

**Nutrient Trading Expansion Regulatory Advisory Panel
DEQ Central Office
Monday, April 15, 2013**

Regulatory Advisory Panel Members Present

Phil Abraham, Vectre/VACRE
Brent Fults, CBNLT
Taylor Goodman, Balzer and Associates
Normand Goulet, NVRC
Ann Jennings, Chesapeake Bay Foundation
Whitney Katchmark, Hampton Roads Planning District Commission
Allen Meurer, ECS
Darrell Marshall, VDACS
Chris Pomeroy, VAMSA
Nikki Rovner, The Nature Conservancy
Mindy Selman, WRI
Shannon Varner, Troutman-Sanders
Wilmer Stoneman, Virginia Farm Bureau Federation

Facilitator

Kristina Weaver, IEN

Agency Staff

David Aho, DCR
Eric Aschenbach, VDH
Russell Baxter, DEQ
Leslie Beckwith, DEQ
Josiah Bennett, DEQ
Diane Beyer, DCR
Allen Brockenbrough, DEQ
Scott Crafton, DCR
Dean Cumbia, DOF
James Davis-Martin, DCR
Michael Fletcher, DCR
Matthew Gooch, Office of the Attorney General
Katie Hellebush, Alliance Group
Deb Harris, DEQ
Buck Kline, DOF
Kathleen O'Conner, DEQ
Ginny Snead, DCR

Others Present

Casey Jensen, Chesapeake Bay Nutrient Land Trust
Adrienne Kotula, James River Association
Brian Noyes, Colonial Soil and Water Conservation District
Peggy Sanner, Chesapeake Bay Foundation

Via Phone

Pat Gleason, EPA
Darryl Brown, EPA
Ann Carkhuff, EPA

Welcome and Introductions

Ms. Weaver called the meeting to order and welcomed attendees to the 5th meeting of the RAP.

Ms. Snead referenced the Regulatory Action Overview. A copy of this, along with other meeting materials, is available at http://www.dcr.virginia.gov/laws_and_regulations/lr6.shtml.

Ms. Snead said that the intent of this meeting was to continue where the discussion left off at the last meeting. She noted that representatives from the Department of Forestry were on hand to address questions raised at the previous meeting.

Ms. Weaver thanked DEQ for hosting the meeting. She noted the meeting guidelines. She said the intent was to balance the dialogue and continue to move through the regulations.

Ms. Snead noted that representatives from the EPA were participating in the meeting by phone.

Ms. Weaver said that following the meeting any additional comments or suggestions regarding the material presented at this meeting should be submitted by email to Ms. Snead by Monday, April 29.

4VAC50-80-100 Management plan.

Ms. Weaver led a discussion of the draft language continuing from the last meeting.

Ms. Snead said that this section had been reviewed previously, but noted there were additional changes.

Ms. Jennings asked if there could be some clarification regarding what the performance standards would be. She said that as she read the language the banker or applicant would be dictating the performance standards. She said that she thought the Department should articulate the minimum standards.

Ms. Snead said that section was intended to address any type of innovative project. She said that the Department could not anticipate all performance standards. She noted that the application is

site specific. As a part of the application review, the Department will provide a technical review and comment back to the applicant.

Ms. Jennings said that she understood the need to be flexible but that there should be a minimum standard. She said that similar to the wetland mitigation bank there should be a standard as to what the agencies are looking for.

Ms. Snead said that her understanding was that much of that could be accomplished through guidance and not through the regulations. She said that the Department would provide specifics where possible.

Mr. Goulet suggested that language could be modified to say that the applicant must meet performance standards established either by regulation or by guidance.

Mr. Fults noted Ms. Jennings' request for additional details. He asked if the purpose was to provide a structure for the regulations with the intent to come back and fill in the necessary details or if the specific terms should be negotiated at this point.

Ms. Snead said that the items of concern were being included as discussion items and would be addressed at subsequent meetings. She noted that this was a brand new regulation that was being put together.

Ms. Snead said at this meeting that the intent was to address baseline and credit calculations. The May meeting will address fees and water quality issues. She said that the hope was to bring a full draft document to the June meeting with the July meeting being set for final review. She did note that the July end date might not be realistic.

Mr. Fults said that as a RAP member he felt like there had been numerous presentations but not much discussion back and forth between the members.

