General Virginia 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
Wednesday, July 25, 2012; Meeting #2

Regulatory Advisory Panel Members Present

Shelley Bains, Virginia Community College System
Will Bullard, U.S. Navy
Aislinn Creel, Timmons Group
Michael D. Crocker, City of Waynesboro
Tabitha Crowder, City of Bristol
Thanh Dang, City of Harrisonburg
Chip England, Hanover County
Dan Frisbee, City of Charlottesville
L. J. Hansen, City of Suffolk
Steve Hubble, Stafford County
Tracey Harmon, VDOT
Jesse Mains, City of Alexandria
Roy Mills, VDOT
Tim Mitchell, City of Lynchburg
Chris Moore, Chesapeake Bay Foundation
Doug Moseley, GKY and Associates
Lisa Ochsenhirt, Aqualaw
Steve Plante, Loudoun County
David Powers, Williamsburg Environmental Group
Jeff Sitler, University of Virginia
Bill Street, James River Association
Glenn Telfer, Draper Aden Associates
Michelle Virts, City of Richmond

Facilitator

Kristina Weaver
Institute for Environmental Negotiations

Agency Staff Present

Fred Cunningham, DEQ
Robert Bennett, DCR
Ginny Snead, DCR
Doug Fritz, DCR
Michael Fletcher, DCR
Morris Walton, VDOT

Others Present

Anna Killius, Chesapeake Bay Foundation
Adrienne Kotula, James River Association
Ben Mack, Chesapeake Bay Foundation
Kip Mumaw, Ecosystem Services
John Newton, Henrico County
Jeff Perry, Henrico County
Peggy Sanner, Chesapeake Bay Foundation
Chris Swanson, EEE Consulting
Randall Williford, Loudoun County

Welcome and Introductions

Ms. Snead welcomed attendees and reviewed the charge to the RAP.

- 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.

Ms. Snead introduced Kristina Weaver with the Institute for Environmental Negotiation to facilitate the meeting.

Ms. Weaver said that her primary role would be as moderator and to help capture comments of the RAP. She asked members to provide their name and affiliation.

Overview of Comments Received Regarding Last Meeting Discussion Points

Ms. Snead thanked those who had submitted comments. Comments received are available from DCR.

Establishment of Measurable Goals in the Permit where State Statute and Regulation already Identifies the Requirements

- Proper Cross-Reference of State Law
- Reference Regulations-specific where necessary (e.g. 0.41 lbs P/ac/yr)
- Capture Changes in State law during Permit Cycle
- Very Specific
- Delete MSC4 and MSC5
- Flexibility for Non-Traditional MS4s
- Unnecessary and Redundant

Mr. Frisbee asked if this was a summary of the last meeting or just what had come in through the comments.

Ms. Snead said that these items were primarily from the comments received.

Mr. Street noted that the responses ranged from deleting control measures to incorporating specific measures.

Ms. Snead said that clearly the measures could not be deleted, but the thought was that if a measure was in state law that it did not necessarily have to also be in the permit.

Mr. Hansen said that the concern was that if the measure was not worded precisely there would be disparity between the statute and the permit.

Establishment of Measurable Goals in the Permit for Areas where State Statute and Regulations do not Identify the Requirements

- Consider Entire Universe of Permittees
- No, Maximum Flexibility for Adaptive Management
- Flexibility for Achieving Measurable Goals
    - Establish Minimum Level Goals
    - Reasonable and Attainable
- Positive for Standardization among Permittees

- Perhaps More Appropriate for Future Permit after MS4 Services Areas More Clearly Defined
- Perhaps DCR Provide Examples for Review
- Initial inspection timeframe: new reported discharge; elimination new identified ID (e.g., 48 hours; 30 days)

A member said that with the 48 hours requirement, there needed to be consideration given to a weekend. The timing involved needs to be considered.

A member said that it was good to be proactive on illicit discharges, but in an emergency situation the identification of a source might take longer. Some illicit discharges will be hard to track.

Mr. Crocker said that while it is good to be proactive, localities with limited staff cannot meet that requirement.

Mr. Hansen said that the concern as that the 48 hours and 30 day requirements were not based on anything other than written comments. The time frames are not in the statute.

Mr. Plante asked what constituted the report for a discharge. An email? A voice mail? He said that the reality was that the intial report may not get to the right person in the prescribed time frame.

