

**Nutrient Trading Credit Certification
Regulatory Advisory Panel (RAP)
DEQ Piedmont Regional Office
Thursday, June 11, 2013**

Nutrient Trading Credit Certification RAP Members Present

Phil Abraham, VACRE
Doug Beisch, WEG
Jack Frye, Chesapeake Bay Commission
Brent Fults, CBNLT
Taylor Goodman, Balzer and Associates
Normand Goulet, NVRC
Ann Jennings, Chesapeake Bay Foundation
Whitney Katchmark, HRPDC
Tim Mitchell, City of Lynchburg
Chris Pomeroy, VAMSA
Nikki Rovner, The Nature Conservancy
Mindy Selman, WRI
Shannon Varner, Troutman-Sanders
Bryan Wagner, VASWCD

Facilitator

Kristina Weaver, IEN

Agency Staff Present

David Aho, DCR
Russ Baxter, DEQ
Diane Beyer, DCR
Allen Brockenbrough, DCR
James Davis-Martin, DCR
Michael Fletcher, DCR
Deb Harris, DEQ
Darrell Marshall, VDACS
Kathleen O'Connell, DEQ
Ginny Snead, DCR

Others Present

Scott Blossom, WEG
Darrell Brown, CBA Program Office (by phone)
Irina Calos, The Nature Conservancy
Laura Cottingham, Southern Environmental Law Center (SELC)

Olivia Devereux, Devereux Environmental Consulting (DEC)
Adrienne Kotula, James River Association
Rick Parrish, SELC
Peggy Sanner, Chesapeake Bay Foundation
Kevin Seaford, Golder Associates
Jenny Tribo, Hampton Roads, PDC
Sarah Wooten, Chesapeake Bay Foundation

Welcome and Introductions

Ms. Snead called the meeting to order. She welcomed attendees to the 7th meeting of the RAP. She noted that materials had been emailed to members the preceding week.

Ms. Snead noted that with the point source stormwater programs moving to DEQ, this would be the last meeting hosted by DCR.

Ms. Snead referenced the Regulatory Action Overview presented at prior meetings. She said that staff would be presenting revisions to the draft document, but that the RAP was not yet ready to test for consensus. She noted that no changes had been made in the work plan or regulatory timeline since the meeting in May.

Overview of Comments Received

Ms. Harris reviewed comments received from RAP members to date. She said that members had requested that the RAP take a step backward and review the comments. She noted that some of the comments had been incorporated into the regulatory draft, but not all. She distributed a handout with comments and noted that the comments were not presented in any particular order.

Ms. Harris noted the following in response to comments received.

The regulation will be applicable to both the Chesapeake Bay and the Southern Rivers regions. She said that where necessary distinctions would be made but most provisions will apply to both regions.

Regarding definitions, Ms. Harris noted that some comments were accepted but that some were not because the definitions had been edited making certain comments were no longer applicable.

Regarding the definition of hydrologic unit codes (HUC) a member said that this was not useful. Ms. Harris said that the definition of HUC was specifically for the use of the acronym in the regulation.

Ms. Harris said that a lot of comments were received concerning the use of the term “management unit.” This term has been changed to “management area.” She said that the concept is that management area encompasses the entire property.

Ms. Harris noted that no comments were received regarding Part II of the regulatory draft.

In Part III, Ms. Harris said that a member commented that the applications should be standardized and that DCR should not wait to issue appropriate guidance. She said that the application requirements are standardized for any submittal. But she noted that if a technical assistance panel is needed to advise the agency regarding a new practice that option was available.

A comment was made that the Department should notify the local government where the credit generating facility is located as well as post the information to the Regulatory Town Hall. Ms. Harris said that the information would be posted on the Regulatory Town Hall and the Agency web site. She said that the draft regulations mirror the public notice requirement as outlined in the statute.

Ms. Jennings asked if the comments from Ms. Harris meant that decisions were final.

Ms. Snead said that comments reflected the current draft.

Mr. Frye suggested that public notice could be made available through a list serve process.

Ms. Snead said that would be helpful but did not need to be included in the regulations.

Ms. Harris noted that members of the public can sign up for notice through the Regulatory Town Hall.

Mr. Beisch asked when the notification was posted.

Ms. Harris said that currently notification is given when the agency has received the complete application.

Mr. Beisch asked if the public would be able to review approved applications as well as pending applications.