Mr. Baxter said that was where the RAP was at this point. The draft was provided for members to comment as to whether the details were sufficient or if more were needed.

Ms. Jennings asked if a land conversion project looked at the entire project area or if a portion could be submitted to the nutrient bank.

Mr. Baxter said that a new definition was being proposed for "management unit" that would address properties where only a portion was submitted for trading. He said the definition proposed was drawn from the Resource Management Plan (RMP) regulations. He said this applied to the baseline activities.

Ms. Jennings said that the concern was different than the baseline. She noted that the term "leakage" was of concern in identifying the specific trading unit.

Ms. Snead said that the intent was to look at the entire unit.

Mr. Baxter said that this was separate from the RMP program, but that the certification would meet certain requirements.

Mr. Stoneman said that was problematic. He said that if the intent was that a farmer who farms 15,000 acres would have across the board compliance, then a trading program would not be successful. He said that a clear definition of management unit was needed. He said that he was comfortable with the provisions in the RMP language because the farmer specifies which land the program applies to.

Mr. Baxter said that staff would flag that as an issue to be further developed.

Ms. Rovner said that the concern was that a farmer not reforest a field and cut down existing trees on the next field because that would not be a reduction. She said if the baseline was defined to apply to the entire farm then any existing forest would have to be retained.

Ms. Snead said that would require looking at the entire farm and the baseline load.

Mr. Brockenbrough noted that there would be nothing to prevent the clearing of trees in the future.

Mr. Stoneman said that the land unit was important.

Mr. Kline from the Department of Forestry said that with regard to the seed tree law, that applied to the species. He said that a certain percent of a stand has to be in contiguous acres.

It was noted that there is an exemption for conversion to cropland.

Ms. Selman asked if a management unit would be defined by the farmer.

Mr. Baxter said that staff would propose a definition for management unit.

Ms. Selman said that with regard to the leakage issue, Maryland set a baseline defined at the tract level, but if a farmer owned or operated more than one tract the farm would need to meet the nutrient management plan minimum standard.

Ms. Jennings said it would be helpful to know what other states have done with regard to the issue of leakage. She said that could also be helpful with regard to carbon trading as well.

Under section C1 Mr. Fults asked about the stem density. He asked how the number 400 was derived.

Mr. Goodman said that the question was if 400 stems were planted what was the extended number. He said plans call for thinning in ten years or there is the potential for clear cutting and replanting. He said that the 400 stem number depends on what the desired outcome was for the land.

Mr. Cumbia from the Department of Forestry said that pine was generally planted at 400-500 stems per acre and that with the anticipated mortality the growth distribution would be about 250 stems. He said that there could be problems with fire or mice. He said that the survival rate varied but the final anticipated harvest could be 100 stems per acre.

Mr. Cumbia said that number planted may not be an accurate measure. He said that a professional forester could make an initial recommendation based on soil types, preparation, etc.

Mr. Baxter asked if it would be more appropriate to specify a survival rate.

Mr. Kline said that was his suggestion. He said that what matters at the end of the planting is the survival rate.

Mr. Abraham said that focusing on the word “achieve” did not seem to be good guidance. He said that planting to achieve seemed to be a difficult thing to address up front.

Mr. Goulet asked if this was outlined in Department of Forestry Guidance.

Mr. Kline said that the information was not documented in one place. He said that documents available on the DOF website deal with reforestation.

Mr. Goodman said that instead of dictating a rate, the plan should be determined by a forester or landscape architect. He said that with DOF guidance a survival rate could be determined that would meet the performance standard.

Ms. Rovner asked how forest stewardship plans addressed management of invasive species.

Ms. Beyer said that there was a required clause for dealing with invasive species in the forest stewardship plans.

It was noted that neither of the terms “evenly distributed” nor “invasives” were addressed in this draft.

Mr. Goodman said that both would be covered in the monitoring portion.

Ms. Katchmark said the language appeared to be written so that the final operation had to be forest land. She said there may be a desire to convert to an urban pervious surface.

Mr. Goodman said that the guidance accounts for crop to pasture and crop to hay conversions.

Ms. Jennings said that she hoped that the intent was not to allow farms to be converted to less intensive development.

Mr. Baxter said that less intensive development would mean fewer nutrients.

Ms. Jennings said that she would like further discussion of the issue to make sure that the total impact of the land conversion was being considered.

Ms. Weaver placed the matter on the parking lot for future discussion.

