**Stormwater Stakeholder Advisory Group**
**Nutrient Trading Work Group**
Tuesday, May 26, 2015
Draft Meeting Notes

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**Location:** DEQ Central Office
2nd Floor Conference Room A
629 E. Main Street
Richmond, VA

**Start:** 1:07 p.m.
**End:** 3:39 p.m.

**SAG Nutrient Trading Work Group Members Present:**
Melanie Davenport, DEQ
Chris Pomeroy, Aqua Law
L. Eldon James, Eldon James Associates
Rick Parrish, Private Citizen (formerly SELC)
Whitney Katchmark, HRPDC

**Work Group Members Absent:**
Bart Thrasher, VDOT
Elizabeth Andrews, DEQ
Katie Frazier, Va. Agribusiness Council

**Facilitator:** Mark Rubin, VCU
**Recorder:** Debra Harris, DEQ

**Guests and Public Attendees**:
Jeff Day, Bloomberg BNA
Shannon Varner, Troutman Sanders
Chris French, Contech
John Olenik, VDOT
Fred Cunningham, DEQ
Allan Brockenbrough, DEQ
Drew Hammond, DEQ

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**I. Agenda Item: Welcome and Overview of Handouts**

**Discussion:** Mark Rubin welcomed all to the meeting and briefly went over the meeting purpose and the handouts (see Attachment B). Mr. Rubin reminded the NWG that the issues as noted on the handout (see Attachment B) for the NWG will be reviewed at today's meeting. It was noted that the decisions on any recommendations by the NWG will be made by the SAG.

**II. Agenda Item: Reorganize § 62.1-44.15:35 to address nutrient credits and offsite options separately?**

**Discussion:** The NWG discussed the possibility of reorganizing the provisions to address nutrient credits and other offsite options separately. The group also discussed nutrient offsets. The provisions under § 62.1-44.15:35 were discussed and it was noted that it should be made clear that offsite option is not a "nutrient credit" and the provisions are more related to VSMP permit compliance. Based on the discussions, DEQ will develop a strawman to separate the nutrient credit and offsite option provisions for construction activities.

**III. Agenda Item: Clarify use of credits for construction vs. MS4 permits.**

**Discussion:** The NWG discussed how to clarify use of credits for construction vs. MS4 permits as provided in Subsection J of § 62.1-44.15:35. An issue of concern noted was with the emerging nutrient credit banking market. Through this market, if a developer within an MS4 area purchases nutrient credits which are generated outside of the MS4 area that may have an impact on the MS4's compliance with nutrient reduction requirements. The group discussed this issue including how to track nutrient trading for net neutral impacts and how to make sure that a developer's use of credits does not have an adverse impact on the MS4s compliance.

**III. Agenda Item: Clarify Subsection C & D of § 62.1-44.15:35.**

**Discussion:** The NWG discussed the provisions under Subsection C. It was noted that Subsection C would need to be clarified prior to Subsection J. The NWG discussed various issues that arise with the use of nutrient credits and how to clarify the use of credits.

*The group took a break from 3:03 pm until 3:15 pm.*

The NWG then discussed how to clarify what should be allowed for offsite options as provided in Subsection D. Based on the discussion, DEQ will develop a strawman which will provide clarifying language for these subsections.

## V. Agenda Item: What can localities do?

**Discussion:** The NWG discussed what localities can and cannot do under § 62.1-44.15:35 including such issues as dealing with the use of offsite options including the use of nutrient credits generated outside of the MS4 service area and how to best deal with the concern about degradation of local waters if offsite options are allowed. Based on the discussions, DEQ will look at this issue in terms of MS4 compliance.

The NWG meeting was then adjourned.