Mr. Baxter said that this was all public information. But that the notice capabilities of the registry have not yet been addressed.

Ms. Harris said that most likely a general notice provision will be sent out. The application will also be posted on the Regulatory Town Hall as well as on the agency web site.

A member commented that the verification scheduled should align with the MS4 permits. Ms. Harris said that was a matter better addressed through guidance.

Regarding the credit advisory committee it was recommended that a template be developed or that a standing committee be formed. Ms. Harris said that this was outside the scope of the regulations but that the comment would be considered if such a committee was necessary.

A member asked if staff was envisioning one advisory committee or if the committee would be established on a case by case basis.

Ms. Snead said that it would depend on the applications received but would be more on an ad hoc basis.

Ms. Katchmark asked how these applications would be matched with the BMP Clearinghouse.

Mr. Baxter said that there haven't been any final decisions.

Mr. Goulet asked about the use of "shall" or "will" on pages 12 and 13 of the draft regulations regarding visits. He asked about the difference between this language and statutory language. He said that flexibility allows too many details to be overlooked.

Ms. Harris said that currently the language said "may" and not "shall."

Mr. Varner said that DEQ would need the ability to be flexible with regard to visits. He said that some sites will be very standardized. He noted that credits would not be saleable or transferrable until the facility was up and running.

Mr. Fults said that there should be a process to follow concerning visits. He said technology could eliminate the need for some visits.

Mr. Goulet asked how a facility could be verified as up and running without a visit.

Mr. Varner said that the BMP would already be recorded. He said that DEQ would not need to visit every BMP in the state.

Mr. Goulet said that the MS4 permit required that the site is visited at least once during the permit cycle.

A member suggested that the regulations require that a technical advisory committee be convened before a new type of credit generating facility is certified.

Ms. Harris said that in the case of most new technologies the department would convene an advisory group. However she said there will be instances where in-house expertise can address the application.

A member suggested the reference to "others types of protects" should be more specific. Staff said that while additional projects may be added, at this point the other projects are unknown.

A member said that there should be an allowance for members of the public to comment on a proposed facility site and certification. Staff said that the regulations will call for public notice but that there will be no provision for public comment or hearings.

Mr. Frye asked if there was an appeal process for the person who has submitting an approval or for a bank.

Ms. Harris said that there is a case decision process outlined in the draft for 4VAC50-80-120.

Ms. Jennings asked for clarification regarding whether the public would have an opportunity to object to a credit.

Mr. Baxter said that the agency is given the responsibility for the certification of the credit and that he did not see a provision in the statute allowing for a challenge to that certification. He said the statute only provides for public notice.

Ms. Harris moved on to comments regarding the baseline covered in section 4VAC50-80-80.

Ms. Harris noted that the Chesapeake Bay Foundation requested that the agency take into account concerns raised with the Resource Management Plan (RMP) program, specifically regarding agricultural best management practices (BMPs).

Ms. Snead said that this was still in development and that the agency was considering this request.

Staff said that monitoring and verification protocols may be more appropriate in guidance and not in the regulations.

Ms. Harris said that regarding several issues of concerns that the regulations are still under development. Those concerns included a baseline for nutrient credit exchange and leakage.

Regarding the forestation issue Ms. Harris said that further discussion may be necessary as a baseline will apply to the entire area.

A member asked about a requirement for the land owner to agree that the land would remain in the same condition as when submitted.

Mr. Baxter said that the term management area had been narrowed to contiguous acreage. He noted that this section of the draft regulations needed additional clarification.

It was noted that landowners do not always submit all of their land for consideration for credits.

Mr. Varner said, that for perpetual credits, taking 100 acres out of production and allowing it to reforest was a considerable step and that the landowner should receive credit for that.

Ms. Rovner said that comments were made that this process was too difficult. She said that if credits are going to be generated but pollution generated elsewhere that was not a good solution.

Mr. Varner said that it was not that the process was too difficult but the consideration of what would happen to the program. He said that it was important to remember that the farmer is not required to do this. If a farmer puts 100 acres under easement, that's a significant step forward. Additional restrictions could be detrimental to the program.

Mr. Baxter said that it would be helpful to note the distinction between perpetual and not perpetual.

Regarding additionality, a member suggested including additional provisions. Staff said that this was still a parking lot issue to be addressed.

Staff noted that the definition of management unit as well as agricultural practices in support of the RMP were still under discussion.

