

**Stormwater Stakeholder Advisory Group
Enforcement Work Group**

Friday, May 1, 2015
Final Meeting Notes²

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

Start: 9:40 a.m.
End: 12:35 p.m.

EWG Members Present:

Peggy F. Sanner, Chesapeake Bay Foundation
Elizabeth A. Andrews, DEQ

James Golden, DEQ

EWG Members Absent:

Michael L. Toalson, HBAV
Chris Pomeroy, Aqua Law

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

Guests and Public Attendees:

David Taylor, Chesterfield County
Ashley Tucker, Chesterfield County
Christine Watlington, VDOT
Chris French, Contech

Kathleen O'Connell, DEQ
Carla Pool, DEQ
Cindy Berndt, DEQ

I. Agenda Item: Welcome and Overview of Handouts

Discussion: Mark Rubin welcomed all to the meeting and asked each attendee to introduce themselves. After the introductions, Mr. Rubin gave a brief overview of the handouts provided (see Attachment B). During today's meeting, Mr. Rubin reminded the EWG to keep in mind that the process for each topic and its corresponding statutory language is to: (i) review the differences and similarities of the three articles (SWMA, ESCL, and CBPA¹); (ii) where possible, harmonize the provisions of the three articles; and, (ii) once harmonized, look at the possibility of moving the enforcement provisions "up" to the SWCL. Ms. Andrews reminded all attendees that it is understood and recognized that all three articles are already components within the SWCL, but for ease of reference, overarching provisions of the SWCL are being referenced as the "SWCL".

II. Agenda Item: Virginia Stormwater Management Fund

Discussion: The EWG discussed [§ 62.1-44.15:29](#) of the SWMA which established the Virginia Stormwater Management Fund. This fund is a unique provision of the SWMA although the fund is referenced in the SWCL at [§ 62.1-44.15\(8a\)](#). It was further noted that this fund is unique as the monies collected from the enforcement of the provisions of the SWMA are used for the purposes of carrying out the DEQ's responsibilities under the SWMA. The question posed was whether penalties from the stormwater management and erosion and sediment control programs should be placed in the Virginia Environmental Emergency Response Fund, like other water program penalties, rather than the Stormwater Management Fund, which funds the SWM and ESC programs.

Conclusion: Based on the discussion of the fund provisions, no changes to § 62.1-44.15:29 were proposed and the provision should be kept as is in the SWMA.

III. Agenda Item: Monitoring & Reports

Discussion: The EWG discussed the monitoring, reports and inspection requirements under the SWMA and the ESCL which are provided in [§ 62.1-44.15:37](#) of the SWMA and [§ 62.1-44.15:58](#) of the ESCL. The differences noted between the two articles were:

- The ESCL has requirements for the responsible land disturber (RLD) that are not in the SWMA.
- In § 62.1-44.15:58.A of the ESCL, "owner" is listed as a responsible party in addition to permittee or person responsible. Owner is not listed in the similar SWMA requirements.
- Subsection B of § 62.1-44.15:58 does not belong in this section and should be moved to § 62.1-44.15:54.

It was asked what the benefit of the RLD certification program is? The DEQ staff noted that this question is being reviewed as part of

¹ See Attachment A - List of Acronyms.

² Minutes approved 5/22.

the review of the education and training provisions of the articles. Depending on the results of the review, the requirement for an RLD certificate may be changed.

Additional comments noted were:

- Enforcement actions in the water programs may be taken against the land owner (see definition of owner in the SWCL).
- The RLD program needs to be reviewed as this is not a provision that is not actively enforced by the localities or DEQ.
- Subsection C of § 62.1-44.15:58 (ESCL) and subsection B of § 62.1-44.15:37 (SWMA) have similar concepts but are written differently. Subsection B of § 62.1-44.15:37 requires a hearing prior to DEQ issuing a stop work order. This is a formal hearing under the APA which is a cumbersome and lengthy process and does not provide an adequate enforcement tool as immediate action is often needed in this program.
- There may need to be some discussion or brainstorming to see if there is a way to make § 62.1-44.15:37.B more flexible in order for DEQ to deal more immediately with issues at construction sites, since DEQ is subject to the requirements of the Virginia Administrative Process Act when it makes decisions.
- Two options to consider are: (i) switching the formal hearing to an informal fact finding (IFF) proceeding; or, (ii) providing stop work order authority for DEQ without initiating a formal hearing or informal process under the APA.
- The main point is that a quicker response time regarding E&SC violations is necessary for DEQ.

