

**General Stormwater Management Program (VSMP) Permit for Discharges of
Stormwater from Construction Activities (4 VAC 50-60-1100 et seq.) [Part XIV]
Regulatory Advisory Panel
Thursday, November 1, 2012, Meeting #5
Richmond, Virginia**

Regulatory Advisory Panel Members Present

Phil Abraham, Virginia Association of Commercial Real Estate
Barbara Brumbaugh, City of Chesapeake
Will Bullard, U.S. Navy/Dept of Defense
Pat Calvert, James River Association
Ann-Neil Cosby, Sands Anderson
Jason P. Ericson, Dominion Resources Services, Inc.
Normand Goulet, NRVC
Jenny Johnson, Joyce Engineering
Jeff Kelble, Shenandoah Riverkeeper
Mike Lee, DCR
Roy Mills, VDOT
David Nichols, Town of Bridgewater
David Nunnally, Caroline County
John Paine, HRPDC
Mike Rolband, Wetland Associates
Peggy Sanner, Chesapeake Bay Foundation
Mike Toalson, Homebuilders Association of Virginia

Facilitator

Tanya Denckla Cobb, IEN

State Agency Staff

Michael Fletcher, DCR
Doug Fritz, DCR
James Golden, DEQ
Drew Hammond, Hammond
John McCutcheon, DCR
Liz McKercher, DEQ
Ginny Snead, DCR
Christine Watlington, VDOT
Joan Salvati, DCR
Michelle Vucci, DCR

Others Present

Chip England, Hanover County

Todd Flippin, Augusta County
Lee Hill, Joyce Engineering
Lee Hixon, EEE

Welcome and Introductions

Ms. Snead welcomed members to the fifth meeting of the RAP. She reviewed the agenda and the regulatory charge.

Discussion of Draft Text

Mr. Fritz led a discussion of the draft text emailed to RAP members.

Mr. Fritz said that the draft was emailed the preceding day. He noted that sections pertaining to TMDLs and impaired waters were being discussed with DEQ and would be available for comment in the next draft. He noted that language on the registration statement was also being delayed to coordinate with the ePermitting process.

Ms. Snead began the discussion at line 1123.

Lines 1124-1133

Mr. Nunnally asked how localities would work with sites when there was no one on site for several days.

Ms. Snead noted the language on line 1131 which reads “If an on-site location is unavailable to store the SWPPP when no personnel are present, notice of the SWPPP’s location must be posted near the main entrance of the construction site.”

Mr. Abraham asked if it was allowable for developers to charge for a copy of the SWPPP.

Mr. Fritz said that it had been previously noted that fees could be assessed. He noted that DCR does not regulate the people who would be requesting the copy of the SWPPP. He said that it would not be appropriate to include that in the permit.

Mr. Abraham asked if that would mean people could assert that a fee was not allowed.

Ms. Denckla Cobb said the question was who would govern the fees.

Mr. Fritz said that would need to be determined. He said previously the permit was written that the person requesting the copies had to pay for the printing. He said that it needed to be removed from the permit until it could be determined how it should be regulated.

Mr. Fritz asked if the permit could make it clear the operator could charge a reasonable fee.

Mr. Fritz said that was a general understanding. He said that FOIA would not apply to a private company.

Mr. Toalson said that it was fair that the person asking for the documents pay for the copying.

Mr. Fritz said that he agreed but the question was how to implement in the permit.

Mr. Toalson asked if the SWPPPs would be on record with the local government.

Mr. Fritz said not necessarily. He said that the Erosion and Sediment Control and Stormwater permits are public record. He said that reviewing the Pollution Prevention Plan (PPP) may not be a matter of public record. He noted that utilities and others may not file their plans with the local government.

Mr. Toalson said that with regard to posting a permit on an individual lot building site it may not be realistic to have the SWPPPs posted.

Mr. Fritz said that the plans had to be on site when the developer was on site and when someone wants to do an inspection. He said that a notice could be posted as long as the developer lists an available contact.

