

Non-Point Nutrient Credit Certification Regulatory Advisory Panel (RAP) Meeting

August 22, 2013

Meeting Notes

Location: DEQ Central Office
2nd Floor Conference Rooms B&C
629 E. Main Street
Richmond, VA 23219

Start: 10:08 a.m.

End: 3:55 p.m.

Meeting Attendees:

<i>RAP MEMBERS*</i>	<i>INTERESTED PARTIES</i>	<i>RAP TECHNICAL SUPPORT</i>
Phil Abraham - Virginia Association of Commercial Real Estate	Jenny Tribo - HRPDC	Russ Baxter - DEQ
Scott Blossom (alt. for Doug Beisch, Jr.) - Williamsburg Environmental Group	Andrienne Kotula -JRA	Josiah Bennett – DEQ
Jack Frye - Chesapeake Bay Commission	Leslie Middleton – Bay Journal	Cindy Berndt - DEQ
Brent Fults - Chesapeake Bay Nutrient Land Trust, LLC	Peggy Sanner - CBF	Diane Beyer – DEQ
Taylor Goodman - Balzer and Associates, Inc.	Rick Parrish - SELC	Betsy Bowles - DEQ
Normand Goulet - Northern Virginia Regional Commission	Noelle Slater – ARCADIS	Allan Brockenbrough – DEQ
Steven Herzog - Hanover County	Jonet Prevost White - COR	James Davis-Martin – DEQ
Ann Jennings - Chesapeake Bay Foundation	David Grandis - OAG	Debra Harris – DEQ
Whitney Katchmark - Hampton Roads Planning District Commission	Bob Spoth – ECO Ins	Liz McKercher – DEQ
Joe Lerch - Virginia Municipal League	Kevin Spoth – ECO Ins	Kathleen O'Connell – DEQ
Chris Pomeroy - Virginia Association of Municipal Wastewater Agencies	Brad Copenhauer – VA Agribusiness Council	Ginny Snead – DEQ
Nikki Rovner - The Nature Conservancy		Rick Weeks – DCR
Sarah Walker (alt. for Mindy Selman - World Resources Institute)		
Tom Simpson - Water Stewardship, Inc		
Shannon Varner - Troutman Sanders LLP		
Brian Wagner - Virginia Soil and Water Conservation Districts		

*NOTE: RAP Members not in attendance: Larry Land - Virginia Association of Counties; Joe Maroon - Virginia Environmental Endowment; Adam Meurer - ECS Mid-Atlantic; Timothy Mitchell - City of Lynchburg; Kevin Seaford - Virginia Association of Professional Soil Scientists; Wilmer Stoneman - Virginia Farm Bureau Federation; Jack Storton - Virginia Manufacturers Association; Mike Toalson - Home Builders Association of Virginia

Agenda Item: Welcome & Introductions

Discussion Leader: Ginny Snead

Discussion: Ginny Snead welcomed all of the meeting participants to the 8th meeting of the Nutrient Trading Credit Certification Regulatory Advisory Panel. She asked for introductions of all of the members of the RAP and other meeting attendees and requested that all attendees sign the sign-in sheet so that we could have a record of attendance.

Agenda Item: DEQ RAP Procedures

Discussion Leader: Cindy Berndt, DEQ

Discussion: Cindy Berndt, DEQ-Office of Regulatory Affairs Director, went through the applicable FOIA public body and public meeting provisions that apply to the RAP.

Agenda Item: Local Water Quality (9VAC25-900-70)

Discussion Leader: Allan Brockenbrough, DEQ

Discussion: Allan Brockenbrough presented the revised draft language for local water quality considerations when purchasing nutrient credits. This information was presented in Section 70 of the discussion draft of the regulation. This section was revised for clarification as requested by previous RAP comments. Allan explained the rationale and the requirements for purchasing nutrient credits for use by an activity located within either the Chesapeake Bay Watershed or the Southern Rivers watersheds. Allan asked the RAP if they had comments regarding the revised language.

RAP Questions:

Q: The TMDL is a loading amount but the TMDL does not specify a specific loading per farm?