Attachment A
List of Acronyms

Acronyms:
CBPA – Chesapeake Bay Preservation Act
DEQ – Department of Environmental Quality
E&SC – erosion and sedimentation control
ESCL – Erosion and Sedimentation Control Law
MS4 – Municipal Separate Storm Sewer System
NWG – Nutrient Trading Work Group (a subgroup of the SAG)
RLD – Responsible Land Disturber
SAG – Stormwater Stakeholder Advisory Group
SWCL – State Water Control Law (in this context the term normally refers to the general provisions)
SWMA – Stormwater Management Act
VSMP – Virginia Stormwater Management Program

VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY

## Nutrient Trading Work Group (NWG)

| Subject | SWMA<br>(LINES 2 – 1022) |
|---|---|
| Nutrient Credits<br><br>NWG | 62.1-44.15:35<br>- Reorganize to address nutrient credits and offsite options separately?<br>- Clarify use of credits for construction vs. MS4 permits (see subsection J)<br>- Clarify subsection C<br>- Clarify language: For Section 62.1-44.15:35.D, what needs to be done for sites with less than 5 ac. or 10 lbs./year?<br>- What can localities do, and what can they not do, under 62.1-44.15:35? For example, can an MS4 locality deny use of offsite options including nutrient credits outside of the MS4 service area? How can they deal with the concern about degradation of local waters if they allow the use of offsite options?<br>- Under this section of the statute, what happens to excess credits that have been generated by localities from BMPs? |

**§ 62.1-44.15:35. Nutrient credit use and additional offsite options for construction activities.**

A. As used in this section:

"Nutrient credit" or "credit" means a nutrient credit certified pursuant to Article 4.02 (§ 62.1-44.19:12 et seq.).

"Tributary" has the same meaning as in § 62.1-44.19:13. For areas outside of the Chesapeake Bay Watershed, "tributary" includes the following watersheds: Albemarle Sound, Coastal; Atlantic Ocean, Coastal; Big Sandy; Chowan; Clinch-Powell; New Holston (Upper Tennessee); New River; Roanoke; and Yadkin.

"Virginia Stormwater Management Program Authority" or "VSMP authority" has the same meaning as in § 62.1-44.15:24 and includes, until July 1, 2014, any locality that has adopted a local stormwater management program.

B. A VSMP authority is authorized to allow compliance with stormwater nonpoint nutrient runoff water quality criteria established pursuant to § 62.1-44.15:28, in whole or in part, through the use of the applicant's acquisition of nutrient credits in the same tributary.

C. No applicant shall use nutrient credits to address water quantity control requirements. No applicant shall use nutrient credits or other offsite options in contravention of local water quality-based limitations (i) determined pursuant to subsection B of § 62.1-44.19:14, (ii) adopted pursuant to § 62.1-44.15:33 or other applicable authority, (iii) deemed necessary to protect public water supplies from demonstrated adverse nutrient impacts, or (iv) as otherwise may be established or approved by the Board. Where such a limitation exists, offsite options may be used provided that such options do not preclude or impair compliance with the local limitation.

D. A VSMP authority shall allow offsite options in accordance with subsection I when:

1. Less than five acres of land will be disturbed;

2. The postconstruction phosphorous control requirement is less than 10 pounds per year; or

3. The state permit applicant demonstrates to the satisfaction of the VSMP authority that (i) alternative site designs have been considered that may accommodate onsite best management practices, (ii) onsite best management practices have

been considered in alternative site designs to the maximum extent practicable, (iii) appropriate onsite best management practices will be implemented, and (iv) full compliance with postdevelopment nonpoint nutrient runoff compliance requirements cannot practicably be met onsite. For purposes of this subdivision, if an applicant demonstrates onsite control of at least 75 percent of the required phosphorous nutrient reductions, the applicant shall be deemed to have met the requirements of clauses (i) through (iv).

E. Documentation of the applicant's acquisition of nutrient credits shall be provided to the VSMP authority and the Department in a certification from the credit provider documenting the number of phosphorus nutrient credits acquired and the associated ratio of nitrogen nutrient credits at the credit-generating entity. Until the effective date of regulations establishing application fees in accordance with § 62.1-44.19:20, the credit provider shall pay the Department a water quality enhancement fee equal to six percent of the amount paid by the applicant for the credits. Such fee shall be deposited into the Virginia Stormwater Management Fund established by § 62.1-44.15:29.