Ms. Rovner said that she thought it would be clearer if reforestation and land conversion were addressed separately.

Ms. Selman asked about Agriculture baseline requirements. She asked if the agreement would have to be permanent.

Mr. Baxter said that the credits would have to continue for the management unit to be in compliance with the base line.

Ms. Selman asked if that would keep the easement for the next owner.

Mr. Brockenbrough said that was the intent but that it was uncertain how to do that in the long run.

Mr. Stoneman suggested under section D1 that parcels be identified by geographic coordinates. He said that would be more consistent than addresses and farm service tract numbers.

Under section G, Ms. Rovner suggested there should be a scientific review panel.

Mr. Baxter said that was addressed in Part III of the draft regulations.

Ms. Rovner said there should be a way to set the expectations for new practices.

Ms. Jennings agreed about the review and said that there should also be a way for the public to be involved.

Resource Management Plans (RMPs)

James Davis-Martin gave the following presentation.

Ms. Snead noted that the presentation was in response to a specific request from the RAP regarding a presentation about RMPs.

Mr. Davis-Martin gave the following overview of the RMP Regulations that were recently approved by the Virginia Soil and Water Conservation Board.

RMP Development Timeline

- March 2011- General Assembly passes HB1830 establishing Resource Management Plans

- March 2011 – Board authorizes development of regulations
- June 2011 – February 2012 – Regulatory Advisory Panel meets
- March 2012 – Board approves proposed regulations
- July – September 2012 – Public comment period
- March 2013 – Board approves final regulations
- December 2013 – Final regulations effective

RMP Process

- Plan development
- Plan review and approval
- Implementation
- Verification of implementation
- Certificate of RMP implementation issued
 - Valid for 9 years
 - Safe harbor – full compliance with TMDLs and state water quality requirements
- Inspections every 3 years (minimum)

Plan Developer

- Certification by DCR
- Registry of certified planners
- Qualifications:
 - Certified Nutrient Management Planner (DCR) and
 - Certified Conservation Planner (NRCS) or academic/applied proficiencies
 - § Agricultural conservation planning
 - § Environmental laws, regulations and ordinances
 - § Historic resources laws, regulations and ordinances
 - § Soil erosion processes and RUSLE
 - § Fundamentals of water quality and nonpoint source pollution
 - § Site vulnerability assessment tools

Plan Minimum Standards

- Cropland
 - Nutrient management
 - 35' Buffer along perennial streams
 - Soil conservation to "T"
 - Cover crops (when needed)
- Hayland
 - Nutrient management
 - 35' Buffer along perennial streams
 - Soil conservation to "T"

- Pasture
 - Nutrient management
 - Fencing along perennial streams
 - Pasture management/soil conservation to “T”

Mr. Davis-Martin reviewed a chart with the Model evaluation of the final RMP regulations. A copy of that chart, along with the full presentation is available at: http://www.dcr.virginia.gov/laws_and_regulations/lr6.shtml

Mr. Goulet asked how the sediment was adjusted in the model.

Mr. Davis-Martin said that sediment was accounted for because sediment reduction was overachieved in the Watershed Implementation Plan (WIP). He said that those excesses were generated from all sources, not just from agriculture.

Ms. Jennings said that it might be helpful to explain when the model is run assuming the pasture fence is constructed at 35 ft. from the stream bank.

Mr. Davis-Martin said that the pasture fencing does exclude cattle from the stream. He said that when the fencing practice is established at 35 ft. that does not give credit for the upland filtering benefits of the buffer.

Mr. Davis-Martin said that DCR believed this model was a conservative estimate of what the RMPs could reach.

At this time the committee recessed for a break.

Following the break, Ms. Snead began a discussion of the draft documents. She noted that this was a rough draft and just the beginning of the process to see advice and feedback from the RAP.

4VAC50-80-80. Establishing baseline.

On line 15, Ms. Snead noted that the management unit term was not yet defined. She noted that much of this language came from the proposed RMP regulations.

Ms. Jennings said that in Section B if there was a reference to the Bay TMDL and a local TMDL that the regulations should specify that the goal was for the TMDL with more strict requirements.

Ms. Jennings noted that Mr. Davis-Martin’s presentation indicated the difficulty in mapping practices. She said that where possible language should be more specific with regard to a practice based approach vs. a tool-based approach.