Mr. Frisbee said that the terminology "detect and address" might be more appropriate as not every single discharge can be eliminated.

Mr. Moore said that there needed to be a delineation between the initial inspection vs. finding the actual source. The start of the process is very important.

Mr. Moseley said that the term illicit discharge covered a wide range. He said that there should be procedures for detecting and eliminating.

Numeric WQBELs in Lieu of Narrative BMP Approach

- WQBELs Designed for End of Pipe not MS4s
- WQBEL Monitoring Cost Prohibitive, Labor Intensive, Highly Variable, Worker Safety
- MEP is Compliance Standard in the Clean Water Act
- Narrative with MEP Compliance Standard for MS4s Preferred; WQBELs Unattainable
- Variability in Stormwater Monitoring Data make Numeric Limits "Operationally Impossible" for MS4s
- Numeric Standards Impractical: TMDL Calculations Themselves Use Model Basins and Study Averages for Stormwater/MS4
- WQBELs Necessary

Ms. Snead said at the next meeting there would be a presentation regarding the Clean Water Act and WQBELs.

Adequate Implementation of 6 MCM Protects Water Quality for Impaired Waters Prior to TMDL Approval

- Appropriate and Justifiable until the TMDL Sources are Identified and Contributions are Calculated
- Established by EPA as Effective to Protect Water Quality
- 6 MCMs Selected by EPA as an Effective Tool to Reduce Pollutant Discharges
- Already Protective in Current Permit
- Agree, Need Time to Plan for TMDL Implementation
- Concern if MS4s are a Major Contributor
- Disagree

Mr. Frisbee said that the first bullet point was the most important. Until the source of the impairment is known and what proportion is coming from the MS4 to would be difficult justify spending time and planning to develop action items.

Mr. Street said that there was not always confidence that the six minimum control measures were addressing the impairment. While there are flaws in the TMDL process, right now it is the best tool available.

Address TMDL WLAs for Listed Impaired Waters Upon TMDL Approval and Not Wait until Next Permit Cycle

- No, Permitee Should be able to Clearly Ascertain Permit Requirements When Issued
- VAMSA: State of Virginia Legal Conclusion this is Impermissible
- Consider Prioritization compared to Chesapeake Bay TMDL
- Allow Adequate Time for SWMP Revision and Plan Implementation
- Phase-In Period Would Be Needed
- Current Permit Language Protective
- Plan/Budget for Unforeseen is Unachievable
- 6 Months to Incorporate into Local Plans

Ms. Ochsenhirt ask for clarification regarding the state position regarding TMDLs that were not already approved.

Mr. Fritz said that the standard was that something new cannot be introduced into this permit that was not in place at the time it was issued. He said the permit would reference the impaired waters list.

Assign Credit for BMP Reductions that Cannot be Modeled

- Imperative; MS4s Required to Comply with 6 MCMs; Need to Credit Costs of this Compliance
- Agree, This is Needed
- Some BMPs in this Category have High Potential for Pollutant Reduction
- Agree but Likely to Not be Accepted
- Should be Credited with Adequate Documentation
- Agree, DCR Provide Guidance on Credits Available
- Absolutely Necessary: Else MCMs Need Re-Evaluation
- Yes, for BMP Clearinghouse Approved Efficiencies

Determine Adequate Progress to Meet TMDL WLA for Permit Cycle and Measuring Compliance Progress

- Suggest Develop Locality Specific Compliance Plan
- At This Time Too Cost Prohibitive; Monitoring to Measure Compliance Unrealistic for Stormwater Due to Variability of Sources and Precipitation
- Perhaps List a Series of Methods for Each Impairment Type and Percentages Can Be Implemented; Direct Measurement of Pollutant Reduction Impossible
- Consideration of Budget Cycle Could Make Impossible
- Phase I This Permit (Assessment); Phase II Next Permit (Implementation)
- Permit Should have Chesapeake Bay Action Plan Specifics

<u>Chesapeake Bay TMDL</u>

Mr. Fritz gave the following presentation regarding the Chesapeake Bay TMDL.

Chesapeake Bay TMDL
Addressing Existing Sources

The Chesapeake Bay Commitment

- MS4 operators will be required to implement urban nutrient management plans on all lands owned and operated by the MS4 operator during the first give-year permit cycle.
- MS4 operators will also be required to implement the revised stormwater management regulations for new and redevelopment projects by July 1, 2014.