A: Yes, it is correct that the TMDL is based on a uniform loading per acre and it does not get into a specific practice at a specific farm.

Q: How will we implement this section? And what are we comparing?

A: It will depend on where an activity/facility that will use the credits is located. That will determine from where credits shall be purchased.

Q: Does the TMDL watershed extend to headwaters?

A: Generally, yes, but for larger rivers, sometimes we may have to break up that watershed into smaller sections that do not include all headwaters.

Q: How is an observed source confirmed?

A: DEQ provided examples of observed source and also included its definition in Part I of the regulations.

Q: When does the delivery factor come into play?

A: That will be considered during the calculation of credits.

Q: Are there impaired waters with no observed sources listed?

A: Yes, there are a few impaired waters without observed source. There are two types of impairments benthic and dissolved oxygen that can be attributed to nutrients. The observed source is not "specified" until TMDL development.

Q: In the definition of observed source, why do we have to use a specific report date? Can we not just say the most recent?

A: Unfortunately, no, the regulations have to specify the date of the report to use.

Q: Will purchased credits be invalidated by updates to the 303 report?

A: No, the trades will not be invalid by a change in 303d report; however, available credits may be impacted.

Other RAP comments/suggestions noted:

- It was suggested that the concept for subdivisions 1 and 2 in subsections B be the same for a uniform approach.
- The "observed" source terminology caused concern for some RAP members as being too subjective.
- In subsection 2, the term "upstream of the impaired waters" is not clear. Is this the upstream line of the impaired segment or is it the downstream line as the "line" above which one can purchase credits? This language needs to be clarified.
- Sections B.1 and determining upstream in B.2 need to be clarified as they are difficult to understand. Additionally, what is the intent of Section B.3? This also needs to be clarified and perhaps explain to the RAP how the DEQ staff determine "where" it is acceptable to acquire credits.
- A private developer must design to a P standard which may be a surrogate for others. Will that effect how we deal with other sources in the stream?
- The definition for Southern Rivers watershed includes coastal areas that should be reviewed for accuracy [Editorial Note, the definition was from another source and does include the non-CB coastal areas].

It was explained to the RAP that the procedures or steps are not spelled out in this section. The regulation provided criteria for acquiring the credits and the process/procedures based on the criteria would be provided in guidance. It was also noted that the EPA draft guidance is rather presumptive and is more applicable to larger sources; however, even a new point source using the best technology would still need to offset any load.

Based on concerns regarding the Chesapeake Bay (CB) TMDL sediment requirements, staff noted that the statute only provides for

certification of nitrogen (N) and phosphorus (P) credits. As sediment is not listed in the statute, MS4s cannot use credits to meet their sediment requirement. The RAP discussed the sediment issue and its implications. It was noted that sources still must meet sediment criteria, as N and P are dealt with through trading. Sediments would need to be met by the BMPs. The discussion of sediment criteria touched on sediment criteria being a lack of incentive for trading as trading does not provide for sediment. Staff noted the concern but reiterated that this regulation would deal with certification for N and P in accordance with the statutory provisions.

Action Item – DEQ – Staff shall continue discussions regarding local water quality in respect to the comments and suggestions provided and will revise Section 70.

CONCLUSION: No consensus was reached on the application of local water quality issues as it relates to nutrient trading.

Agenda Item: Agricultural Baseline (9VAC25-900-100.B&C)

Discussion Leaders: Russ Baxter, DEQ & James Davis-Martin, DEQ

Discussion: Russ Baxter began the presentation on the background on the agricultural baseline. He noted that this topic was discussed previously and the section was redrafted to consider the resource management plan (RMP) regulations and animal feeding operations (AFOs). After Russ' background, James Davis-Martin then presented an explanation of the RMP regulation requirements and the plan processing steps as background information for the RAP when reviewing this section. Russ then went through the draft discussion language and the rationale for the requirements as presented in this section. Based on the presentation, the RAP asked questions and provided comments on their concerns and suggestions for consideration regarding establishing agricultural baseline.

RAP Questions:

Q: Can the RMP be certified prior to implementing all the practices listed in the plan?

