

MINUTES FROM THE OCTOBER 11TH MEETING OF THE HB1774 WORKGROUP-SUBCOMMITTEE 2

In attendance were Phil Abraham (Va. Assoc. of Commercial Real Estate), Fred Cunningham (DEQ, for Melanie Davenport), Daniel Procter (Stantec, for Doug Beisch), David Nunnally (Caroline County), Ann Jennings (Chesapeake Bay Commission), Shannon Varner (Troutman Sanders), Julie Herman (VIMS for Carl Hershner), Allyson Monsour (Clark Nexsen), Shannon Alexander (A-NPDC), Joe Wood (CBF for Peggy Sanner), Tom Swartzwelder (King and Queen County), Sandy Williams (ATCS), and Jonathan Harding (VA Agribusiness Council).

Also in attendance were Brandon Bull (DEQ), Xixi Wang (ODU), David Kuzma (Isle of Wight County), Mujde Unal (ODU), Megan Ryan, Hannah Gill, and Chris Antoine, Jamie Huffman, and Angela King of VCPC. The meeting was facilitated by Elizabeth Andrews, VCPC.

The meeting began at 9:00 a.m. at William & Mary Law School.

The minutes from the last meeting were approved without comment.

DISCUSSION OF THE FINAL STRAWMAN

Elizabeth started by explaining the Subcommittee's previous discussion on the strawman and the comments from the last meeting that had been incorporated. Ann noted concerns regarding the need for clear definitions and processes, because of the sentence providing a developer's authority to take issue with a locality's IC% map. There was Subcommittee discussion regarding the definition of IC and that it should only apply to this tiered approach, and Elizabeth updated the strawman to reflect this.

Ann pointed out that, under section A, if localities haven't developed their IC mapping, a developer can go ahead and do that themselves in order to justify using tier A or tier B. Further, she noted that it is said elsewhere in the strawman that if a developer disagrees with a locality's map, then they can justify why they think the locality is wrong. Ann expressed concern that the language is too vague and doesn't spell out the procedures for this and others agreed.

The PDC and locality representatives then reported on their research regarding the ability of localities in their region to update the IC% maps. Shannon Alexander reported that Accomack County has opted in to administer a stormwater program, so this does not really apply to them, and Northampton said they could maintain a spreadsheet but not GIS mapping. David Nunnally reported that the mapping is doable for Caroline County. And, Tom reported that the counties he spoke to all had no issues with the current strawman language.

Allyson said that all an engineer needs to do is to go to the locality's website and check the IC% to figure out which tier they fall into and which requirements apply. Allyson stated that if localities just keep a spreadsheet with IC% then that will be sufficient information for engineers doing their projects (and, thus, GIS maps are unnecessary). Xixi agreed that a spreadsheet would provide the same information as a map. Ann stated that, in relation to her previous concerns expressed at other Subcommittee meetings regarding public notice, she felt that a map would be better for displaying information to the public. Shannon Alexander pointed out that the spreadsheet would have the same information as a map. Allyson said that while a map is great, the spreadsheet would be adequate for our purposes and would make it easier for

localities to comply with this proposal. Shannon Varner pointed out that the same information could be available via both means, but that a map is not easy to use. He also suggested that the spreadsheet could identify projects by subwatershed. Tom said that tracking development to update IC%, after adoption of the initial map, is not something for which public hearings are necessary. David Nunnally suggested having an initial map and a spreadsheet that tracks it, and then periodically updating the map. David said he would not want to have to update a map for each and every project, because this would be burdensome. Tom said that if the concern is that the public cannot see the maps, the localities can just use paper maps and make a note on those for each development. However, Tom said the public pretty much never asks to see zoning maps anymore. However, Joe Wood pointed out that zoning maps become more important under the tiered approach, but Tom disagreed on this point.

Elizabeth recapped the approach the Subcommittee discussed at its last meeting: using VGIN data for maps at the outset, and then having localities update the maps with actual project information. Fred Cunningham stated that this is quite a complicated procedure to implement. Elizabeth asked for the will of the group on the strawman - if it should be edited or presented “as is” to the full Workgroup? David pointed out that within these localities there could be intensive pockets of development that may have more of an impact and that this is a concern for him. He said he does not know how big of an issue this would be, but that as a program manager he would like to have the ability to address that if it became an issue at the local level. David said that, for example, localities may want to use the energy balance method for those areas and may adopt that by ordinance (meaning that they could adopt a more strenuous program than the tiered approach if they would like). Tom pointed out that localities are allowed to be more stringent than the state program under the regulations now, and David said that he would want that to be the case if a locality adopted the tiered approach too. This means localities could adopt more stringent regulations for “areas of concern.” Elizabeth asked David how to define an area of concern. Tom suggested that “area of concern” be defined by the localities at their discretion. Elizabeth suggested that the language of the strawman should state that localities can opt to use the energy balance method in the existing stormwater management regulations, not that they can just pick whatever approach they want to do instead. Allyson expressed concern about giving localities too much arbitrary power over this as it could affect developers and engineers (in that they may not know beforehand if a project is going to be subject to more stringent standards).

