

**General Stormwater Management Program (VSMP) Permit for Discharges of
Stormwater from Small Municipal Separate Storm Sewer Systems (4 VAC 50-60-
1200 et seq.) [Part XV] Regulatory Advisory Panel (RAP)**

East Reading Room
Patrick Henry Building, Richmond, Virginia
June 20, 2012

RAP Members Present

Shelly Bains, VCCS
Aislinn Creel, Timmons Group
Michael Crocker, City of Waynesboro
Tabitha Crowder, City of Bristol
Thanh Dang, City of Harrisonburg
Sherry Earley, City of Suffolk
Dan Frisbee, City of Charlottesville
Normand Goulet, NVRC
Steve Hubble, Stafford County
Adrienne Kotula, James River Association
Roy Mills, VDOT
Tim Mitchell, City of Lynchburg
Doug Moseley, GKY & Associates, Inc.
Lisa Ochsenhirt, AquaLaw, PLC
Steve Plante, Loudoun County
David Powers, Williamsburg Environmental Group, Inc.
Peggy Sanner, Chesapeake Bay Foundation
Jeffrey A. Sitler, CPG

Facilitator

Christine Gyovai, Institute for Environmental Negotiations

State Agency Staff Present

David C. Dowling, DCR
Ginny Snead, DCR
Doug Fritz, DCR
Mike Fletcher, DCR
Mason Harper, DCR
Burt Tuxford, DEQ

Others Present

Fran Geissler, James City County
Ann Jennings, Chesapeake Bay Foundation

Jenny Malloy, US EPA
Randall Williford, Loudoun County

Welcome and Introductions

Mr. Dowling welcomed attendees on behalf of the Department of Conservation and Recreation and the Virginia Soil and Water Conservation Board. He thanked members and guests for their participation. He said that three meetings were currently scheduled, but that a fourth may be added.

Mr. Dowling said that he looked forward to productive discussions and the development of a general permit with which DCR and the RAP could be comfortable.

Mr. Dowling turned the meeting over to Facilitator Christine Gyovai from the Institute for Environmental Negotiation.

Ms. Gyovai asked members to introduce themselves and their affiliation.

Ms. Gyovai said that general guidelines were:

- cell phones would be on vibrate or off
- acronyms should be spelled out

Ms. Gyovai said that the purpose of initial meeting was to seek an understanding of the issue. She said that discussion of greater detail would come as the meetings progressed. She said that the agenda for the day was very full and that she would keep a parking lot list of issues that were important but could not be addressed due to time constraints.

Regulatory Action Overview, Committee Charge and Regulatory Timeline

Mr. Dowling noted that the agenda was modified slightly from what had been sent to members.

Mr. Dowling gave the Regulatory Action Overview, Committee Charge and Regulatory Timeline.

Mr. Dowling said that during the public comment period on the NOIRA, DCR received five sets of comments. Those comments are available from DCR.

Regulatory Action Overview

Mr. Dowling gave following Regulatory Action Overview.

- The purpose of this regulatory action is to consider amendments to the applicable portions of the Virginia Soil and Water Conservation Board's Virginia

Stormwater Management Program (VSMP) Permit Regulations in order to reauthorize and amend the General Virginia Stormwater Management Program (VSMP) Permit for Discharges of Stormwater from Small Municipal Separate Storm Sewer Systems (small MS4s).

- **Framework of Stormwater Regulations**

VIRGINIA STORMWATER MANAGEMENT PROGRAM (VSMP)
PERMIT REGULATIONS [4 VAC 50-60-10 et seq.]

Part I: Definitions, Purpose and Applicability

Part II: Administrative and Technical Criteria for Regulated Land-Disturbing Activities

Part II A: General Administrative Criteria for Regulated Land-Disturbing Activities

Part II B: Technical Criteria for Regulated Land-Disturbing Activities

Part II C: Technical Criteria for Regulated Land-Disturbing Activities: Grandfathered Projects and Projects Subject to the Provisions of 4VAC50-60-47.1

Part III: General Provisions Applicable to Stormwater Program Administrative Authorities and to Local Stormwater Management Programs

Part III A: Programs Operated by a Stormwater Program Administrative Authority

Part III B: Department of Conservation and Recreation Procedures for Review of Local Stormwater Management Programs