Mr. Baxter said that the definition of management unit was from the RMP regulations. He said that was placed in the document as a discussion starting point.

Mr. Stoneman said that with regard to BMPs for soil erosion, the standard should be performance based and not based on no-till or cover crop.

Mr. Marshall said he would use caution with regard to prescribed grazings. He said that NRCS standards for prescribed grazing were very specific.

Ms. Jennings said that she wanted to restate that there was a lack of comfort with regard to the RMP program and whether that actually meets the WIP. She said that CBF would prefer to have additional clarity with the Nutrient Trading program. She noted that program participation was voluntary. She said that she would like for EPA to weigh in with any indication as to whether the program meets the WIP requirements.

Ms. Snead noted that representatives from the EPA were **listening** in to the meeting and would have the opportunity to comment. She noted that also through the Chesapeake Bay Program there would be a review of all trading programs.

Ms. Selman noted under Section B there was no mention of confined animal areas or feed lot areas.

Mr. Goulet asked if staff was saying that if a farm had an RMP it was achieving the baseline goal.

Mr. Baxter said no. He noted that the RMPs were not referenced in the Nutrient Trading draft. He said that some of the language was drawn from the RMP regulations to give a foundation for discussion as a preliminary draft.

Mr. Goulet said that the language should be more specific with regards to meeting the necessary reductions for the Bay WIP. He said that should be part of the application package. He said that it should be generic in the event the WIP is changed. He said that it should demonstrate compliance at whatever level is in progress at the time.

Mr. Stoneman said that if the trading program was going to be taken to the level of the TMDL for agricultural purposes there would be nothing to trade. He said that if agriculture was at the 98% level of BMPs then farmers would have nothing to trade.

Ms. Sanner said that there was some ambiguity because of the implication that the RMP meets the WIP. She said there needed to be some tool based way of measurement.

Ms. Snead said that staff would have to review these considerations and come back with amended language.

Under Section B2, Mr. Stoneman said that the 35 ft. buffer requirement should be consistent with the RMP regulations.

Mr. Fults asked why intermittent streams were excluded. He said that most farms have intermittent streams, but not perennial streams.

Mr. Goodman asked if the baselines would be the same for the Chesapeake Bay as for the Southern Rivers.

It was recommended that the Southern Rivers be addressed in a separate section.

Under Section C, Mr. Abraham said that the use of the term drainage area under control of the owner was unclear. He said that on line 71 that the language did not need to be “compliance or achievement” but just “compliance.”

Mr. Stoneman asked if all urban practices had to meet the Stormwater Management regulations regardless of whether there was a permit.

Mr. Baxter said yes, if the owner/operator wants to generate credits. He noted that the program is voluntary.

Mr. Stoneman said that if there is a program for urban localities, there should be a similar program for agriculture.

Mr. Baxter said that staff would revisit the language with regard to agriculture.

Mr. Pomeroy asked if a parcel within an MS4 would have a credit regardless of what happened elsewhere in the system. He said he was trying to clarify the roll of the MS4 with regard to nutrient reduction in the WIP.

4VAC50-80-90. Credit calculation procedures.

Mr. Pomeroy noted on Sections A-C that it was not typical to include specific web-based applications in the regulation for any particular model since those tools changed and are modified over time.

Ms. Snead noted that when the Stormwater Regulations go into effect on July 1, 2014 that only the BMPs from the Clearinghouse can be used.

Mr. Crafton said that DCR was not comfortable with that language but that it could not be amended.

Mr. Goulet said that limits innovation.

Ms. Snead said there is a process to include items in the Clearinghouse that evaluates new innovative BMPs.

Ms. Snead said that staff would revisit that section.

Ms. Jennings asked if there was a way to provide assurances of checks and balances with the EPA. She suggested that in the introductory paragraph there be a “consistent with” reference.

Ms. Jennings said that two additional issues were the need to have a more general discussion regarding land use conversion to more intensive land use and the need for public engagement in innovative practices.

At this time the committee recessed for a break.

Following the break the discussion continued with the Part IV discussion.

Part VII Financial Assurance

Discussion continued regarding the Financial Assurance section. Leslie Beckwith and Josiah Bennett from the DEQ financial division joined the discussion.

4VAC-50-600. Financial assurance applicability.

Ms. Jennings asked about the inclusion of the stream fence. She asked why this was limited to structural BMPs.

