

House Bill 1774 Stormwater Workgroup August 30, 2017 Meeting

Minutes

The House Bill 1774 Stormwater Group met at 9:00AM on August 30th, 2017 at the DEQ Office to review and consider alternative methods of managing stormwater in rural localities pursuant to HB 1774. Present at the meeting were Workgroup members Melanie Davenport (DEQ), Jonathan Harding (VA Agribusiness Council), Ann Jennings (Chesapeake Bay Commission), Allyson Monsour (Clark Nexsen), David Nunnally (Caroline County), Peggy Sanner (CBF), Thomas Swartzwelder (King & Queen County), Marcie Parker (VDOT), Patrick Fanning for Shannon Varner (Troutman Sanders), Sandra Williams (ATCS), Shannon Alexander for Curtis Smith (Accomack-Northampton Planning District Commission), Russ Baxter (Deputy Secretary of Natural Resources), Chris Pomeroy (AquaLaw), Eldon James (Rappahannock River Basin Commission), Adrienne Kotula (James River Association), Lewie Lawrence (Middle Peninsula Planning District Commission), Tom Swartzwelder (King and Queen County).

Also in attendance were Carl Hershner (VIMS), Mike Rolband (WSSI), Mujde Erten-Unal (Old Dominion University), Jaime Bauer (DEQ), Ryan Brown (Kane Jeffries), Mark Luckenbach (VIMS), Michael Polychrones (VML), Larry Land (Va. Association of Counties), Xixi Wang (Old Dominion University), KC Filippino (HRPDC), and Scott Crafton (VDOT). The meeting was facilitated by Elizabeth Andrews (Virginia Coastal Policy Center).

The meeting began with the approval of the July 11, 2017 Workgroup minutes. The minutes were approved without comment. The Workgroup Ground Rules were also approved.

Elizabeth reminded the group that the goal is to complete the Workgroup's recommendations before Thanksgiving. Elizabeth transmitted remarks to the group from Delegate Hodges, reminding group members of the Workgroup's goals.

PRESENTATION ON MS19

Melanie Davenport delivered a presentation regarding Minimum Standard 19 (MS19). At a previous meeting, Mike Rolband had provided an alternative interpretation of MS19. Melanie stated that she and Jaime took a second look at the language of the Code and it is their interpretation that the Erosion & Sediment Control Law says that for the flow capacity, volume, and velocity elements of MS19, those elements are to be met by application of the energy balance method under the stormwater statute and regulations. Other group members provided additional clarification of the original intent behind the statute and MS19. Melanie stated that it is the position of DEQ that the energy balance method is the only acceptable way to meet those criteria now, and that the elements of MS19 have been replaced. David Nunnally provided background on MS19 and the different interpretations of the statute throughout the years. David stated that MS19 does have multiple requirements, and that one cannot just default to the energy balance method and not confront the water velocity issue. Mike stated that energy balance was originally intended as a stopgap measure and it was assumed if one did energy balance all of the criteria were met. However, in situations where one is granted an exception because energy balance is not feasible, other action is still required.

Elizabeth stated that uniformity of interpretation is one of the issues that needs to be resolved in relation to MS19. Relatedly, Melanie stated that if the Rolband tiered approach is

something the group intends to pursue, the meaning of the statute will need to be clarified. Elizabeth stated that if the Workgroup decides to utilize the tiered approach and use MS19 for the first tier, one possibility is to recommend that DEQ form a Regulatory Advisory Panel in order to clarify the MS19 regulation.

REPORT OF SUBCOMMITTEE 2

Elizabeth reported that this subcommittee had discussed 5 proposals: (1) Mike Rolband had previously proposed a tiered approach to stormwater management determined by the percent of impervious cover in a watershed, achieved by overlay districts keyed to the comprehensive plan. (2) David Nunnally had proposed using certain BMPs for smaller projects, with fewer calculations. (3) Scott Crafton had proposed a possible waiver from stormwater management water quantity requirements for a discharge directly to tidal waters. (4) Another proposal involved an in lieu fee. This was postponed pending Subcommittee 1's decision regarding volume credits. (5) The group had discussed possibly expanding the Agreement in Lieu of a Plan concept to some small commercial sites.

Carl Hershner reported on VIMS' and ODU's work in support of Subcommittee 2, stating that they have just begun collecting data regarding these proposals. Essex and Middlesex Counties were used as examples for the presentation. They began mapping roads and land cover in an effort to identify drainage to roads and to the ditches that serve the roads. They are using the maps to identify where water is likely to collect because of drainage to the ditches, and thus where a BMP could be located in order to clean the water. Various assumptions were made in creating the model, and if such a plan is to be implemented, more precise data will be necessary. There are hundreds of drainage points in Essex County where BMPs would need to be located, demonstrating the complexity of this issue. Carl attempted to find the comprehensive plans in all of the localities, but noted that they are (1) highly variable, and (2) rarely specify density. Therefore they provide little concrete information concerning localities' planned impervious cover. Thus, relying on comprehensive plans is problematic and likely unreliable. Carl calculated the percentage of impervious cover for watersheds in Essex County; they were all well below the 5% threshold. As for Middlesex County, the impervious cover in the various watersheds was generally within 1-4%. The calculations for land use cover are tremendously complex, but it is still possible to do them, according to Carl. The data used so far has been based on various assumptions, however, so the calculations are still quite rough. Jaime also noted that phase 6 of the Bay model, on which Carl's data was based, has not been completely approved yet and thus may change.