Julie Herman pointed out that localities could designate an “area of concern” according to whether or not the IC% of a pocket of development exceeds the IC% of the overall HUC, which is less arbitrary. Shannon Varner liked this approach as he expressed concern about this designation being too arbitrary on the part of localities. Allyson said that in rural localities all of the development is pocketed anyway, so then this exception would obviate the need for this proposal. Elizabeth pointed out that the point of this whole workgroup is that these rural localities said they do not have the engineering expertise to do energy balance, which is why they wanted to have a program that is easier to administer.

PRESENTATION ON ODU DATA

Xixi analyzed how much storage would be required for the 3 tiers of the Rolband approach. He used USDA Technical Release 55 (TR-55) to compute runoff volumes and peaks. They used a hypothetical subcatchment with B soil in Mathews County and varied IC% and slope to figure out the sensitivity to the required storage (so, essentially, how much storage is

necessary for different storm events). Daniel said that the equation used for the graph was actually energy balance and not MS-19. Daniel further stated that the tiered approach was intended to incorporate a separate set of calculations. Daniel said that Xixi's equation for MS-19 was actually the safe harbor for MS-19 and is not the right equation. There was discussion about the equations used for energy balance and MS-19.

David pointed out that the original MS-19 requirement was that post-development peak discharge could not exceed pre-development peak discharge. Or, alternatively, you could have an increase in post-development peak discharge as long as it did not cause erosion of the channel. The third option under MS-19 was that if a project contributed less than 1% of the watershed at discharge level, the increase was then considered acceptable. And, the fourth option under MS-19 was a combination of any of the above. Then, MS-19 was changed by DCR such that an adequate channel was always required.

Daniel said the equation is highly variable based upon the downstream channel, so this is a very site-specific equation.

DISCUSSION ON THE TIERED APPROACH STRAWMAN

Elizabeth asked for the will of the group on the strawman – it could either be presented to the full Workgroup at this point or the subcommittee can meet again to discuss it further. David said that he would be in favor of adopting the tiered approach as presented, but would want to be clear about allowing a locality to adopt more stringent regulations (i.e., energy balance method set forth in the current stormwater management regulations) for areas of concern even when a locality adopted a tiered approach. Daniel said this is fine as long as it is a designated area on a map. No one was opposed to the idea of adding this language. Phil pointed out that we want to keep this as simple as possible for the localities. Tom pointed out that we are losing the forest for the trees and we need to keep in mind that development in these rural localities is so insignificant that none of this really matters.

Ann expressed five concerns with the strawman. First, it provides no clarity on how developers can do their own maps for localities. Second, project proponents could argue with localities about the designated tier for a watershed and there is no clarity on how that would occur. Third, Ann felt that it is necessary to clarify DEQ's role in reviewing the maps and their application. Fourth, Ann pointed out that there will likely be a push to have this apply beyond these communities (i.e., in other parts of Virginia beyond Tidewater). Ann requested that language be added to the strawman that explicitly delineates that this should only apply to rural, coastal communities with no more than a set number of developments per year. This would keep the legislation focused on this part of the state and not others. Tom pointed out that the Subcommittee already put in language re: which localities this would apply to, to prevent this from happening, and Sandy agreed and said that we cannot stop people from trying to make this apply statewide. Ann requested a clear prohibition on this being used in other parts of the state. Tom said this is outside of the Workgroup's legislative charge. Finally, the fifth issue raised by Ann was that localities must update the maps with new development projects and Ann wants it to be clear that agricultural developments covered by stormwater requirements are included in this, not just residential and commercial developments. The group agreed that the last point is already the law today.