Regarding urban practices, a member suggested adding a baseline for nitrogen and sediment as well as phosphorus.

Mr. Baxter said that the baseline was meeting the phosphorus standard.

Ms. Snead noted that when a stormwater BMP is designed that it was not just phosphorus being treated.

Mr. Frye noted that the runoff reduction method which determines the phosphorous load also has a nitrogen component.

Mr. Beisch said that the issue was not that there was no nitrogen standard. He said that phosphorus is the compliance metric but that the spreadsheet still calculates nitrogen.

Ms. Snead said that staff would take another look at the proposed language.

A member suggested that urban credits generated on private land be first offered to the local government. Staff said that the statute provides that the locality will receive notification of the credits five days prior to being placed on the registry.

A member asked about land-use conversion. Ms. Harris said that was a statutory requirement, "Baselines for land use conversion shall be based on the pre-conversion land use and the level of reductions assigned in the Virginia Chesapeake Bay TMDL Watershed Implementation Plan or approved TMDLs applicable to that land use."

Regarding the urban baseline, Ms. Harris said that again, staff was using the statutory requirement, "Baselines for urban practices from new development and redevelopment shall be in compliance...."

A member commented that the program was becoming too restrictive to incentivize anything other than a significant land conversion. Staff agreed and said that it was important to find balance. Additional consideration is warranted.

A member said that the issue of new development was clearly addressed but that it was less clear for existing development.

Ms. Harris noted that this was provided for in the statute, “Baselines for urban practices from new development and redevelopment shall be in compliance with post construction nutrient loading requirements of the Virginia Stormwater Management Program regulations. Baselines for all other existing development shall be at a level necessary to achieve the reductions assigned in the urban sector in the Virginia Chesapeake Bay TMDL Watershed Implementation Plan or TMDL.”

Regarding credit calculation procedures in section 4VAC50-80-90, staff noted that presentations regarding the procedures had been made to the RAP.

A member said that the land conversion section should be made more generic to include conversions other than for agriculture to forest. Staff said that this was under discussion with the development of the baseline for agriculture.

Staff noted that a definition of performance standards was still being developed.

Regarding reforestation, it was noted that the requirement was still based on stem density.

Mr. Brockenbrough said that stem density does vary and the intent was to look at initial survivability.

At this time the RAP recessed for lunch.

Following lunch a discussion of the comments received continued.

Regarding stem density, Mr. Goulet asked if there could be other considerations such as for the tree canopy.

Ms. Beyer noted that the problem with a tree canopy was that most lands would not see a substantial canopy for ten or fifteen years. She noted that the stem count language was borrowed from the wetlands mitigation language. She said that 400 would be the initial count to establish the forest and that the count could be revised down from that point depending upon the type of tree. She said that was one of the reasons a forest stewardship management plan was important.

MS4 Baseline Discussion

Ms. Snead said that staff had been having internal discussions regarding the MS4 baseline issue and wanted to receive feedback from the RAP.

Ms. Snead read from the Code of Virginia regarding MS4s.

Ms. Katchmark asked if an MS4 would have to meet the thresholds outlined in order to generate credit.

Ms. Snead said that she did not believe the agency could separate an MS4 entity for the purposes of meeting the requirements of the Watershed Implementation Plan (WIP).

Ms. Tribo noted that the wasteload allocations for MS4s were aggregated and did not specify which land belonged to the MS4 and which did not.

Mr. Pomeroy expressed a concern about mixing two different concepts.

Mr. Mitchell noted that if an MS4 were to generate credits and receive the revenue that would be a large incentive.

Mr. Crafton said that the agency had to be careful not to establish criteria just for entities to receive funding and to generate credits.

Ms. Snead said that this issue would require further discussion.

Mr. Pomeroy said that there was a question as to whether a state agency or local government could prohibit a private property owner from applying to DCR for certification.

Other comments regarding the MS4 baseline included:

- Proposal to address this on a parcel by parcel basis
- Counter proposal to meet Level 2 (L2) in the WIP before credit generation
- Proposal to generate credits when MS4s exceed 5% required by permit
- There are really two discussions here: 1) credit use; 2) credit generation (baseline). It's important to keep this distinction in mind
- MS4 owners should not be disqualified from credit generation
- Proposal that MS4s be obligated to use any revenues generated through the exchange to further their long term obligations to reduce pollution to the "maximum extent practicable"
- There is a parallel framework on the agriculture side: we should consider whether we want to reward early adopters in agriculture if you reward overachievers in MS4 permit cycle
- Are we talking about MS4 or the larger urban context?

