the SAG)
RLD – Responsible Land Disturber
SAG – Stormwater Stakeholder Advisory Group
SWCB – State Water Control Board
SWCL – State Water Control Law (in this context the term normally refers to the general provisions)
SWMA – Stormwater Management Act
VESCO – Virginia Erosion and Sediment Control Program
VESMA – Virginia Erosion and Stormwater Management Act (proposed act to consolidate the SWMA and the ESC)
VESMP – Virginia Erosion and Stormwater Management Program (proposed consolidation of the VESCO and VSMP)
VPDES - Virginia Pollutant Discharge Elimination System
VSMP – Virginia Stormwater Management Program
WWG – Wordsmithing Work Group (a subgroup of the SAG)

Attachment B Handouts



10-16_VESMA_UltraLite Sections.docx



RappahannockCo10515.pdf

Example of Petition from Opt-Outs



10-15_Consolidated_VESMA and Other Arti