Mr. Toalson said that he thought the SWPPP would be a part of the local government.

Mr. Goulet noted that the SWPPP often had to be updated frequently.

Ms. Sanner said that she agreed that in an ideal world the VSMP authority would have a copy of the whole SWPPP. She said that with regard to public availability that she understood that not everyone has Internet availability. But she said that limiting the availability to one time a month was insufficient. She said that she would recommend a minimum of four times a month to make the plan more accessible for the public.

Ms. Snead said that this was a general permit. She said that no less than once a month would cover all entities. She said that four times a month may not be applicable in all situations.

Mr. Kelble said that the Soil and Water Conservation Board included the 30 day provision to prevent the public from overburdening the builder. He said that the provision was that at time needed to be arranged. He said that while 30 days seemed long that it was acceptable.

Ms. Brumbaugh asked if this was a federal requirement and whether localities would have to enforce.

Ms. Snead said that if a member of the public asked to review a SWPPP and was denied that they could go to the locality.

Ms. Brumbaugh said that if multiple people wanted to review the SWPPP at different times that could prove problematic.

Mr. Kelble said that the best solution was still to post the SWPPP on the Internet.

Ms. Brumbaugh noted that not every developer has a website.

Mr. Fritz said that during the last permit cycle contractors were concerned about having to make the plan available.

Ms. Brumbaugh asked if there was a provision like this in any other general permit.

Mr. Hammond said that this was not typically something that was done.

Ms. Brumbaugh said that her concern was that this could lead to the public trying to regulate the sites vs. the localities trying to regulate.

Mr. Fritz said that under the Clean Water Act the public has the availability to regulate.

Mr. Toalson noted that there was significant opposition to this provision in the last permit cycle.

Mr. Nunnally said that he was not aware of any site in Caroline County having a problem with this provision. He said that this was an attempt to satisfy every possibility. He said that this could be a problem for the developer as well as the locality. He said that he was not aware of a situation where someone asked to see plans and was told no.

Ms. Snead said that she appreciated the comments but that the permit needed to look at the reality. She said the provision was there and noted that DCR had not had any problems with the response. She said that DCR had not had to deal with problems from local governments.

Mr. Toalson said there had been some understanding that there had been about 30% compliance with this provision. He said that for the most part there was no compliance with individual lots. He said that this needed to be mandated in a balanced manner because it placed a significant burden with very little benefit on the operators as well as the local government.

Mr. Kelble said that in the three years since the previous permit there had not been significant complaints about this provision.

Mr. Toalson said that over the last three years there had been a record low production of housing in Virginia. He said that permit requests had fallen to a level not seen since 1956. He said that there had been roughly 30-35% compliance with this provision and that was the basis of his concern.

Mr. Nunnally said that the difference was that this was going to become a responsibility of the local government. He said that perhaps the requirements for local governments should not be so rigorous.

Mr. Rolband said that the biggest issue was availability. He said that was not a problem for larger developers. He suggested that single lot development would be exempted from availability.

Ms. Snead said that the comments would be taken into consideration in drafting the final language for the permit. She said that DCR's intent was to take this section to the Board and provide the comments.

Lines 1135-1142

There were not comments regarding this section.

Line 1144-1166

Ms. Sanner asked on lines 1161-66 why the removal of sediment was not mandatory. She asked if this was optional who made the decision.

Mr. Fritz said that the problem related to situations where large equipment may be required to move sediment from wetlands and creeks. He said that the intent was to make sure that DEQ was contacted and the appropriate permit was obtained for the land disturbance. He said that DCR was discussing that provision with DEQ.

Ms. Brumbaugh said that she agreed with Ms. Sanner that sediment should not be getting into the waterways. She said that it seemed like a strange placement in this permit. She said the permit was not authorizing the contractor to do anything with regard to surface water. She said that the locality would never tell a contractor they were responsible for removing sediment from state waters.