- What about the direction of the trade? We don't want to tie the hands of MS4s and prevent them from developing incentive programs to encourage improvements on lands they don't own/operate
- Certification for term credit generation
- We should expect minimal volume of trading
 - At the same time, we can't anticipate future developments and should regulate with an open mind
- Need to be careful not to discourage immediate progress – don't set the bar at 100%, which will likely cause delay
- Want to encourage more innovative redevelopment planning that moves us in the right direction (e.g. incentivize downtown redevelopment rather than greenfield development)
- Need to look at larger picture to include unregulated lands (this would be the biggest “bang for buck”)
- Parcel level approach: Specific parcel would have to achieve L2, which resolves some concerns and is a better option than basis on permit conditions
- Private parties don't have permit requirements, so it's tricky to saddle them with those
- Can Virginia law prohibit private property owners from applying for certification?
- Suggest that DEQ create a table illustrating the breakdown of Baseline, Compliance, and Certification for the two kinds of owners: MS4 and Private Property Owner
- MS4 can't meet L2 with only land they own, which is a problem stemming from the Bay Model
- Who would claim credit for private owner meeting L2?
- Technical point: stormwater utility credit programs in MS4s
- Recap: We are trying to create a system where private property owners interested in retrofits can participate in an incentive program operated by an MS4, but at the same time they can also participate in credit generation by first meeting L2 through an arrangement with the MS4.

Financial Assurances

Ms. Harris led a discussion of financial assurance topics. A copy of the handout is available at http://www.dcr.virginia.gov/other/deq/laws_and_regulations/lr6.shtml.

- Comment: Proposal for structural BMPs poses a hardship for the trading industry. We need a proportional burden
 - DEQ response: Law says “we shall”
 - Recommendation that assurance could be provided through a professionally sealed Engineer Cost Report as an option that would not overreach
- Comment: Land conversion may need financial assurance also, so there may be exceptions. This needs to be addressed somewhere in the regulations

- DEQ response: It is addressed as “corrective action”
- Comment: All assurances are not financial; there are many others incorporated in the statute.
- Comment: Wetland program has a three tiered approach to risk-weighted assurances that we may want to emulate:
 - 1: Establishment Period
 - 2: Long-term Stewardship
 - 3: Catastrophic Damage
- Comment: Land conversion might just need Establishment and O&M financial assurance, with more required for structural BMPs
- Comment: Delete 1B in handout because no continuing assurance would be required for term credits
- Comment: BMP stormwater bond requirement would only be temporary, so this is not the same as financial assurance we’re talking about here
- Comment: Cash bond for structural replacement is not practical – maybe just ask for enough cash to repair?
- Comment: Banks won’t issue 5 year bonds (usually require 1 year renewable) – language needs to be reworked to reflect the intent to allow multiple instruments
- Comment: Catastrophic replacement issue: one size won’t fit all (i.e. mitigation bank vs. dam), so pleased to see the insurance mechanism included
- Comment: Line 854: “credits are *used*”
- Comment: Line 856: may be used [as such entity’s option]
- Comment: Line 858-860: this is overly specific; recommended change “...to assure an adequate supply of credits to meet the entity’s obligations, whether by continued [complete sentence] or by other means.”

Local Water Quality

Ms. Snead said that water quality would be discussed a future meeting. However the following issues were raised.

- TMDL translation issue
- Language on impaired waters doesn’t match with what is in Stormwater Construction general permit (GP)
- Existing as well as new or expanding sources?
- What is “observed source nutrients”?
- “Impaired water” could be anything – need to be more specific (i.e. “nutrient impairment”)
- Scale matters – impaired waterway?
- “Impaired” where? “Observed by” whom? Need to spell this out

- Use the map
- Have DEQ presentation regarding impaired waters

General Questions and Public Comments

Mr. Parrish from the Southern Environmental Law Center noted that with regard to converting land from agriculture to forestland that there was no consideration for a managed forest. He said that there would be considerable land disturbance from activities like harvesting trees, removing stumps, etc.

Ms. Weaver noted that this would be the last meeting she would be facilitating.

The next meeting will be held on August 22, 2013 in the DEQ training office. Comments should be submitted by July 31.

The meeting was adjourned.