Carl stated that if the group is going to further pursue the tiered approach, there will be value in trying to direct localities to designate relatively restricted areas where more intense development will be located. Carl stated that there are some areas where impervious cover will exceed 10%, and that is where there may be value in alternative or increased levels of stormwater management. Someone suggested that cities should just deal with the high IC% areas only. Carl stated that a major obstacle is getting data from cities; much of this data is not synthesized and compiled by the municipalities, so if the group needs it the group itself must compile it. Tom Swartzwelder noted that they are proposing that water quality requirements should still be applied to the "donut hole" projects, but that there would be relief on the energy balance method requirements. As for VIMS' role, Carl said they can synthesize and report data, but they are entirely reliant on outside sources for the compilation of data.

Carl pointed out that in order for the tiered approach to have much of an impact, a locality would need to designate areas that are smaller than the level 6 watersheds as their planned development areas, because of the low IC%. Tom stated that the rural municipalities/local governments would be willing to designate smaller areas even though they do not do so now. Adrienne Kotula pointed out that a comprehensive plan is just a guide and zoning ordinances really direct what can and cannot happen on the ground, and that zoning may or may not match the comprehensive plans. Further, zoning does not specify the level of impervious surfaces allowed on a lot. Mike suggested that we are looking for a problem that does not exist because the IC% is so minimal to begin with in these rural localities - thus there is no real problem with stormwater impacting water quality there. Peggy Sanner asked if there is more development, however, in parts of coastal Virginia other than the Middle Peninsula; however, Shannon Alexander from the ANPDC agreed that there is very little development in the other rural coastal PDCs as well, so all of them face similar problems in this area. Another issue with this approach is that the last developer to develop a site in an area would foot the bill for increased stormwater management as the threshold %IC is reached.

Someone suggested culverts as small regional BMPs (instead of ditches) and asked if Carl could identify this as a possibility. Using Mathews County as an example, Carl stated that the challenge is that very few of the drainage points identified are on public land.

REPORT OF SUBCOMMITTEE 1

Elizabeth reported that this subcommittee was looking at both regional BMPs and volume credits as possible solutions. Carl then reported on what VIMS and ODU are doing to support that subcommittee, and stated that an alternative discussed was capturing non-point source loads on a large scale via a publicly managed effort funded by localities (specifically, MS4 localities). The rationale behind this was that there is the potential that large enough reductions in pollutants could actually make a difference in water quality in the Bay. They have yet to figure out if all of the water is treatable, but, if so, the reduction for the Bay could be meaningful, Carl believes. However, there is a significant program implementation challenge. The primary source of phosphorous in the area in question is agricultural land, however there are considerable challenges related to regulation of crop land. Carl stated that the key point is that his data does NOT reflect the delivered phosphorous load; this data has not been compiled yet. Someone noted that the water in question in the ditches may not, in fact, be that polluted. Carl responded that his sense at this point is that the amount of polluted water that would benefit from treatment is probably a small fraction, and that they may be able to specifically target and address the areas where there are significantly contributing landscapes.

Mark Luckenbach stated that the level of complexity in order to just obtain estimates for this data is an obstacle. Rural governments need to be able to implement the program themselves and the complex nature of these calculations would increase the burden on them. Lewie stated that if the water quality program is monetized and profitable for localities, then they would probably undertake it.

DISCUSSION RE: 1-ACRE THRESHOLD PROPOSAL

The group then discussed Mike Toalson's proposal that the regulatory threshold for stormwater be raised to 1 acre in order to get rid of the donut holes problem. Carl reported the difficulty in developing data to determine how much impact this would have on water quality.

David Nunnally suggested as an alternative using the old Chesapeake Bay Preservation Act regulations + MS19. Tom stated that it is easier for a locality to have 6 or 7 BMP choices under those old regulations, as opposed to 59, as they currently have under the current stormwater regulations. David noted that the advantage of using the old CBPA regulations is that people know how to apply them because they were used for years. However, Elizabeth pointed out that Tom and Lewie had informed the group that the major issue in most rural localities is implementing the water quantity requirements, and the old CBPA regulations addressed water quality. Scott Crafton and Mike cautioned against shifting back to the CBPA regulations. Scott stated that the new calculation method under the new regulations does make a difference as pertains to water quality. The old regulations did not take all factors into account and were based on erroneous assumptions about first-flush runoff contaminants. The new calculation method accounts for extra nutrient load from residential lawns and also pollutants that come off of roads after first-flush runoff. Tom pointed out that there has been a significant change regarding water quantity under the new regulations.