Part III C: Virginia Soil and Water Conservation Board Authorization Procedures for Local Stormwater Management Programs

Part IV: Technical Criteria and Permit Application Requirements for state Projects

Part V: Reporting

Part VI: VSMP General Program Requirements Related to MS4s and Land-Disturbing Activities

Part VII: VSMP Permit Applications

Part VIII: VSMP Permit Conditions

Part IX: Public Involvement

Part X: Transfer, Modification, Revocation and Reissuance, and Termination of VSMP Permits

Part XI: Enforcement of VSMP Permits

Part XII: Miscellaneous

Part XIII: Fees

Part XIV: General Virginia Stormwater Management Program (VSMP) Permit for Discharges of Stormwater from Construction Activities – Effective July 1, 2009

Part XV: General Virginia Stormwater Management Program (VSMP)
Permit for Discharges of Stormwater from Small Municipal Separate
Storm Sewer Systems – Effective July 9, 2008
FORMS

- Regulations developed under the federal Clean Water Act (33 USC §1251 et seq.) and §10.1-603.1 et seq. of the Code of Virginia require that VSMP permits be effective for a fixed term not to exceed five years.
- The existing 5-year General Permit became effective on July 9, 2008; thus necessitating the regulatory promulgation of a new General Permit before the July 8, 2013 expiration date.
- On May 24, 2011, in accordance with these state authorities and under the auspices of federal designated authorities to the state, the Board authorized DCR to prepare and submit a NOIRA to consider changes and solicit recommendations; in accordance with the Administrative Process Act exemption requirements specified in §2.2-4006 A8, the Virginia Register Act, and other applicable technical rule making protocols
- **Regulatory Amendment Process**
 - Regulatory actions are typically comprised of three primary steps; the Notice of Intended Regulatory Action, the Proposed Regulations, and the Final Regulations. Routinely under the Administrative Process Act (APA) this takes about 2 years.
 - However, amendments to this General Permit are exempt from the full APA (§2.2-4006 subsection A8 of the Code of Virginia). As such, a slightly abbreviated APA process is required. We still go through the NOIRA, Proposed, and Final regulatory steps, public input processes remain; however, the administrative review process is reduced.
 - The General Permit shall be exempt from portions of the APA if the Board:
 - Provides a Notice of Intended Regulatory Action (NOIRA).
 - Forms a regulatory advisory panel composed of relevant stakeholders to assist in the development of the General Permit (following the passage of 30-days from the publication of the NOIRA)
 - Provides notice in the Virginia Register of Regulations and receives oral and written comment.
 - Conducts at least one public hearing on the proposed General Permit.
 - Publishes in the Register both the proposed and final regulations.

- At least two days in advance of the Board meeting where the regulation will be considered, a copy of the regulation shall be provided to members of the public that request a copy.
- A copy of that regulation shall be made available to the public attending the Board meeting.
- The permits are also subject to additional federal NPDES requirements relevant to the promulgation of general permits. These include:
 - Development of a fact sheet.
 - EPA formal 90-day review of the proposed General Permit regulation and fact sheet.
 - Mailing of the draft permit, public notice document describing commenting procedures and hearings, and fact sheet to:
 1. Members of the RAP
 2. All current general permit coverage holders
 3. Neighboring states
 4. State and federal agencies (incl. DEQ, VDH, DHR, VIMS, DGIF, Corps, USFWS)
 5. All individuals and entities requesting to be placed on a list to be notified
 6. All localities that contain and MS4
 - Publishing a public notice of the close of the public comment period
 - EPA concurrence with the final General Permit regulation

Regulatory Timeline (TENTATIVE – MAY BE SUBJECT TO CHANGE)

- **May 24, 2011**, the Board authorized and directed the filing of a Notice of Intended Regulatory Action (NOIRA) related to the Part XV of the Board's Virginia Stormwater Management Program (VSMP) Permit Regulations and other related sections.
- **March 6, 2012**, the NOIRA was filed with the Registrar of Regulations (exempt from Administrative Review).
- **March 26, 2013**, published in Volume 28; Issue 15.
- **March 26, 2012 – April 25, 2012**, 30-day public comment period.
- **May 16, 2012**, Develop RAP recommendations, seek Director's approval, send letter from Director making appointments
- **April and May**, DCR Team begins internal discussion of MS4 GP
- **June 13, 2012**, distribute meeting agenda for June meeting, TAC list, NOIRA and draft regulation to RAP.
- **Next steps (target dates)**
 - **June 20, 2012; July 25, 2012; August 8, 2012, and August 22, 2012**, hold RAP meetings June through August 2012.
 - **September 13, 2012**, complete proposed regulation and discussion package and mail to Board.
 - Develop Federal Fact Sheet, public hearing remarks, public notice.