A: The minimum practices for the RMP must be implemented prior to the certificate for the RMP being issued. However, there may be additional practices (i.e., continuous tillage) that are beyond "minimum" that would not be needed to be implemented for the certificate. It was noted that the RMP minimum practices would have to be applied to the entire management area. Some RAP members noted their concerns about the inequity between smaller and larger land owners.

Q: At this time, for agricultural practices, the only perpetual practice is land conversation? Would extended period cover crops be deemed perpetual?

A: At this time, all perpetual credits have been generated by a land conversion credit generating entity except for one. Use of cover crops for an extended time period would not be a true perpetual practice so in reality land conversion is, at this time, the perpetual option.

Q: What is meant by management area?

A: Management area is the entire contiguous land under the same ownership/operation. It is the most reasonable approach at this time but we would like to hear other approaches if anyone has one.

Q: Do the AFO permits require livestock exclusion?

A: The AFO requirements are just for the AFO area of the management area. The rest of the management area will be required to meet the other applicable baseline practices.

Q: How will the agency handle the inspection coordination for these facilities under permit?

A: The agency will be looking at coordination and the interface between these various inspections.

Q: How was the load analysis run and can the RAP get the results of that analysis?

A: Yes, the results will be sent to the RAP. This was an actual watershed model run (not a VAST run) and a range of practices that are part of the RMP requirements were evaluated to achieve T. The results for this load analysis provided good results for meeting T. It was also noted that T varies based on the soil type, the operation, slopes, etc. So the analysis was based on reasonable expectations for meeting the minimum RMP with some incentives. EPA provided the results to DEQ and DEQ will share that with the RAP. The results are good but it was noted that EPA has not said whether they will accept these results.

Q: The WIP requires 100% compliance for mortality disposal (100% mortality composters). Why is that not a baseline?

A: There are other regulations that deal with the proper disposal of mortality and those would provide the applicable standards.

Q: What about extra practices that may go into the RMP? If the baseline is the RMP, then "extra" practices would not be able to generate credits?

A: The RMP certification is for the minimum standards as required by the RMP regulations. Extra practices are not part of the RMP certification so if you do more than the minimum standards, those practices while in the RMP are not part of the certification so they can still be used to generate credits.

Q: Section B.2.d provides requirements for cover crop. What is this 50 lbs/acre of nitrogen?

A: Cover crops are required as specified in the regulation which includes when more than 50 lbs/acre of nitrogen is applied.

Q: Will technology regulation impact the VPDES permit for AFOs?

A: For individual permit for VPDES, DEQ can require additional BMPs to meet the technology requirement.

Q: For AFOs, what would those permits require? What are typical practices?

A: The typical practices are management of the CAFO to include: BMPs, a storage system, a nutrient management plan, etc. Any individual permit will allow adding BMPs for site specific concerns. Additionally, there are buffer set-backs for land application.

Q: Is there a requirement to meet T?

A: Yes, all fields within the management area will have to meet T for baseline.

Q: If you have your RMP certification and you add a 35' riparian buffer will that be credit worthy?

A: Yes, provided that the buffer is not constructed with cost-share funding.

Other RAP comments/suggestions noted:

- The concept of management area and requiring baseline practices throughout this area will not be an incentive for the large scale land owner. Some members have a lot of concern with this approach and its effect on the industry. At this time, the RAP did not present any firm alternatives. It was suggested that perhaps the definition say all or up to 50 acres. Additionally, many of the farms are operated on leased land so that should be considered with respect to the definition.
- Suggest that section B.2.a be changed to specify soil conservation tillage because there may be an issue with getting to T without conservation tillage.
- It would be interesting to hear the feedback provided by the agricultural community regarding this section.
- The land in the management unit for a confined AFO includes more than the CAFO area. That should be considered with the management area definition.
- Some RAP members did not like the option for outside storage of poultry litter.

[Editorial Note: The practices outlined in the Poultry Waste Management Regulations are intended to be protective of state waters. There are similar requirements for end-users of poultry as there are for permitted producers. This allows short term storage outside as long as it is covered within 14-days and protected from stormwater intrusion.]

