

**Nutrient Trading Expansion
Regulatory Advisory Panel (RAP)
Patrick Henry Building West Reading Room
Friday, February 22, 2013; Meeting #3
10 a.m. to 3 p.m.**

Regulatory Advisory Panel Members Present

Scott Blossom, Williamsburg Environmental Group for Doug Beisch
Jack Frye, Chesapeake Bay Commission
Brent Fults, Chesapeake Bay Nutrient Land Trust (CBNLT)
Fran Geisler, James City County for Whitney Katchmark
Norm Goulet, Northern Virginia Regional Commission
Steve Herzog, Hanover County
Ann Jennings, Chesapeake Bay Foundation
Adrienne Kotula, James River Association
Larry Land, Virginia Association of Counties (VACO)
Tim Mitchell, City of Lynchburg
Brian Noyes, Colonial Soil and Water Conservation District
Chris Pomeroy, AquaLaw
Jacob Powell, Virginia Conservation Network
Nikki Rovner, The Nature Conservancy
Mindy Selman, World Resources Institute
Tom Simpson, Water Stewardship, Inc.
Jenny Tribo, Hampton Roads Planning District Commission
Wilmer Stoneman, Virginia Farm Bureau Federation
Shannon Varner, Troutman-Sanders

Facilitator

Kristina Weaver, Institute for Environmental Negotiation

Agency Staff Present

Emilee Adamson, DEQ
David Aho, DCR
Russ Baxter, DEQ
Diane Beyer, DCR
Allen Brockenbrough, DEQ
Scott Crafton, DCR
Michael Fletcher, DCR
Todd Groh, DOF
Matthew Gooch, Office of the Attorney General
Debra Harris, DEQ
Buck Kline, DOF

Stephanie Martin, DCR
Darrell Marshall, VDACS
Joan Salvati, DCR
Michelle Vucci, DCR

Others Present

Brian Becker, Center for Natural Capital
Mike Collins, Center for Natural Capital
Valerie Frances, U.S. Department of Agriculture
Pat Gleason, U.S. Environmental Protection Agency (EPA) Region 3
Taylor Goodman, Balzer and Associates
Casey Jensen, CBNLT
Scott Reed, CBNLT
Mark Taylor, Accomack County
Cabell Vest, AquaLaw

Welcome and Introductions

Ms. Weaver welcomed members and guests to the RAP meeting. She turned the meeting over to Ms. Snead.

Ms. Snead thanked members for participating. She noted that the draft sent out for review was just the first attempt at putting the regulation together.

Regulatory Action Overview, Committee Charge, and Regulatory Timeline Including Discussion of Future RAP Meetings and Revised Work Plan

Ms. Snead reviewed the charge to the RAP from previous meetings. A copy of the charge is available on DCR's website at: http://www.dcr.virginia.gov/laws_and_regulations/lr6.shtml.

Ms Snead reviewed the work plan moving forward following this meeting:

Meeting 4, March 20, 2013

- Presentations on Potential Calculation Tools
- Consideration of Baselines and Credit Calculation Methodologies
- Agricultural, Urban and Land Conversion
- Procedures for establishing baseline for "other credit-generating practices"
- Bundling of credits: procedures for review
- Discussion of March Draft Regulation Parts with RAP comment incorporated

As edited from February meeting

- Part I – Definitions
- Part II – General Information
- Part III – Administrative and Technical Criteria
- Application Procedures (e.g. Public Notification, Review Process)

Credit Certification Procedures
Management Plans
Financial Assurances
Appeals

As newly presented:

Part IV – Compliance and Enforcement
Inspections/Audits
Recordkeeping and Reporting
Enforcement
Penalties

Meeting 5, April 15, 2013

Continued consideration of Baselines and Credit Calculations Methodologies
Agricultural, Urban and Land Conversion
Procedures for establishing baseline for “other credit-generating practices”
Building of credits: procedures for review
Presentation of Regulations on Calculation Procedures

Meeting 6, May, 2013 (tentative)

Fee Presentation
Continuation on Baselines and Calculations Draft Regulations, as needed
Local Water Quality Issues

Meeting 7, June, 2013

Presentation on Credit Registry
Local Water Quality Issues Continued
Discussion of Regulations as Drafted

Meeting 8, July, 2013

Consensus Testing to Finalize Draft Regulations to the Board

Ms. Snead asked that the RAP members submit comments regarding the draft work plan by March 8.

Ms. Snead reviewed the remainder of the agenda.

Ms. Weaver noted that the meeting guidelines were posted in the room.

Stormwater Best Management Practices

Ms. Snead gave a presentation regarding Stormwater BMPs.

Cranston Mill Pond

This is the only approved Stormwater (SW) BMP Bank to Date. The dam broke in 2005 and the approval process occurred before banking was put into law.
Pond was Restored and Enhanced
2005 Baseline Date not in Law/Regulation at the Time
Credit Calculations Utilized Runoff Reduction Method Spreadsheet

Current SW BMP Policies

2005 Baseline Year
Regulations Under Development
In Meantime, Conservative Assumptions
Considerations
Baseline?
Drainage area land use changes
Calculation methodologies

Ms. Snead said that none of these have been approved to date. She said that DCR has been telling applicants that they need to be conservative with estimates until these regulations are in place. She said this has probably been a deterrent to participation.