- **September 27, 2012**, Take proposed regulations to the Board.
 - **October 17, 2012**, file by noon with Registrar's Office.
 - **November 5, 2012**, publish in the Virginia Register of Regulations
 - **November 5, 2012 to January 4, 2013**, 60-day public comment period.
 - EPA official review during this time period
 - Publish a notice twice in 10 newspapers (federal requirement) 30 days in advance of the close of the public comment period.
 - **December 4, 2012 and December 6, 2012 (target dates only)**, hold at least two Public hearings early December 2012.
 - Review Comments and Coordinate general permit approval with EPA.
- **December 2012 and January 2013**, staff meetings to develop final regulation and package (various dates).
- **February 1, 2013**, send draft final regulation to EPA for unofficial review and comment.
- **March 1, 2013**, send final regulation to EPA for official review and concurrence.
- **March 13, 2013**, letter to be issued by Counsel in the Attorney General's Office.
- **March 14, 2013**, mail package to Board.
- **March 25, 2013**, target for EPA to provide verbal; concurrence with the final regulations.
- **March 28, 2013 (potential target date for meeting)**, take final regulation to Board.
 - **April 3, 2013**, file on Town Hall and with Registrar.
 - **April 22, 2013**, published in the Virginia Register of Regulations
 - **May 22, 2013**, public comment period ends and regulations are final.
 - **July 1, 2013**, effective date.

Mr. Dowling said that this was an aggressive schedule. He noted that the August 8, 2012 date for an additional RAP meeting would be a further discussion point.

Mr. Dowling said that it was important to stay on schedule. He reviewed the purpose and charge of the RAP.

Regulatory Advisory Panel (RAP) Charge

- The purpose of the panel is to assist in developing amendments to the Small MS4 GP. This panel has been formed to help the Department and the Board balance the thoughts and concerns of all those interested in this regulatory action. All such thoughts and concerns will be addressed by the panel, and any panel member is free to advance any opinion.
- The role of the panel is advisory. The panel's primary responsibility is to collaboratively contribute to a regulation that is in the best interests of the Commonwealth as a whole and that is compliant with state and federal law.

- The panel's goal is to reach a consensus on these regulations and make recommendations to the Department and the Board. For the purposes of this RAP, consensus is generally defined as a willingness of each member of a panel to be able to say that he or she can live with the decisions reached and will not actively work against them outside of the process.
- This is not to say that everyone will be completely satisfied by the results of the process. It is necessary however, that each participant come prepared to negotiate in good faith around complex and sensitive issues. Also, because the panel represents many different interests, all members should expect to compromise in order to accomplish the group's mission. If the group cannot reach consensus, the Department staff will advance as a recommendation what it views is the best balanced regulation but will present the differing opinions to the Board.
- Voting, per se, is contrary to a consensus-based process, but people may be asked to demonstrate their strength of feeling for or against a particular idea, and may be asked to help set priorities during the course of the process.

There were no questions for Mr. Dowling at this point.

Review of Current MS4 General Permit

Mr. Fritz reviewed the current MS4 General Permit. A full copy of Mr. Fritz's presentation is available from DCR.

Mr. Fritz said that the definitions apply to all 15 parts of the Stormwater Regulations. Some are applicable to the MS4. Some are not. He said that a change in definitions might potentially affect other sections.

Mr. Dowling said that in the last General Assembly Session there was an integration bill that looked at stormwater management, erosion and sediment control and the Chesapeake Bay Act. He said that a number of changes to definitions may be addressed through a separate RAP.