- Suggest remove Line 502 that states "baseline for agricultural management areas are those practices implemented to achieve a level of reduction assigned in the WIP or approved TMDLs whichever is more restrictive" as there are areas that are not subject to WIP or TMDL.
- If there was runoff from a manure/litter storage area to a surface water, VPDES permit would be required and that is outside the scope of this regulation.
- One does not need an RMP to implement conservation practices. It was asked that if modeling assumes that everyone has implemented baseline practices for all agricultural parcels.
- There are many cases where a functional equivalent practice may need more thought and discussion.
- CAFO what would those permits require? What are typical practices?

Action Item – DEQ – Staff will look at the coordination of the compliance inspection schedules for credits, RMP and AFOs.

Action Item – DEQ & RAP – Staff will continue to discuss the management area concept and requests that the RAP members provide other ideas and language.

Action Item – DEQ – Send this load analysis evaluation to the RAP.

Action Item – DEQ – Staff will continue to review this section in light of this discussion and the comments provided.

PARKING LOT – Management area concept and use are a concern. Discussion is still needed.

NEXT MEETING TOPIC – Run through the analysis performed for watershed model run.

CONCLUSION: No consensus on the requirements for agricultural baseline was reached. The RAP has comments and concerns on the proposed language and no consensus criteria were agreed to for this section.

RAP broke for lunch at 12:28 p.m.

RAP reconvened at 1:35 p.m.

Agenda Item: Urban Baseline (9VAC25-900-100.D)

Discussion Leaders: Ginny Snead

Discussion: Ginny Snead presented the background and rationale for the revised language of this section. Based on statutory requirements, the baseline for new construction is in accordance with the Virginia Stormwater Management Program (VSMP). For other practices, the baseline is established through meeting the approved TMDL or the WIP as appropriate. This is stated in the statutory provisions. Ginny went through the draft discussion language and the rationale for the requirements as presented in this section. Based on the presentation, the RAP asked questions and provided comments on their concerns and suggestions for consideration regarding establishing urban baseline.

RAP Questions

Q: The management area concept is confusing. How is the definition of management area going to play into the urban baseline? Will there be additionality concerns for adjacent parcels?

A: For baseline, all contiguous parcels under the same ownership will need to meet baseline prior to generating credits.

Q: Will contiguous parcels owned by same county need to be upgraded to meet baseline prior to credits being generated?

A: Yes.

Q: What about a town that is not an MS4? Will they have to meet VSMP?

A: VSMP is the baseline for new urban development.

Q: Can someone generate credits for treating run-off from someone else's land (if you are treating nutrient credits coming off a parcel that you do not own, will you get credits)? How do we address that in this language?

A: That is not addressed specifically in the regulation but is more suited for the implementing guidance and credit calculation.

Q: The management area definition is a problem. If I have a development that greatly reduces loads, will the ownership issue and the contiguous issue preclude any of that from credit certification? Or would it provide incentive for someone?

A: If credit is certified for all nutrient reductions above baseline that come off your management area, whether you generated the nutrient load or not, it may not be precluded depending on the site specific factors. However, you only get credits for reducing nutrients below the baseline level.

Q: Are we talking about local authorities or private in this section?

A: Both, this section does not distinguish and is for all urban practices.

Q: The Clean Water Act stipulates to the maximum extent practicable, so with those goals will the MS4 be allowed to trade?

A: MS4 has accountability under the CWA and MS4 are accountable under the MS4 program; however, the MS4 locality may be able to generate credits within its management area.

Q: Are we allowing government to participate in private VSMP permit? Many believe that localities will not be allowed to trade until they meet their 2025 goal.

A: The statute is silent to that matter.

Other comments and suggestions

- There is some confusion on what is meant by redevelopment and by retrofitting. Please add clarifying definitions.
- There is some concern over the authority to consider more stringent local ordinances as baselines.
- Concern over the management area – what are the contiguous parcels for localities? Roads? This needs to be clarified.
- An option for areas without a WIP or TMDL needs to be considered.