The EWG was asked for their thoughts regarding the possibility of changing the standard in the SWMA that is currently “imminent and substantial danger” and the two options provided above. It was noted that the localities like the stop work order authority as a tool to use when needed and as a sufficient deterrent but the process for issuing stop work orders does differ from locality to locality. For DEQ, the option of an IFF for these stop work orders would be different as the IFF would occur after the decision not before. The EWG comments noted:

- A lower standard would be concerning to the construction contractors.
- The APA provisions for case decisions still prevail for state agencies, and for a case decision an IFF is needed.
- Perhaps use a temporary stop work order as allowed under the ESCL section (e.g. order effective for seven days)?

Conclusion: Based on the discussion regarding the provisions of the SWMA and ESCL for monitoring and reporting, the following changes were suggested:

- *For subsection A of §62.1-44.15:58.A, the DEQ will review the RLD certification requirements as part of their review of the education and training provisions and see if the RLD certificate requirement can be deleted. If it can, then § 62.1-44.15:37 and § 62.1-44.15:58 could be combined into one provision (wait on DEQ review/draft of education and training provisions under §§62.1-44.15:30, 15:52(E), 15:52(F) and 15:53).*
- *For subsection B of §62.1-44.15:58, it was noted that this subsection is not in the correct section and should be moved to § 62.1-44.15:54, Establishment of Virginia Erosion and Sediment Control Program.*
- *ESCL §62.1-44.15:58.C – This subsection and subsection B of SWMA §62.1-44.15:37 are similar and could be combined.*
- *Enforcement provisions allow authorities to use stop work orders under 15:37; however, if DEQ issues such an order it will trigger a formal hearing process under the APA which is too long and burdensome a process to be an effective enforcement tool. Could DEQ do these under a lesser process (as the localities do) or under an emergency order? DEQ will consider and draft an option for further discussion by the EWG.*
- *The EWG discussed the possibility of providing a lower standard (e.g., the ESCL standard of imminent and substantial danger of causing harmful erosion of lands or sediment deposition in waters within the watersheds of the Commonwealth or otherwise substantially impacting water quality) for issuance of an emergency order under subsection B of 15:37. However, it was recognized that such an option may be difficult for consensus agreement.*

IV. Agenda Item: Right of Entry

Discussion: The EWG discussed the provisions for right of entry under the SWMA ([§ 62.1-44.15:39](#)), the ESCL ([§ 62.1-44.15:60](#)), and the SWCL ([§ 62.1-44.20](#)). The differences noted between the three sections were:

- Under the SWCL section, duly authorized agent does not include localities.
- The second paragraphs of sections under the SWMA and the ESCL are similar but are not in the SWCL.
- The SWMA right of entry language includes authorities for MS4s which is not in either the ESCL or the SWCL.

Mr. Rubin asked the EWG for their ideas or concerns with moving the right of entry provisions in the SWMA and the ESCL to the SWCL. The following comments were noted by the EWG:

- Adding localities as duly authorized agents in the SWCL may have implications for other water programs.
- If moved up, the MS4 phrase from the SWMA would have to be added to the SWCL.

- It seems to make more sense to keep the local authorities in the SWMA or the ESCL.
- The Department's authority is covered by the SWCL section so it may not be needed in the SWMA or the ESCL provisions.

Conclusion: Based on the discussion regarding the right of entry provisions of the SWMA, ESCL, and SWCL, the provision for local VSMP and VESCP authorities should remain in the SWMA/ESCL while the Department's authority is covered under the SWCL section.