- MS4 operators will be given three full permit cycles (15 years) to implement the necessary reductions to meet the 12 implementation levels for non-federal MS4s.
    - Baseline efforts for all MS4s will be based upon 2009 progress loads.
    - The baseline effort will be expected to be continued with an expectation of an additional 5% reduction of loads for existing developed lands to be met by the end of the first permit cycle.

    Commonwealth of Virginia Chesapeake Bay Watershed Implementation Plan, November 29, 2010, page 93

Key Dates

Date	Importance	Why Important
July 1, 2009	The date that delineates the 2009 Progress Run and New Source Discharges	The reduction of the loadings from the 2009 progress run to the L2 scenario are based on urban lands in existence prior to this date
July 1, 2013	The proposed date for the reissuance of the Small MS4 GP	The new world begins for MS4 operators
July 1, 2014	Reissuance of the Construction General Permit; Local Programs Review to New Design Criteria; E-Permitting Program On-Line	Stormwater programs updated to implement the revised design criteria to address transitional sources and new sources
July 1, 2015	Chesapeake Bay TMDL Action Plan Due	Plan due describing updated programs, methods and means to meet 5% of the reductions required on existing lands
June 30, 2018	MS4 General Permit Expires	Implementation of sufficient means and methods to reduce existing loads by 5% of the required reduction.

Determining the Existing Source

- "Existing Sources" means pervious and impervious urban land uses served by the MS4 from urban land uses as of July 1, 2009.
- Identify the number of urban impervious acres and pervious acres serviced as of July 1, 2014.
    - Subtract 0.16 acres of impervious and 0.84 acres of pervious from the total for every acre developed between July 1, 1009 and June 30, 2014 in accordance with an average land cover condition of 16%.
    - Note: The average land cover condition of 16% is the default of the existing VSMP General Permit.

- Note; Where a local average land cover condition was developed greater than 16%, the MS4 operator will need to develop a means and methods to address increased load based on the difference between 16% and the local average land cover condition.

Mr. Fritz gave examples of determining the existing source acreage and the required reduction. Those examples are available in the full presentation at this link: http://www.dcr.virginia.gov/documents/lr3chesbaypresentation_rap_7_25_12.pdf

Why Account for Growth where Average Land Cover Condition was Greater than 16%?

- Sixteen percent represents a "no net" increase scenario based on 1985 non-urban Chesapeake Bay land uses.
- Local average land cover conditions were allowed by regulation; however, the TMDL changed the world.
- The TMDL does not provide for increased loads as a result, there must be offset to remain "consistent with the assumptions and requirements of any available wasteload allocation."

Calculating the Increased Load from New Sources as a Result of Average Land Cover Above 16%

For FY10 through FY13, the average land cover condition employed was 50% instead of 16%. The phosphorous loading rate was 1.14 lbs/ac compared to 0.45 lbs/ac. As a result, the MS4 operator must account for [225 acres * (1.19-0.45)] or 166.5 lbs of phosphorous.

Following the presentation the RAP broke for lunch.

LUNCH

Ms. Weaver called for discussion concerning the Chesapeake Bay TMDL presentation.

Mr. Hubble said asked if other localities who submitted information during the WIP II process could provide that info for use as an example.

Mr. Fritz said that the WIP II looks at all land use, but for the MS4 permit he was looking only at urban land use.

A member asked for an explanation of the 5% based on the 2009 actions.

Mr. Fritz said that any numbers prior to 2009 were already accounted for. Any reduction after 2009 can count toward the 5% in the current cycle.

Mr. Mills said that VDOT would submit written comments, but noted that the 24 month time period was not enough time. He said that the estimates would be in millions of dollars for VDOT.

Mr. Hansen said that there was a PCB TMDL currently. He said that PCBs were not something over which a locality would have control. He said that his concern was that if a TMDL was automatically incorporated but there was no known BMP for PCBs that would put the locality in violation of the permit.

Mr. Fritz asked that additional comments be sent to him by August 1.

Minimum Control Measure 4

Mr. Fritz reviewed Minimum Control Measure 4

The Federal Requirements

- You must develop, implement, and enforce a program to reduce pollutants in any storm water runoff to your small MS4 from construction activities that result in a land disturbance of greater than or equal to one acre.

- Reduction of pollutants from storm water discharges from construction activity disturbing less than one acre must be included in your program if that construction activity is part of a lager common plan of development or sale that would disturb one acre or more.