Virginia Stormwater BMP Clearinghouse

Design standards and specifications of BMPs approved for use in Virginia to control the quality and/or quantity of stormwater runoff.

Ms. Snead said that this has taken almost six years to get in place. She said that the hope was that the Clearinghouse work would be completed by mid to late summer.

15 Non-Proprietary BMPs

Downspout Disconnection
Sheetflow to Vegetative Filters/Conservation Areas
Grass Channels
Soil Compost Amendments
Vegetated Roots
Rainwater Harvesting
Permeable Pavement
Infiltration
Bioretention
Dry Swales
Wet Swales
Filtering
Constructed Wetlands

Wet Ponds
Extended Detention

Manufactured (Proprietary) BMPs

Clearinghouse website disseminates the results of Virginia's process to evaluate and certify the performance claims of manufactured/proprietary BMPs using the Virginia Technology Assessment Protocol (VTAP).

Mr. Fults said that it had been requested several times to footnote credits for nutrient offsets. This was not a structural BMP but that it would be nice to have recognition for those efforts.

Ms. Snead said that the role of the Clearinghouse was still evolving.

Mr. Wagner asked how 2005 baseline data applied to BMPs when considering the conservation of agricultural ponds for water quality.

Mr. Brockenbrough said that provision was not in the law but was currently in the DEQ nutrient trading regulations for the general permit. He said that any credits or offsets from an urban stormwater project represents improvements beyond what was in place on July 1, 2005.

Mr. Wagner asked if an agricultural pond was converted to a water quality BMP if it would comply with the standards.

Mr. Brockenbrough said credit would be given for the enhancement.

Ms. Selman asked if the 15 non proprietary BMPs were the same as in the Bay Model. They are not.

Mr. Crafton said that the Bay program had been going through a process of having expert panels look at BMPs in the model and new BMPs in terms of credit. He said that the move was to include all of these in the model.

Department of Forestry Presentation

Mr. Groh gave the following presentation for the Department of Forestry.

MISSION:

- We Protect and Develop Healthy, Sustainable Forest Resources for Virginians

VISION:

- We envision forest resources that support and enhance a healthy living environment.

Goals for Forestry in Virginia

230 Employees to meet our Goals

- Protect the Forest Resource from Wildfire, Insect and Disease and other Natural Disaster
- Conserve the Forest Land Base
- Protect Water Quality
- Improve and Renew Forest Resources

Professional Assistance

- Research
 - Genetic Improvement
- Seedling Availability – DOF Nurseries

Virginia Forest Sustainability

- Private Land Ownership
 - Management planning
 - Practice Implementation

Management Planning

- Multiple-Use Forest Management Plans
 - Virginia Forest Stewardship Plans
 - Natural Resources Conservation Service Forestry Conservation Activity Plans
 - Virginia Tree Farm Program Plans
 - Memorandum of Understanding stating that plans are reciprocal under programs
- Plan Contents
 - Landowner's management objectives
 - Overall property description and location
 - Current stand types and conditions
 - Stand specific recommendations
 - Concise practice implementation timeline
 - Map of property with stand delineations
 - General management information
- Quality Control
 - Virginia Forest Stewardship Plans
 - DOF/Consultant written and DOF approved
 - NRCS Forestry Conservation Activity Plans
 - Technical Service Provider written, DOF approved
 - Virginia Tree Farm Plans
 - Tree Farm Program training and plan audits

Practice Implementation

- Site Preparation
 - Recommended by Forester
 - Chemical or Mechanical
 - Based upon site conditions
- Tree Planting
 - Site specific recommendations
 - Match the species to the site
 - Proper seedling care and handling
 - Planting crew supervision
 - Planting quality inspections

Mr. Varner asked if the purposes of the plan was aimed toward developing a good crop or a healthy forest.

Mr. Groh said that would depend on the landowner's objectives.

Mr. Goodman asked about the density for hardwood trees.

Mr. Groh said that working with NRCS the goal was 110 trees per acre if there were surrounding trees. He said that if there were no nursery trees or seed trees there could be as much as 300 trees per acre. He said that DOF looks for a 70% survival rate.

Mr. Brockenbrough noted that there had been some issues with survivability. He asked if the services and practices provided by DOF were free.

Mr. Groh said that currently services requested by landowners were free of charge. He said that based on volume that may have to be readjusted. He said that sometimes DOF does charge and that there were thresholds to the payment system.

Mr. Goulet asked if there was a difference between how planning and tracking was done for private vs. public entities.

Mr. Groh said that there are different databases. He said that DOF could make available the baseline data for public lands.

Mr. Simpson said there should be a discussion as to whether the DOF Forest Stewardship should be a requirement for the generation of credits.

A question was raised regarding different uses on a given parcel.

Mr. Groh said that the Forest Stewardship Plan deals with the entire property. Because it is a voluntary program landowners generally apply it to the entire property.

It was suggested that the RAP may wish to consider requiring a nutrient credit plan for the entire property.