Therefore, the proposed harmonized language for the right of entry provisions (§ 62.1-44.15:39 and § 62.1-44.15:60) is as follows: In addition to the Board's authority set forth in § 62.1-44.20, ~~The Department, the VESCP/VSMP authority, where authorized to enforce this article, or any duly authorized agent thereof of the Department or VSMP authority, or any locality that is the operator of a regulated municipal separate storm sewer system may,~~ may at reasonable times and under reasonable circumstances, enter any establishment or upon any property, public or private, for the purpose of obtaining information or conducting surveys or investigations necessary in the enforcement of the provisions of this article. For operators of municipal separate storm sewer systems, this authority shall apply only to those properties from which a discharge enters their municipal separate storm sewer systems.

In accordance with a performance bond with surety, cash escrow, letter of credit, any combination thereof, or such other legal arrangement, a VESCP/VSMP authority may also enter any establishment or upon any property, public or private, for the purpose of initiating or maintaining appropriate actions that are required by the permit conditions associated with a land-disturbing activity when a permittee, after proper notice, has failed to take acceptable action within the time specified.

V. Agenda Item: Information to be Furnished

Discussion: The EWG discussed the provisions for information to be furnished under the SWMA ([§ 62.1-44.15:40](#)), and the SWCL ([§ 62.1-44.21](#)). The differences noted between the three sections were:

- The SWCL section references the owner while the SWMA reference the permittee.
- There is no definition of owner in the SWMA so the definition of the SWCL applies.
- The discussion then turned to the issue of the different owner definitions in the ESCL and the SWCL. It was noted that, under the SWCL, owner includes those persons that do not hold title to the land and includes permittees and permit applicants.

The EWG took a break at 11:20 a.m. and reconvened at 11:28 a.m..

After the break, Mr. Rubin asked the EWG for their thoughts on combining the SWMA section into the SWCL section. The following comments were noted:

- For localities that are VSMP authorities, the ability to ask for information and to enforce comes from their ordinances not the general permit.
- Localities that are VSMP authorities are not state permit-issuing authorities so those localities do not need to ask for information to be furnished from the permit applicant for a general permit.
- Protections for the Department are also within FOIA and the trade secret provisions of the Code.
- Why isn't there a similar section in the ESCL for VESCP authorities?

Conclusion: Based on the discussion regarding the information to be furnished requirements under the SWMA and the SWCL, the EWG suggests that:

- *Section 62.1-44.15:40 of the SWMA be modified to use the term "owner" instead of permittee or permit applicant; otherwise, leave this section as it is currently written. The clarified revision for § 62.1-44.15:40 is:*

The Board, the Department, or the VSMP authority, where authorized to enforce this article, may require every owner, including permittees and permit applicants, ~~permit applicant, every permittee, or any person subject to state permit requirements under this article,~~ to furnish when requested such application materials, plans, specifications, and other pertinent information as may be necessary to determine the effect of his discharge on the quality of state waters, or such other information as may be necessary to accomplish the purposes of this article.

Any personal information shall not be disclosed except to an appropriate official of the Board, Department, U.S. Environmental Protection Agency, or VSMP authority or as may be authorized pursuant to the Virginia Freedom of Information Act (§ 2.2-3700 et seq.). However, disclosure of records of the Department, the Board, or the VSMP authority relating to (i) active federal environmental enforcement actions that are considered confidential under federal law, (ii) enforcement strategies, including proposed sanctions for enforcement actions, and (iii) any secret formulae, secret processes, or secret methods other than effluent data used by any owner permittee or under that owner's permittee's direction is prohibited. Upon request, such enforcement records shall be disclosed after a proposed sanction resulting from the investigation has been determined by the Department, the Board, or the VSMP authority. This section shall not be construed to prohibit the disclosure of records related to inspection reports, notices of violation, and documents detailing the nature of any land-disturbing activity that may have occurred, or similar documents.

- *Section 62.1-44.21 of the SWCL will be left as it is currently written.*
- *The SAG needs to discuss and decide whether or not a similar provision in the ESCL for a VESCP authority is necessary.*
- *The authority for the SWCB to require information from localities should be added to the program review sections.*

VI. Agenda Item: Private Rights, Liability

Discussion: The EWG discussed the provisions for private rights and liability under [§ 62.1-44.15:41](#) of the SWMA and [§ 62.1-44.22](#) of the SWCL. It was noted that:

- Subsection B of the SWMA section is already covered under the SWCL section.
- Subsection A of the SWMA is a liability provision and is not in the SWCL section.