- Your program must include the development and implementation of, at a minimum:

    - An ordinance or other regulatory mechanism to require erosion and sediment controls, as well as sanctions to ensure compliance, to the extent allowable under State, Tribal, or local law.
    - Requirements for construction site operators to implement appropriate erosion and sediment control best management practices;
    - Requirements for construction site operators to control waste such as discarded building materials, concrete truck washout, chemicals, litter, and sanitary waste at the construction site that may cause adverse impacts to water quality;
    - Procedures for site plan review which incorporate consideration of potential water quality impacts;
    - Procedures for receipt and consideration of information submitted by the public, and
    - Procedures for site inspection and enforcement of control measures.

The Constant Reminder

- Permits do not convey any property rights or any exclusive privileges to the MS4 operator, 40 CFR 122.41(g).
- Permits do not authorize any injury to private property or invasion of personal rights, or any infringement of federal state or local law or regulations. 40 CFR 111.5 (c)
- MS4 regulations do not regulate the county, city or town. They regulate the MS4 [Clarified in Federal Register Vol. 64 No. 235. Dec.8, 1999. P. 68750]

Why MCM is written like it is

- Permit conditions must be written within the legal authorities of the MS4 operator.
- Legal authorities are different for each category of small MS4.
- Flexibility in permit language is required to ensure that the expectations of each MS4 program are the same.
- Concern over generic references to State statutes and regulations "federalizing" State authorities.

Minimum Control Measure 4 Expectations

- Land disturbance size thresholds are established for which sites are regulated under MCM4 for all MS4 operators.
- Size thresholds are consistent with the Virginia Erosion and Sediment Control Law and the Virginia Chesapeake Bay Preservation Act.
- The MS4 operator must require an "approved" erosion and sediment control plan prior to discharge to the MS4.
- The MS4 operator must do inspections and require modifications to inadequate plans.
- The MS4 operator must work within their legal authorities provide by the Commonwealth of Virginia.
- The MS4 operator must receive and follow-up on complaints.
- The MS4 operator must coordinate with VSMP permitting.
- The MS4 operator IS responsible under this permit for a regulated land disturbing activity beginning land disturbance prior to obtaining an approved plan.
- The MS4 operator IS responsible under this permit for failure to require a land disturbing activity to modify its plan if the plan is determined to be inadequate.

The Difference in Legal Authorities

MS4 Operator	ESC Plan Approving Authority under VA ESC Law	Potential MS4 Legal Authorities Utilized to Require Compliance

Local Government	Local Government	Ordinance
Local School Board	Local Government	Contract Language that includes ability to stop work, implement penalties for failure to comply
State Agency without Approved Annual Standards and Specifications	DCR or Local Government (Colleges and Universities)	Contract Language
State Agency with Approved Annual Standards and Specifications	State Agency	Contract Language
Federal*	None	Contract and Order Language to Require Development and Implementation of Approved Plan
* Federal Agencies **may** enter into voluntary agreements with DCR. In addition, by federal agreement, federal agencies are supposed to implement State and Local requirements. However, DCR cannot enforce the contents of a federal agreement alone.		

The Most Important Message

- The MS4 Program Plan must adequately and clearly describe how the requirements of MCM4 will be implemented.
- The compliance expectation is that the MS4 Program Plan will be followed.

Mr. Hubble said that he would recommend that requiring the operator to implement appropriate controls not be a requirement until the locality adopts the stormwater management program.

Mr. Fritz said that was a federal requirement. He said that as of 2014 the authority would come from the new stormwater regulations.

Minimum Control Measure 5
Post Construction Stormwater Management in New Development and Redevelopment

Mr. Fritz gave the following presentation.