Mr. Fritz pointed to the definition of MS4 on page 7, line 315:

“Municipal Separate Storm Sewer System Management Program” or “MS4 Program” means a management program covering the duration of a permit for a municipal separate storm sewer system that includes a comprehensive planning process that involves public participation and intergovernmental coordination, to reduce the discharge of pollutants to the maximum extent practicable, to protect water quality, and to satisfy the appropriate water equality requirements of the CWA and regulations and the Act and attendant regulations, using management practices, control techniques, and system, design and engineering methods, and such other provisions that are appropriate.

Mr. Fritz said that the definition of Small MS4s was on page 12:

“Small municipal separate storm sewer system” or “small MS4” means all separate storm sewers that are (i) owned or operated by the United States, a state, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to state law) having jurisdiction over disposal of sewage, industrial wastes, stormwater, or other wastes, including special districts under state law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under § 208 of the CWA that discharges to surface waters and (ii) not defined as “large” or “medium” municipal separate storm sewer systems or designated under 4VAC50-60-380 A 1. This term includes systems similar to separate storm sewer systems in municipalities, such as systems at military bases, large hospital or prison complexes, and highway and other thoroughfares. The term does not include separate storm sewers in very discrete areas, such as individual buildings.

Mr. Fritz noted that the federal government does not define “maximum extent practicable” in their guidance. He said that Virginia has tried to do that.

Mr. Fritz said that the general permit for small MS4s was on page 16. He said that the task for the RAP was to revise that section.

Mr. Fritz said that if definitions pertaining to the Small MS4 permit needed to be revised it would be best to do that in 4VAC50-60-1200 where the definitions would apply to just that section.

Mr. Fritz said that 4VAC50-60-1210 provides the effective dates of the permit, who is regulated and how they are regulated.

4VAC50-60-1220. Authorization to discharge.

Mr. Fritz said that if a plan is accepted the entity is authorized to discharge under that permit.

Mr. Fritz noted that industrial stormwater discharges were not covered under this section. He said those are regulated by the Department of Environmental Quality.

4VAC50-60-1230. Mr. Fritz said this section addresses the registration statement. He said this was under the existing permit. A new registration statement must be completed for coverage under this permit.

On Line 832, page 18, Mr. Fritz said that the original coverage is 180 and continued coverage is 90 days. For those under current coverage, the registration statement is due 90 days prior to expiration. He said that the timeline is extremely important.

A member asked if the references to the TMDL were for both the Chesapeake Bay TMDL and the Virginia TMDL.

Mr. Fritz said that references to the Chesapeake Bay TMDL would specifically note that designation.

Mr. Fritz said that Section II dealt with the nuts and bolts of the program, including minimum control measures, public education and outreach, and public involvement.

Under Section II, Number 5 Mr. Fritz said that the six minimum control measures were established through federal regulations.

NOIRA Comments

Mr. Dowling reviewed the comments that were received on the NOIRA. A copy of those comments is available from DCR.

Break

Overview and Discussion of Issues to Address

Ms. Gyovai said that Mr. Fritz would give an overview of items for discussion. She said that issues of concern would be captured in a “parking lot.”

Mr. Fritz gave a power point presentation addressing the following issues:

- Impact of 2010 Census on the Regulated Community
- Developing Enforceable Permit Language While Maintaining MS4 Flexibility
 - Measureable Goals and Accountability
 - Utilization of BMPs to Attain Pollutant Reductions
- Attainment of Water Quality Standards through the MEP Process
 - Impairments and TMDLs
 - Creditable Actions
 - Allocation of TMDL Reductions for Chesapeake Bay MS4s
- Coordination of MS4 Permit with Stormwater Regulatory Rollout
- Monitoring for Program Effectiveness and TMDL Requirements
- Annual Reporting

Mr. Fritz said that his intent was to help formulate where the department was in the regulatory process. He said he would review the program and how it was developed in terms of the issues that needed to be addressed.

Mr. Fritz said that where possible, his presentation gave the appropriate federal reference.

Mr. Fritz said that DCR had not yet seen a localized map of urbanized areas. He noted that urbanized areas in Virginia have been redefined.

Mr. Fritz gave example language from the Draft Texas Small MS4 General Permit. He said that Virginia needs to figure out how to address the new urbanized areas. He said that in Virginia only portions of municipalities located in urbanized areas are regulated.