Subsections B and C were deleted to address Ann's first and second concerns. Members of the subcommittee asked Fred to look into whether there are any agricultural exemptions in the 2,500 square foot to 1-acre window. Fred indicated he would bring information for the full Workgroup on Friday. To address Ann's fourth concern, the group noted that they would tie the tiered approach to the localities covered by HB1774. Ann requested language that clearly prohibits the expansion to other localities. She suggested in addition to limiting it to the rural coastal localities, that language regarding the number of projects could also be included as a limitation. Tom expressed concern that this was outside the Workgroup's legislative charge. Turning back to Ann's third concern regarding DEQ authority, Fred noted that the tiered approach seemed very complicated and suggested allowing the localities to use the VGIN map now to determine IC% and then reevaluate in 5 or 10 years to determine an updated IC%, because there is such little development in these localities. David pointed out that the subcommittee had discussed that, but there were concerns about whether or not VGIN would be updated or what would happen if a locality exceeded the IC% for the tier during that time. Tom agreed it would be easier, but what does DEQ do to a locality if they find it exceeded the IC% for the designated tier? Tom suggested a shorter review period of 2 years to lessen the chance of a locality exceeding the IC%. Joe Wood expressed concern with this approach and asked whether the tiered approach at the HUC 6 level really provides protection? Joe stated that he has significant reservations about this approach. Joe expressed concern that any of this is necessary as long as an engineer can stamp a plan pursuant to the alternative approved by the full Workgroup at its last meeting. Elizabeth noted that Peggy had provided some written concerns along those lines via email, since she could not attend today's meeting. Elizabeth also summarized that many of Ann's concerns had been addressed and asked if others in the group shared Joe's concern regarding the HUC level. Julie noted that HUC level 6 is really the smallest available, that there are other ways to get smaller but it is a whole different ballgame. Daniel noted that going smaller may also open up the possibility of unintended consequences, because decreasing the watershed size for the assessment may not actually be more protective, but could increase the number of areas that could apply the tiered criteria – which was counterproductive to what the Chesapeake Bay organizations are trying to accomplish. . Sandy noted that changing the HUC may not be the answer to what David was talking about with areas of concern.

Shannon Varner noted that we have discussed that the legislation calls for the group to look at alternatives that are no less water quality protective, that we need to keep in mind we are dealing with very few projects, and perhaps we limit it by the number of projects per year. Joe said it would be very helpful to limit everything to a certain level of development per area. Tom noted that the science presented to the Subcommittee has shown there is no water quality impact. Elizabeth summarized that the Subcommittee created the tiered approach because of the low number of projects and that localities would still comply with water quality requirements; the tiered approach is only for water quantity compliance. Mujde said that they are going to present some more data on Friday to the full Workgroup that could be helpful on this point. The Subcommittee agreed to add language to paragraph II A saying that localities may set aside certain areas of denser development or areas of concern that can be subject to more stringent regulations. David asked if those areas could be keyed to an increase in IC% rather than the number of projects per year; i.e., growth rate would be the limiting factor. The group agreed that they would like to have this research assigned to Mike Rolband as a homework assignment. Phil stated that he just does not know how that would work in practice.

Elizabeth asked the group if they would like to present this strawman to the full Workgroup on the 13th. Phil asked that the Subcommittee consider the other proposal first before deciding.

PRESENTATION ON STREAMSTATS VS. VGIN

Allyson stated that VGIN was hard to work with and was not user friendly. ArcGIS was needed to use the tool. However, VGIN is more accurate. Sandy agreed that VGIN is not user friendly. StreamStats is user friendly, it is for site-specific areas and the process is easy. However, StreamStats is only updated every 5 years while VGIN is updated more often. Allyson said that if StreamStats were more accurate she would absolutely suggest it over VGIN. That being said, it is unclear how accurate StreamStats really is. Elizabeth asked the group about giving the option to localities to choose which program to use. Shannon Alexander said she did not think the level of difficulty was an impediment because localities would not really use the programs themselves; they would just use the data. Elizabeth said this is an important issue because the group cannot draft the strawman to require localities to use a program if they are unable to do so. Megan Ryan pointed out the different uses for the different programs. Julie said that with VGIN you use data layers to create the maps you want, which is different than StreamStats, which is a tool where you click and get local information. Julie noted that the issue with StreamStats is the underlying land cover data. The group decided to leave VGIN in the strawman as it is. Tom pointed out that localities would use a GIS person to extract the data from VGIN.

PRESENTATION ON AGREEMENT IN LIEU OF A STORMWATER PLAN

Allyson presented her homework assignment on expanding the use of an agreement in lieu of a stormwater plan for smaller, non-residential sites within the “donut hole”. Allyson stated that under this approach her research shows that the current template ALP does not meet water quality requirements. Technically single family home developments are not meeting water quality and Allyson does not want to expand that to commercial and other developments. Allyson was disappointed in the results she got from her data; and directly applying the in lieu of agreements as currently written to commercial developments is not going to work because this is contrary to one of our original goals of not reducing water quality protection.