The Federal Requirements

- You must develop, implement, and enforce a program to address storm water runoff from new development and redevelopment projects
    - that disturb greater than or equal to one acre, including projects less than one acre that are part of a larger common plan of development
    - that **discharge into your small MS4**
    - Your program must ensure that controls are in place that would **prevent or minimize** water quality impacts.
- You must:

- Develop and implement strategies which include a combination of structural and/or non-structural best management practices (BMPs) appropriate for your community.
- Use an ordinance or other regulatory mechanism to address post-construction runoff from new development and redevelopment projects **to the extent allowable under State, Tribal or local law;**
- Ensure adequate long-term operation and maintenance of BMPs

The Constant Reminder

- Permits do not convey any property rights or any exclusive privileges to the MS4 operator. 40 CFR 122.41(g).
- Permits do not authorize any injury to private property or invasion of personal rights, or any infringement of federal, state or local law or regulations. 40 CFR 122.5 (c)
- MS4 regulations do not regulate the county, city or town. They regulate the MS4 [Clarified in the Federal Register Vol. 64 No 235. Dec. 8, 1999. P. 68750]

Why MCM 5 is written like it is

- Permit conditions must be written within the legal authorities of the MS4 operator.
- Legal authorities are different for each category of small MS4.
- Flexibility in permit language is required to ensure that the expectations of each MS4 program are the same.
- Concern over generic references to State statutes and regulations "federalizing" State authorities.
- Flexibility is mandated this permit cycle to allow for implementation of recent and on-going statutory and regulatory modification to the legal authorities regarding stormwater management.

Minimum Control Measure 5 Expecations

- Size thresholds are established for which sites are regulated under MCMs for all MS4 operators.
- Size thresholds are consistent with the Virginia Stormwater Management Act and the Virginia Chesapeake Bay Preservation Act.
- The MS4 operator will require that post-construction runoff from new development and redevelopment projects is controlled in accordance with the water quality and quantity requirements required in Part II.C of the Virginia Stormwater Management Program regulations.

	Part II.C.	Part II.B
Applicability	Projects obtaining VSMP permit coverage prior to 7/1/14	Projects obtaining VSMP Permit coverage after 7/1/14

	and grandfathered projects	
Site Threshold of Regulated Construction Activities	1.0 Acre and Greater including Part of Common Plan of Development; 2,500 ft^2 and greater in CPBA designated areas	
Land Use(s) by Which Pollutant Load Calculated	Impervious Surface	Forest/Open Space, Turf, Impervious
Design Storm Event	0.5 inches of Runoff (~70%)	1.0 inches of Rainfall (~90%)
Water Quality Design Criteria for New Development	Average land cover condition	0.41 lbs./ac/yr P
	Performance or Technology-Based	
Water Quality Design Criteria for Redevelopment	10% Reducation P	<1 acre-10% Reduction P
		>1 acre – 20% Reduction P
Compliance Methodology	Simple Method	Runoff Reduction

Minimum Control Measure 5 Expectations

- The MS4 operator IS responsible under this permit to require that Post-construction storm water management in new development and redevelopment is implemented.
- The MS4 operator IS responsible for tracking and reporting BMPs implemented.
- The MS4 operator IS responsible under this permit for verification that long-term maintenance is conducted.

The Most Important Message

- The MS4 Program Plan must adequately and clearly describe how the requirements of MCM 5 will be implemented.
- The compliance expectation is that the MS4 Program Plan will be followed.

Mr. Street asked if something could be included to ensure that a facility is inspected upon the completion of installation.

Mr. Fritz said that one of the questions regarding the stormwater rollout was how often inspections should be done during construction.

Mr. Street said that his concern was primarily with new construction to make sure that the post-construction stormwater facilities were verified.

E-Permitting and MS4 Reporting

Mr. Seeley gave an update regarding ePermitting.

Mr. Seeley said that the intent of the ePermitting process was to ensure that DCR would still be accountable as well as to figure out a way for DCR and EPA to monitor the program while the locality was covering day to day management.

Mr. Seeley said that he was the liaison between the regulated community and the developers of the system. He said that the development had been ongoing for 2-3 years.

A copy of Mr. Seeley's presentation is available from DCR.

Mr. Mills asked if the system would calculate the development area and the disturbed area or if that would have to be manually entered.

Mr. Seeley said that the system puts the watershed information in and it remains until the user overrides that information.

Mr. Mills asked if there was the option for interagency transfers (IATs).

Mr. Seeley said that currently the options for payment were credit cards and electronic bank payment, but that DCR was pursuing the IAT.

RAP Issues Identification and General Questions

Ms. Weaver asked if there were final general comments or concerns from the RAP.

Mr. More asked if in the general permit there were things that could be done to make the requirements for non-traditional systems more specific or less onerous.

It was noted that the next meeting would be August 7, 2012 at 10:00 in the same location. The final meeting date is August 22, 2012.

Mr. Fritz said that he would the draft language with line numbers included would be emailed to the RAP.

The meeting was adjourned.