The group then discussed the "menu approach" proposed by Sarah Carter and David Nunnally, in which the type of development determines which stormwater management requirements are applied. This proposal was shifted back to Subcommittee 2. Peggy suggested the full Workgroup wait to make a decision regarding the 1 acre threshold proposal until after the subcommittees make their recommendations. The group agreed to wait. The group further discussed using old CBPA regulations for smaller sites because they are familiar and have simpler/fewer options. The group agreed to refer this issue to subcommittee 2.

PROPOSALS REGARDING LOCALITIES' ADMINISTRATION OF THE VIRGINIA STORMWATER MANAGEMENT PROGRAM

The group discussed a proposed change in the statutory language of the Stormwater Management Act to allow VSMP authorities and localities to hire contractors to assist with stormwater plan approval, etc. Tom stated that he would like to take the language a step further - to enable developers of sites to approve stormwater plans themselves for their own projects, without locality approval. Plans would have to be certified and sealed by the professional engineer who prepared them. This would reduce the cost to localities because they do not have to hire someone to approve stormwater plans. This would shift the cost and responsibility for stormwater plans to developers, without the need for the localities to review and approve them (because the developers still have to create these plans themselves anyway, so this cuts out action on the part of the locality). Melanie noted that those who administer the regulations at the local level are trained and certified by DEQ, but that people with professional licenses are not required to know the stormwater management regulations.

Tom suggested that DEQ provide guidance to the developers in terms of complying with the regulations; this would cut out the locality as the middle man. Scott and others stated that oversight is necessary in this area because of the generally poor quality of the plans that come in,

due to the regulatory requirements being new. Mike pointed out that there is no consistency amongst different counties, and that plans that would be accepted in some counties may not be accepted in others. Thus, more training from DEQ is necessary in this area. Melanie stated that stormwater plan review and approval is necessary because there is no way to demonstrate that a BMP is doing what it is supposed to do after the fact, thus more checks are necessary before the project is built to ensure that the plan is sufficient. Unlike wastewater treatment plants, which are monitored after construction to ensure they are meeting their effluent limits, there is no effluent being discharged from a pipe and there is no way to ensure that a BMP is working properly once built. Mike pointed out that this only applies to development of less than an acre, so any miscalculations regarding BMP calculations are not catastrophic - they are on a very small scale and are largely insignificant.

Elizabeth asked the group if they wished to consider amending the statute as Tom suggested to say that rural Tidewater localities could leave the plan preparation and approval up to the developers for these small development sites, subject to DEQ checking on a locality's program every 5 years. Peggy observed that there is value in imposing a statewide standard, and that DEQ can fill that role. Allyson Monsour also stated that some engineering firms may not be comfortable with the liability that they would incur under such a scheme. In response, the group discussed that engineering firms, if they are uncomfortable with this, could obtain more insurance or engage third party firms to certify and seal plans for them (or pursue other liability avoidance tools). Tom asked whether DEQ CBPA staff could be cross-trained to check stormwater plans in localities when they conduct their 5-year reviews of the local CBPA programs. Melanie agreed to check with DEQ on different requirements regarding implementing this plan. Elizabeth also asked Tom to draft some potential modified statutory language for the Workgroup's review. Chris Pomeroy pointed out that policies similar to Tom's proposal have been adopted in other areas of environmental regulation, such as alternative onsite septic systems and designs for wastewater treatment plants, so this is a policy trend in the legislature. Further, this is on a much smaller scale (development of less than an acre) and will have a much less significant impact on water quality. In order to determine how much development is at issue, the MPPDC and ANPDC were asked to provide data on commercial development over 2,500 sq. ft. and under an acre in their member localities for the last five years, by the subcommittee meeting on September 6th.

Peggy suggested asking Del. Hodges to introduce an amendment to the State Budget that would fund DEQ doing plan review, inspections, etc. for these small development sites in rural Tidewater localities, without changing the regulations. Peggy stated that this may be a less expensive alternative than having DEQ and localities implement changes to the current stormwater management program. Tom stated that he is fine with this as it gets rid of the two "donut holes." Elizabeth asked Melanie if there are other innovative funding options available (other than a new appropriation to DEQ from the General Assembly) that could achieve the same result. Others expressed concern that the General Assembly could simply take away funding later, and then the localities would be back to square one. Melanie and Lewie pointed out that DEQ cannot fund the program as it is. Tom stated that he would not want this to be a temporary program (which it could be because it is subject to the whims of the General Assembly and may get defunded). As pertains to Peggy's suggestion for a new appropriation, the group decided to possibly include it as one of several options, pending Shannon's and Lewie's compilation of data on the number of development projects in their localities.

Elizabeth noted the need to reschedule the Oct. 18 Workgroup meeting since DEQ staff cannot attend that day. The VCPC will send out a Doodle poll to determine the best replacement date to meet. Some noted that they will be at the RRBC meeting on Sept. 27 so the VCPC will send out alternative dates for the September meeting as well, although it may not be possible to find a suitable alternative date on short notice. Elizabeth asked if there was any public comment. Hearing none, the group ended its meeting at 1:45p.m.