- Stream restoration should not be considered a perpetual option but it may be more than annual. A stream restoration subsection is needed for this section.
- CWA requires to the maximum extent practicable. Any thought to "extra" beyond the interim goals being deemed credit-generating or just maximum extent practicable?

ACTION ITEM – DEQ – Add definitions for redevelopment and retrofit into Part I.

ACTION ITEM – DEQ – Review section D.2 and consider an option for non-CB and non-TMDL areas.

ACTION ITEM – DEQ – Stream restoration language will be considered and, if needed, drafted.

ACTION ITEM – RAP – Review the discussion draft and provide any comments to DEQ by 9/4.

Conclusion: No consensus on the requirements for urban baseline was reached. The RAP continues to have comments and concerns regarding the draft language.

The RAP took a break from 2:20 p.m. until 2:35 p.m.

Agenda Item: Financial Assurance (Part VI)

Discussion Leader: Josiah Bennett

Discussion: Josiah Bennett, DEQ, presented the background for the revised language of this part. Financial assurance is required by the statute to assure the continued generation of credits by a nutrient credit-generating entity. As requested by the RAP, an insurance mechanism has been added and the scope was revised. The draft discussion regulation for this Part includes requirements for structural BMPs as those are the most likely to be damaged or destroyed during a catastrophic event and require repair/rebuild to continue generating credits. Based on the presentation, the RAP asked question and provided comments on their concerns and suggestions for consideration regarding financial assurance.

RAP Questions

Q: Could an owner use a 10-year term insurance policy up front and then at the end make a "balloon" payment for the assurance?

A: The purpose of the financial assurance is to provide assurances for 100% of the cost estimate based on a worse-case scenario. For structural BMPs that generate term credits this includes costs for full replacement and O&M. However, for structural BMPs generating perpetual credits, insurance may be used up front but once credits start to sell then some of the financial assurance will be provided by cash mechanisms. The goal is that once all credits are sold then the financial assurance will be a cash mechanism that will run for perpetuity with the structural BMP.

Q: Why is there only a five year requirement for O&M costs?

A: The cost estimate is renewed every five years and the O&M costs are part of it, so it is like a five year rolling amount. The cost estimate will cover five years of O&M.

Q: For financial assurance, are we talking about all structural BMPs above baseline?

A: Yes, any structural BMP that generates nutrient credits (i.e. produces nutrient reductions below the baseline level) for a term of greater than one year or perpetually is subject to providing financial assurance for its credit generating activity.

Other comments and suggestions

- Bob Spoth from Ecosystems Insurance noted that there are insurance policies for up to a ten year term for this market. Additionally, the sold credits are what the insurance is applied to.
- Clarification that the "endowment" phase is for perpetual structural BMPs is needed.
- Financial assurance for structural BMPs will add a heavy cost burden to this sector and may make these BMPs not cost-efficient. This could discourage instead of encourage this market.
- Please consider the IRT option and use of an endowment.
- The practical effect on water quality of requiring financial assurance for BMPs needs to be considered. Please think about the reasonableness of the financial assurance requirements and its effect on structural BMPs projects especially the need for assuring a full construction cost.
- In 9VAC25-900-610, replace "may" with "shall be".

ACTION ITEM – DEQ – Review the endowment options under the IRT wetlands and, if appropriate, revise this part.

ACTION ITEM – DEQ – Revise the language for insurance regarding defense.

ACTION ITEM – DEQ – Review the interplay between the structural BMP FA requirements as it relates to those BMPs that are covered under the VSMP. VSMP requires maintenance coverage.

Conclusion: No consensus on the requirements for financial assurance was reached. The RAP continues to have comments and concerns regarding the draft language.

Agenda Item: Public Comment

Discussion: No one from the public chose to provide any additional comments during this agenda item.

Agenda Item: RAP General Comments

Discussion Leader: Russ Baxter

Discussion: No additional comments were provided by the RAP. The RAP was reminded to submit their comments to DEQ by 9/4/13 and that the next meeting will be held at DEQ's Piedmont Regional Office on September 25, 2013. The meeting was then adjourned.