F. Nutrient credits used pursuant to subsection B shall be generated in the same or adjacent eight-digit hydrologic unit code as defined by the United States Geological Survey as the permitted site except as otherwise limited in subsection C. Nutrient credits outside the same or adjacent eight-digit hydrologic unit code may only be used if it is determined by the VSMP authority that no credits are available within the same or adjacent eight-digit hydrologic unit code when the VSMP authority accepts the final site design. In such cases, and subject to other limitations imposed in this section, credits available within the same tributary may be used. In no case shall credits from another tributary be used.

G. For that portion of a site's compliance with stormwater nonpoint nutrient runoff water quality criteria being obtained through nutrient credits, the applicant shall (i) comply with a 1:1 ratio of the nutrient credits to the site's remaining postdevelopment nonpoint nutrient runoff compliance requirement being met by credit use and (ii) use credits certified as perpetual credits pursuant to Article 4.02 (§ 62.1-44.19:12 et seq.).

H. No VSMP authority may grant an exception to, or waiver of, postdevelopment nonpoint nutrient runoff compliance requirements unless offsite options have been considered and found not available.

I. The VSMP authority shall require that nutrient credits and other offsite options approved by the Department or applicable state board, including locality pollutant loading pro rata share programs established pursuant to § 15.2-2243, achieve the necessary nutrient reductions prior to the commencement of the applicant's land-disturbing activity. A pollutant loading pro rata share program established by a locality pursuant to § 15.2-2243 and approved by the Department or applicable state board prior to January 1, 2011, including those that may achieve nutrient reductions after the commencement of the land-disturbing activity, may continue to operate in the approved manner for a transition period ending July 1, 2014. The applicant shall have the right to select between the use of nutrient credits or other offsite options, except during the transition period in those localities to which the transition period applies. The locality may use funds collected for nutrient reductions pursuant to a locality pollutant loading pro rata share program under § 15.2-2243 for nutrient reductions in the same tributary within the same locality as the land-disturbing activity or for the acquisition of nutrient credits. In the case of a phased project, the applicant may acquire or achieve the offsite nutrient reductions prior to the commencement of each phase of the land-disturbing activity in an amount sufficient for each such phase.

J. Nutrient reductions obtained through nutrient credits shall be credited toward compliance with any nutrient allocation assigned to a municipal separate storm sewer system in a Virginia Stormwater Management Program Permit or Total

Maximum Daily Load applicable to the location where the activity for which the nutrient credits are used takes place. If the activity for which the nutrient credits are used does not discharge to a municipal separate storm sewer system, the nutrient reductions shall be credited toward compliance with the applicable nutrient allocation.

K. A VSMP authority shall allow the full or partial substitution of perpetual nutrient credits for existing onsite nutrient controls when (i) the nutrient credits will compensate for 10 or fewer pounds of the annual phosphorous requirement associated with the original land-disturbing activity or (ii) existing onsite controls are not functioning as anticipated after reasonable attempts to comply with applicable maintenance agreements or requirements and the use of nutrient credits will account for the deficiency. Upon determination by the VSMP authority that the conditions established by clause (i) or (ii) have been met, the party responsible for maintenance shall be released from maintenance obligations related to the onsite phosphorous controls for which the nutrient credits are substituted.

L. To the extent available, with the consent of the applicant, the VSMP authority, the Board or the Department may include the use of nutrient credits or other offsite measures in resolving enforcement actions to compensate for (i) nutrient control deficiencies occurring during the period of noncompliance and (ii) permanent nutrient control deficiencies.

M. This section shall not be construed as limiting the authority established under § 15.2-2243; however, under any pollutant loading pro rata share program established thereunder, the subdivider or developer shall be given appropriate credit for nutrient reductions achieved through nutrient credits or other offsite options.

N. In order to properly account for allowed nonpoint nutrient offsite reductions, an applicant shall report to the Department, in accordance with Department procedures, information regarding all offsite reductions that have been authorized to meet stormwater postdevelopment nonpoint nutrient runoff compliance requirements.

O. An applicant or a permittee found to be in noncompliance with the requirements of this section shall be subject to the enforcement and penalty provisions of this article.

2009, c. 364, § 10.1-603.8:1; 2010, c. 686; 2011, c. 523; 2012, cc. 748, 785, 808, 819; 2013, cc. 756, 793.