Mr. Fritz said that perhaps the provision would be better placed under corrective actions. He said that the language was provided by DEQ.

Mr. Rolband said that it was important to keep the concept regardless of where it was placed in the regulations. He noted that in addition to contacting DEQ and the Army Corps of Engineers there needed to be permission to access private lands.

Mr. Fritz said that strengthened the argument. He said that this needed to be addressed so that it did not infringe on private property rights.

Mr. Mills asked if the seven days threshold could be tied to the inspection schedule.

Ms. Sanner said that there needed to be some notification. She said that the process needed to occur within the next business day or a short time frame because of the time it would take for DEQ to contact the Corps or work out a resolution.

Mr. Mills said that seven days would work for TMDL areas.

Mr. Nunnally asked on line 1155 if there was a way to recognize the severity of the issue yet allow the local government some discretion.

Mr. Fritz said that this related to self inspection and not the locality.

Ms. Salvati said that the VSMP regulations require the local governments to establish requirements for inspections and monitoring for compliance with the local ordinance. She said this gives localities the latitude to determine through policy the procedures.

Mr. Nunnally asked if the permit could reference this.

Mr. Goulet said that the permit did not address inspections.

Ms. McKercher said that the issue of construction sediment discharges had been contemplated for a long time. She said that there is a Memorandum of Understanding between DEQ and DCR regarding what to do when this occurs. She said that there is guidance available to address the situation. The said that there is some latitude because both the Corps and DEQ have thresholds.

It was requested that the minutes reflect that a copy of the MOU would be provided to RAP members.

Lines 1168-1200

Mr. Rolband said that on line 1178 that weekly inspection as better in runoff events. However he noted that the occasional holiday could alter that schedule. He suggested saying every seven calendar days with an appropriate allowance for holidays.

Mr. Fritz said the intent was to say work hours, not holidays.

Ms. Snead said that there would be a discussion of runoff producing events at the next meeting.

On line 1175 Mr. Nunnally asked why normal working hours were specified.

Mr. Rolband said that he did not believe normal working hours needed to be noted. He said that he recommended the language state seven calendar days with noted exceptions for holidays. He noted that in the construction business summer working days could be 12-14 hours.

Ms. Sanner noted on lines 1185-1188 the reference to 30 days in winter conditions was not necessary. She said that with Virginia's winter conditions 30 days was too long.

Mr. Nunnally said that frozen ground would not eliminate runoff issues.

Mr. Kelble said that he agreed that with freeze-thaw conditions there would be destabilization of sites. He said that how long ground is frozen was unpredictable.

Mr. Mills suggested an average of days over a period of a month.

Mr. Fritz said the language did not say the ground was frozen for 30 days but said winter conditions.

Mr. Kelble said that his problem was with the language not the concept. He said that winter conditions leave too much to be interpreted.

Mr. Hammond said that the EPA permit had provisions that were very similar in language.

Mr. Nunnally said that this was an issue of the frequency of self inspections. He noted that the Erosion and Sediment control program allowed for alternative inspection programs. He suggested a local option to do that with this permit.

Mr. Mills said that this needed to address the potential for erosion and sediment runoff. He said that there could be runoff from frozen ground but not necessarily the transport of sediment.

Ms. Cosby suggested that language be included that said "where areas have been temporarily stabilized or where existing weather conditions make runoff unlikely." If unexpected events make runoff likely inspections would resume immediately.

Mr. Fritz said that DCR would work with DEQ and review the language.

Line 1202-1267

Ms. Sanner said that on line 1239 she would suggest taking out the "out of contrary" at the beginning of the sentence.

Mr. Nunnally said on line 1242 clarification was needed with regard to whether this was water leaving the site or remaining on the site.

Mr. Fritz said that the intent was that if treatment was needed between the discharge point and the surface water the protection should be in place.

Mr. Kelble said that there was no mention of perimeter controls. He said that he would like to see that clarified.