David asked what level of IC would enable them to meet water quality. Allyson stated that she could determine that, but she figured that residential uses would have the least IC (as compared to commercial uses) for that size of a site. David noted that he would like to use an agreement in lieu of plan in cases like an existing commercial site wanting to build a 2,500 square foot addition. David asked Allyson if she could present data on that option. This would involve an addition to an existing site as opposed to new development. Allyson stated that she used a new development site in her calculations. Tom said that if there is an addition it probably would be over an acre and would be subject to the Construction General Permit. Sandy agreed. Fred clarified when Construction General Permit requirements come into play. Allyson said it would be hard to interpolate the data as David was asking her to do. Tom said this is a good example of how the tiered approach is probably the best option in terms of protecting the environment because it is based on science. The Subcommittee discussed whether David’s example of an addition to an existing structure would be deemed a common plan of development, but ultimately agreed that there is confusion about what constitutes a CPOD but that was beyond the scope of this Subcommittee. Allyson mentioned the possibility of using the 1% rule to

determine commercial sites eligible to use an ALP, but Elizabeth noted that many people say the issue with the 1% rule under MS19 was that everyone designed their sites to contribute just under 1% and it resulted in blown out local streams. Allyson suggested evaluating only the immediate outfall at the site to avoid that. Fred said that he heard what she was saying, but that it does not avoid the need to do the calculations because it is a common plan of development, so it would not be an easier alternative.

David suggested using a menu of BMPs in lieu of site-specific calculations, such as using an infiltration trench for water quality treatment for a volume of 1" of rain. Allyson said that we would need more time to evaluate this and that it would be difficult to implement David's suggestion. Joe suggested that we could have the proposal include language that this be considered in the future, but that we should not pursue it now. The group agreed to let the ALP option go.

DISCUSSION OF THE TIERED APPROACH

In response to Ann's previously voiced concern, Fred stated that for Bay Act localities there is program oversight by DEQ currently. Fred said that DEQ would probably have to incorporate the tiered approach into the oversight of the Bay Act localities. Elizabeth pointed out that the Chesapeake Bay Land Disturbing Activities are creations of the Stormwater Management Act, which requires a stormwater program for developments in the "donut hole", so any reviews by DEQ would actually be done under the Stormwater Management Act. Fred said that DEQ is starting to look at localities' E&S programs and is working with VSMP authorities, but that they have not yet done any audits of VSMP authorities due to limited resources. So DEQ oversight on this subject is largely yet to be determined. Shannon Alexander stated that some localities (or at least just Northampton) may not even look at the strawman because it is complicated and they may just use energy balance instead for projects in the donut hole. Phil pointed out that in some localities they will still adopt the tiered approach because it would still be easier for them.

Elizabeth asked for the will of the group on what to report to the full Workgroup on the 13th. Elizabeth asked if it would be acceptable to tell the Workgroup that the Subcommittee is still working on the strawman concept and to have Mike Rolband give his presentation that the group just assigned to him. Elizabeth asked if DEQ's role would be any different than it is today; Fred said it probably would not be, but this is subject to resources. Elizabeth asked if the group was all right with presenting the strawman as is to the full Workgroup, with the exception of the two homework assignments to be discussed on Friday (from Mike and DEQ). The group agreed to add a sentence saying that this process will be subject to the same level of DEQ oversight and review as under the existing regulations. Fred did not want to be any more specific than necessary, so a sentence was simply added that a tiered program will be subject to DEQ review without specifying when or how frequently.

Elizabeth stated that Peggy's questions via email asked whether the tiered approach is even necessary in light of Tom's professional stamp provision that was already agreed upon. Tom said that it is beneficial to have both: one to make it easier for localities to administer a program, and one to assist the developer or property owner for the small projects who cannot afford to hire an engineer to do the work. In that respect, it is less expensive to do MS-19. Phil said that if we are concerned about review and environmental protection, the tiered approach

encourages localities to conduct plan reviews when they are not doing so today with the energy balance method, which is a good thing.

Elizabeth stated that the strawman language is what is going to the full Workgroup (with comments in the margin) subject only to changes from Fred and Mike's homework. Phil asked if we could see how many people support the strawman as is, and Elizabeth asked if anyone still has significant reservations. Joe said he could not say whether the Chesapeake Bay Foundation would vote for it; he has to talk to Peggy. He echoed some of Ann's concerns as well. Elizabeth pointed out that the workgroup is not responsible for supporting whatever the legislature actually writes as the law if it is different from what the Workgroup recommends to the General Assembly.

David expressed concern that we have not done everything we could; he is concerned that we have made things too difficult for developers to comply with the proposed regulation. Tom said this is an issue with not having a definition of "common plan of development." Elizabeth pointed out this is an independent issue for DEQ and does not really have anything to do with the Workgroup. Elizabeth assigned homework to David to draft language about how DEQ needs to give guidance on this CPOD issue. Elizabeth suggested having Fred talk about this at the full Workgroup meeting. Fred said he could, but that it would hijack the entire meeting. David suggested instead having a FAQ section on DEQ's website.

Elizabeth asked for public comment. Hearing none, the meeting was adjourned at 11:56 a.m.