Conclusion: Based on the discussion of the private rights and liability provisions of the SWMA and the SWCL, the following changes were suggested:

- *Make no changes to § 62.1-44.22 of the SWCL.*
- *Delete Subsection B of § 62.1-44.15:41 of the SWMA as these private rights are already provided in § 62.1-44.22.*
- *Keep Subsection A of § 62.1-44.15:41 and change the title of this section to “Liability of common interest communities”.*

VII. Agenda Item: Enforcement by Injunction

Discussion: The EWG discussed the provisions for enforcement by injunction under [§ 62.1-44.15:42](#) of the SWMA, [§§ 62.1-44.15:58](#) and [15:63](#) of the ESCL, and [§§ 62.1-44.23](#) and [44.15\(8a\)](#) of the SWCL. It was noted that:

- Under Section 44.15:42, the Board, the Department, and the VSMP authority are included while under Section 44.23, only the Board is listed.
- Should there be a difference in the process for obtaining an injunction? No, the steps to obtain an injunction should be the same for all.
- There needs to be clarity in the provisions as the way it is currently written, it seems as if everyone can do everything listed, which is not the case (e.g., enforce ordinances).
- VSMP authorities have ordinances that are used for enforcement of its stormwater program, so is it necessary to provide enforcement authorities for a VSMP authority?
- It makes sense to combine the SWMA and the ESCL provisions but not the SWMA and the SWCL.
- Would the nuisance laws provide protections in lieu of Section 44.15:63.C?
- Is Section 44.15:64 needed? Isn't that covered under Section 44.15:63?
- Compare Sections 44.15:64 and 44.15:63 regarding stop work orders.

Mr. Rubin noted that based on the discussion, it seems that the EWG was considering keeping Section 44.15:63 and would ask the SAG about the need for Section 44.15:64. The EWG was then asked if there was a way to harmonize the enforcement by injunction sections. The EWG discussed this option and noted that:

- It would be difficult to combine the ESCL provisions under the SWCL as the \$32.5K maximum penalty amount was too excessive for E&S violations.
- The penalty of up to \$32.5K in the SWCL is necessary for the state's federal authorization of the water program.
- There is some concern that if we applied that maximum penalty amount to the state E&S provision, it would “federalize” our state E&S provisions.
- The EWG discussed the idea of what would be an appropriate penalty amount under the ESCL. Should it be the \$5,000 as in the CBPA?

ACTION ITEM: DEQ will look at harmonizing the ESCL and the SWMA sections while preserving the distinction between the state and federal programs.

Conclusion: Based on the discussion of the enforcement by injunction provisions of the SWMA, the ESCL and the SWCL, the harmonized changes proposed are:

- *Merging §62.1-44.15:63 and §62.1-44.15:64 into one section as the provisions are all related to the rights of private parties.*
- *Harmonizing the rest of the provisions in SWMA and ESCL regarding enforcement by injunction.*
- *Keeping the SWMA and ESCL sections different but look at penalty amounts and possible increase of maximum penalty in ESCL.*
- *Moving the provisions of §62.1-44.15:58 and any other provisions regarding the landowner's rights into the recommended combined section of 62.1-44.15:63 and §62.1-44.15:64.*
- *Discuss with the SAG the need for §62.1-44.15:64.*

The meeting was then adjourned.

Attachment A
List of Acronyms

Acronyms:

CBPA – Chesapeake Bay Preservation Act

DEQ – Department of Environmental Quality

E&S – erosion and sedimentation

ESCL – Erosion and Sedimentation Control Law

EWG – Enforcement Work Group (a subgroup of the SAG)

RLD – Responsible Land Disturber

SAG – Stormwater Advisory Group

SWCL – State Water Control Law

SWMA – Stormwater Management Act

VSMP – Virginia Stormwater Management Program

WWG – Wordsmithing Work Group (a subgroup of the SAG)

Attachment B
Handouts



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