Mr. Nunnally suggested language that addressed repeated failures of perimeter controls.

Mr. Toalson said that he would like to see an option for a more simplified inspection for single lots.

Mr. Goulet said that could be addressed in guidance.

Mr. Toalson said that guidance should be consistent with the regulations.

Lines 1269-1303

Mr. Goulet suggested moving lines 1161-66 to the corrective action section.

Mr. Fritz agreed.

Mr. Mills said that in the other section seven days was referenced but this section said the next rainstorm. He suggested that corrective action should be prior to the next anticipated rainstorm or within the 7-14 day inspection schedule.

Mr. Rolband suggested the language say as soon as practicable but no more than seven days.

Mr. Nunnally asked about the maintenance of records on line 1287. He asked if it was realistic for a homebuilder to maintain SWPPPs for three years.

Mr. Fritz said that was the federal requirement.

At this time the committee recessed for lunch.

Mr. Fritz continued the discussion at the beginning of the document.

Mr. Fritz said that beginning on line 54 grammar corrections were made.

On runoff producing event, Mr. Rolband said that the .25 number was too low. He said that the standard used to be .5.

Mr. Fritz said that .25 was the standard used by EPA.

Mr. Hammond said that EPA referred to a measurable storm event but does not quantify what causes runoff.

Mr. Fritz continued reviewing the document.

Ms. Brumbaugh said that she had concerns with the language of section 1120, but would submit comments in writing.

Mr. Hammond said that on line 112 the language regarding the authorization was cleaned up to provide consistency with DEQ permits.

Ms. Cosby asked if language in 118 could be changed from “acceptance” to “authorization.”

Mr. Hammond said that the Board accepts the registration and grants coverage. He said that when the Board adopts the regulation it would authorize the discharge.

Mr. Hammond said that there was ongoing internal discussion regarding the prior language and the TMDL. He said there would be a thorough discussion at the next meeting.

Mr. Abraham said that in section 1150 he was concerned that there was no time limit on the issuance of coverage.

Ms. Snead said that there were provisions in a separate section that addressed the timing of the review.

Mr. Fritz said that previously the 15 days requirement was included to allow time for the application to be mailed and payment received. He said that with the ePermitting process that the moment the plan is approved and payment made the permit is effective immediately.

Mr. Nunnally said that with the concept of one stop applications there was a need to coordinate comments from a number of entities. He said that he hoped there could be a provision for the local plan of development process to coordinate one set of comments.

Ms. Sanner asked on line 183 if the designated authority was DCR or the local authority.

Mr. Fritz said that it could apply to either.

Ms. Sanner said that it was unclear whether this was a Board action or a locality action.

Mr. Fritz said that DCR needs to review the permit for what is accurate with policy. He said the intent was not for the local authority to make the decision but that the notification may come from the local VSMP authority. He said that staff would review that section.

Mr. Mills said that clarification was needed on line 171.

Mr. Hammond said that he believed that was directly out EPA language but would clarify.

On line 199, Mr. Hammond said that this language made sure that the conditions of the general permit were also consistent with the authorization to discharge.

In section 1140, line 234 Ms. Brumbaugh asked about the use of delegation.

Mr. Hammond said that the Board has the ultimate authority to act under the law and regulation. He said this was to delegate the authority to issue the permit.

Ms. Brumbaugh said that the word delegate was removed elsewhere in the regulations and that the usage here was confusing.

Mr. Bullard said that he still had a concern regarding what federal programs may be able to do with respect to a qualifying program.

Mr. Fritz said that would be outside of the context of the general permit.

Mr. Kelble said that with regard to discharges he was concerned that DEQ had not reviewed all waterways. He said it may be better to have language that addressed the first segment being evaluated by the state.

Mr. Rolband asked if regarding the TMDL the runoff producing event could be the trigger for inspections.

Ms. Sanner said that she would prefer weekly inspections to runoff producing events.