Ms. Snead said that stream fencing was a structural BMP, but that other planting would not be considered structural.

Mr. Baxter said that this had to be related to the release of credits. He said that credits are not released until the practice has been accomplished.

Mr. Brockenbrough said that staff had not considered applying financial assurance to baseline requirements.

Mr. Fults asked how this would be applied in a one on one scenario for a private facility versus a bank.

Staff said that the standards would be the same for private facilities and banks.

Ms. Snead said that most localities require certain bonds or other financial assurances for large development.

Mr. Goodman said those were short term construction dollars that can be released. He said that there is no long-term financial assurance but there can be a maintenance agreement.

Mr. Fults asked why this applied to the banking industry but not to large scale developers.

It was noted that the requirement was in the legislation passed by the General Assembly.

Mr. Crafton said that the issue is not unique to Virginia. He said that other states were dealing with the same issue with regard to whether localities can withhold a portion of the construction bond. He said that most states are in agreement that this needs to be addressed in the regulations.

4VAC50-80-610. Suspension of nutrient credit exchange

Mr. Goulet asked what happened to the buyer if the credit was suspended.

Ms. Snead said that was why the contract was between the buyer and the bank. She said that the permit holder could not transfer liability.

4VAC50-80-620. Cost estimate for the nutrient credit generating facility

Concern was raised regarding whether cost estimates should include maintaining baseline practices.

Mr. Goodman asked about the time frame for operation and maintenance. He asked the duration of the financial assistance.

Mr. Baxter said that needed to be clarified but that it should be the time frame for which the credits are generated.

4VAC50-80-640. Allowable financial mechanisms

Ms. Harris noted that in other financial assurance programs, DEQ does not allow escrow, but does allow trust funds. She said that escrow agents and facilities are not as regulated as banks and trust companies. She said the intent was to make sure that funds invested actually accrued in value.

Mr. Fults asked if there was an opportunity to withdraw from a trust.

Ms. Snead said that would need further discussion and review.

4VAC50-80-650. Surety bond

A member asked if there was a process for changing a surety bond to something else such as a trust.

4VAC50-80-660. Letter of credit

A member requested that the time frame for banking be changed from 120 to 60 days.

DEQ staff said that 120 days was the standard for the agency.

4VAC50-80-670. Certificate of deposit

There were no comments regarding this section.

4VAC50-80-680. Trust

Mr. Varner asked if the remaining years were flexible or if they were a set time.

Ms. Harris said that needed to be clarified. She said that the intent was to allow for installment payments.

Mr. Fults said that massive payments up front were quite unpopular.

4VAC50-80-690. Tax or rate authority

Ms. Harris noted that this language was taken from the legislation.

On line 379 it was suggested that after “may be used” the phrase “by such party” be added. It was suggested this would clarify that the choice belongs to the person taking the risk.

It was suggested that an insurance-based product should be added.

RAP General Questions

Ms. Weaver asked if there were additional comments or questions from the RAP. She noted that any written comments should be submitted to staff by April 29.

Ms. Selman said that based on the day’s discussion regarding the baseline issue she would like to see a clear definition of the baseline management and leakage issue.

Mr. Goodman echoed previous comments regarding the need to address the Southern Rivers.

Mr. Stoneman said that with regard to equity he was concerned that the language was being very prescriptive with regard to agriculture and forestry but not to urban areas.

Regarding the baseline, Mr. Varner said that there needed to be a balance between what was verifiable and what was too onerous to ensure an incentive to participate.

Ms. Rovner said that she was also concerned about the issue of equity, but that banks would not work for everyone. She also noted that the issue of leakage needed to be addressed.

Ms. Jennings said that she remained concerned about the lack of detail regarding the monitoring requirements. She said that it would also be important to fully vet the issue of the baseline for land conversion.

Mr. Goulet said that he was uncomfortable with the aspect of viability. He questioned whether this was forcing an unrealistic development of a market.

Public Comment

Mr. Noyes from the Colonial Soil and Water Conservation District said that he was there to speak on his own behalf and not to officially represent the District. He said that he was concerned with the costs of innovation. He said that the financial limitations were a key consideration. He said that it is also important to understand the challenges of the land owner.

Adjourn

Ms. Weaver noted that the next meeting of the RAP would be May 21, at 10:00 a.m. in the same location. She reminded members that comments were due to staff by April 29.

The meeting was adjourned.