Mr. Fritz said that he was turning to the RAP for help with the following discussion topics:

- Establishment of measurable goals in the permit where the State statute and regulation already identifies the requirements.
- Establishment of measurable goals in the permit for areas where State statute and regulation does not identify the requirements.
- The appropriateness of numeric WQBELs appropriate in the VSMP Small MS4 General Permit in lieu of narrative BMP approach.

A member said that the question has always been how much is enough. The member said that the regulations were established, but that the existing statutes do not appear to be enough.

Mr. Fritz said that the permit must be implemented in accordance with the statutes and regulations.

A member said that she was concerned when state programs started incorporating specific terms on a federal permit.

Mr. Goulet said that in some cases the state regulations currently exceed federal regulations.

Mr. Fritz said that the intent was to make sure that if the state statute was implemented, credit was given at the federal level.

A member asked why state regulations were being opened up to federal oversight.

Ms. Sanner said that there was a need to show compliance with federal requirements.

A member said that he would like to see formal correspondence from the EPA spelling out where the Virginia permit violates EPA standards.

Ms. Gyovai asked what specific information was needed.

Mr. Goulet said that his contention was that what is on the books already meets the requirements of the Clean Water Act.

Ms. Malloy said that the permit does not satisfy the Clean Water Act. She said that EPA wanted to see a compliance accountability measure in the permit.

Mr. Power said that he was concerned that the issue needed to be clarified.

Ms. Gyovai said that for the purposes of this meeting outlining the issues was sufficient. There was a need to know the top issues that will require additional discussion. There would be information to be developed between meetings.

Mr. Fritz said that it was difficult to talk in the abstract.

Ms. Gyovai said that after this meeting there would be specific language to address line by line.

Mr. Dowling said that every locality will have a compliant erosion and sediment control program. He said that he was hearing that the EPA would require more than that.

Ms. Malloy said that for the construction permit there was a federal requirement for a local qualifying program. She said that the Virginia program has not been through the process of determining whether or not the criteria have been met.

A member asked why if something was in the statute it needed to be duplicated in the permit.

At this time the RAP recessed for lunch.

Following lunch, DCR Director David Johnson thanked members for participating. He said that the particular permit was very important.

A member asked where stormwater was going in terms of the regulatory environment. Was it staying at DCR or moving to DEQ?

Mr. Johnson said that an internal discussion in that regard was ongoing. He said that the reform commission recommended that it move back to DEQ. He said that decision should not affect the development of the permit. The permit would be in place regardless of where the program was housed administratively.

Ms. Gyovai encouraged members who had not spoken up to do so. She said that the major issues were still being identified.

Ms. Sanner asked if there would be an opportunity to discuss language issues on subjects that do not necessarily fall into major categories.

Mr. Dowling said that after major issues are addressed there would be an opportunity to address specific concerns with regard to language.

Mr. Moseley said that it was important to remember that measurable goals need to be verifiable. He said that it is difficult for one size to fit all.

A member said that public education and outreach, as well as good housekeeping are difficult to measure. Every situation is different.

A member noted that there had been a reluctance to have each MS4 develop their own program plan. But he said that flexibility is key. Each MS4 permittee has their own situation and in the regulated MS4 areas there may be scenarios that don't fit.

Mr. Fritz said that as a regulator, he did not have the authority to tell a locality they were not doing enough if it was not in the statute or regulation. He said that the regulations are written in such a manner that a plan either does or does not meet the conditions.

Mr. Mitchell said that the boundaries of the MS4 do not necessarily follow the political or watershed boundaries. He said that created a difficulty in going to local councils or supervisors.

Ms. Gyovai said that there was a need to look at ways other states have addressed the issue.

Other issues of concern raised for discussion:

- Public education and outreach. There is a need for firm measures
- Minimum measures
- Flexibility for MS4 permittee to develop their own program
- There is a need to consider what all localities can achieve
- The general permit can address different categories
- Monitoring is expensive
- Localities have budget issues and need more than six months to prepare and plan

Members were asked to submit specific language suggestions to Mr. Dowling and Mr. Fritz via email.

The next meeting was set for Wednesday, July 25, 2012.