Mr. Hammond said that the goal of the general permit was to provide coverage to a wide array of construction activities. He said that when the discussion went to site controls that could lead to requiring individual stormwater permits.

Mr. Calvert noted that there were suggestions to change language on lines 656-659.

Mr. Hammond said those changes would be addressed when the TMDL and impaired section language were addressed.

Mr. Fritz said the changes on lines 822-824 were an attempt to take into account that there were different rain gage systems in localities.

Mr. Rolband said that he would use the term “when applicable.”

Ms. Brumbaugh suggested that rather than referring to a rain gage language be included to say a description of the method used to identify a runoff producing event.

On line 844, Mr. Mills said that the advertisement of the SWPPP was almost an impossibility. He said that developers needed a list of what was expected to be updated in the SWPPPs already in place.

Mr. Fritz said that a list was not yet available. He said the list could not be prepared until the final language was adopted.

In section 1016, Mr. Abraham said that the documentation was a burdensome requirement, particularly in the cases where there could be 40-50 subcontractors on site.

Mr. Mills noted that with the requirements on lines 936-941 it would be helpful if the training aspect would cover the proper methods of waste disposal.

Ms. Brumbaugh said the concept of training was important and related to the discussion of qualified personnel.

Lines 1016-1122

Ms. Snead said that DCR was working with the data phase of the ePermitting system regarding when the public could have access to certain information.

Mr. Kelble said that he would propose public notice for construction permits.

Mr. Abraham said that public comment regarding a general permit seemed to be a waste of resources.

Mr. Fritz said that all permits are current and up to date and listed on the DCR website.

With regard to qualified personnel, Mr. Fritz said that revised language was not available.

Ms. Johnson said that from the perspective of local government it would be a benefit for the site inspector to have the same certification as the local program inspectors.

Mr. Fritz said the statute speaks to local programs having certified personnel but that the economic impact of having certified personnel for every single lot development was impractical.

Ms. Johnson asked if there could be two separate requirements.

Mr. Rolband said that there needed to be a clear definition of qualified personnel. He said there needs to be a certification process.

Mr. Fritz noted that the general permit was to regulate the construction activities, not the final result.

Ms. Brumbaugh said that there had been discussion regarding including stormwater in the responsible land disturber certification.

Ms. Snead said that DCR was aware of the limitations. She said that at the present DCR was in the process of developing certification for the stormwater program.

Mr. Fritz said that DCR would have to determine if there was legal authority to add additional certification.

Mr. Nunnally said that the certification process did not accomplish the enforcement that needs to be enhanced.

Ms. Snead said that the permit had to be in place first.

Mr. Goulet said that if there were not established minimum qualifications there would be a need to spend more time on enforcement and inspection.

Ms. Denckla Cobb surveyed members regarding whether disturbance of more than one acre should require that inspectors be certified for Erosion and Sediment Control and Stormwater. There was no consensus on this topic.

Mr. Nichols said that he did not believe the training accomplished the goal.

Ms. Johnson said that there needed to be an exclusion for single family homes.

Mr. Rolband suggested the exclusion before septic drainfields and driveways.

Mr. Nunnally said that any required training should be simple and online.

With regard to enforcement, Mr. Rolband said there was no effective enforcement at DCR.

Mr. Fritz said that DCR staff shared that frustration but had to live within the law and regulations.

Ms. Snead said that there were many aspects the RAP could not address. She noted that there was one meeting left. She said the goal was to establish a permit that would be effective in 2012.

Ms. Snead said that the next meeting would include a discussion of the common plan of development.

Ms. Brumbaugh said that there were a lot of unanswered questions with regard to the EPA guidance document.

Ms. Snead asked that comments be submitted by Monday, November 5.

Mr. Rolband said that the RAP could not comment on the TMDL part that was not written.

Ms. Snead said that additional time would be allowed for that section.

Mr. Rolband said that when this RAP was done, there needed to be a RAP established to deal with enforcement.

There were not additional comments and the meeting was adjourned.