There was a discussion regarding the core goal of the credit program.

A member said the goals should be a healthy forest, but the Forest Stewardship Plan may not be the vehicle because the area may be more heavily agricultural whereas the Forest Stewardship Plan deals with lands that may be more heavily forested.

Mr. Goulet said that the goal should not be forest stewardship. He said the goal was the accurate accounting of nutrient management.

Banker Perspective on Land Conversion Banks

Taylor Goodman, Project Manager for Balzer and Associates gave a presentation regarding Land Conversion Banks.

A request was made to share the language of the Restricted Covenant with the RAP. Mr. Goodman agreed to get this to the RAP via Ms. Snead.

Mr. Goodman clarified that credits are released after the planting phase.

Ms. Jennings noted that there was only a 10 year requirement for financial monitoring who would be responsible for monitoring after that time.

Mr. Brockenbrough said that the financial commitment was for ten years. He said that with restricted covenants the presumption would be that the land is forested.

Ms. Jennings asked about an adjacent property owner encroaching on the property and removing the trees.

Mr. Brockenbrough said there was not currently a mechanism to address that.

Mr. Fults said that it would be reasonable to post that the land was an area covered by the stewardship plan.

Mr. Blossom asked if the timelines could be aligned with stream mitigation plans.

Mr. Brockenbrough said that had not been considered at this point.

At this time the RAP took a break.

Following the break the RAP began a review of the discussion draft.

February Regulation Draft Discussion: Programmatic Processes

Ms. Snead began a review of the draft dated 2/22/13.

Part I – Definitions

Ms. Snead noted that staff had made edits to the definitions.

Ms. Snead stated that on line 24 a couple of options regarding the definition of BMP had been presented at the December meeting, staff chose to include the definition as:

“Best management practice,” “practice” or “BMP” means a structural practice, nonstructural practice, or other management practice used to prevent or reduce nutrient loads reaching surface waters or the adverse effects thereof.

Ms. Snead noted that this definition came from the law.

On line 29 “as subject to restriction” was added regarding Bundling. It was suggested to strike “for sale” as it did not need to be tied to the sale.

Mr. Brockenbrough noted that the legislation referred to an exchange of credits.

Mr. Baxter noted that the term “bank” was not in the Code.

Ms. Snead noted that “Management Plan” was added on line 41.

Mr. Stoneman asked for a clarification of the term “Nutrient Reduction Implementation Plan.”

Ms. Snead said that this has been the term used for the application received from people interested in banking.

Mr. Baxter said that the term was used in Part III.

It was suggested that the term “nutrient bank” be stricken from the regulations.

Ms. Snead noted the addition of “O&M Plans” on line 57.

On line 67 regarding release credits it was suggested that “sale” be changed to “transfer” or “exchange.”

Ms. Snead turned to the definition of “Service Area” on line 71.

It was suggested that this term be more specific or more in line with Code language.

Edits were suggested to the definition of “Site Protection Instrument” including:

- Expand on the definition based on the multiple options in the Code
- Change the phrase “such as conservation easement”

- There should be no preference toward the option of conservation easement
- Look for a model in the banking regulations. There may be a broader definition in the Mitigation Banking Rule

The following edit was suggested “Site protection means a legal mechanism that provides assurance that credits will be maintained as approved by the Department.”

Ms. Jennings suggested that “Baseline” should be more tightly aligned with the Code. She said the concern was similar to her concern with the definition of “service area.”

At this point the RAP recessed for lunch.

Following lunch discussion resumed with Part II.

Ms. Snead asked that any written comments be sent to her as well as to Ms. Vucci.

Part II – General Information

Authority, Purpose and Applicability, Relationship to Other Laws and Regulations, Limitations and Liability

4VAC50-80-20. Authority.

There were no comments regarding this section.

4VAC50-80-30. Purpose and applicability.

Mr. Varner asked about the credits being “certified” by the board.

Ms Snead suggested striking “and received.”

Mr. Herzog suggested in Section A that “and monitoring” be stricken.

4VAC50-80-40. Relationship to other laws and regulations.

Ms. Snead said that this section referenced other laws and regulations that were pertinent, primarily those that would govern the use of credits.

Ms. Jennings asked about the references to Confined Animal Feeding Operations (CAFO) permits with regards to trading. She asked if there was no wasteload allocation in the permit if the new CAFOs would be allowed to trade.

Ms. Snead said that the permit would need to be written to allow them to be traded but that the law does provide for that authority. She said any limitations regarding the CAFO would need to be outlined in the permit.

Mr. Pomeroy said that it would be helpful to clarify that this section was for descriptive purposes.

Mr. Herzog noted that the use of the “nutrient credits certified” was redundant based on the definitions.

4VAC50-80-50. Limitations and liabilities.

It was suggested that Section A be divided into two parts.

Mr. Wagner asked if “grants” referred to a specific competition. It was noted that this referred to water quality grants.

Mr. Fults asked about farm subsidies. It was noted that cost share funds cannot be used to generate facilities.

Part III - Administrative and Technical Criteria

Application Procedures (e.g., Public Notification, Review Process), Credit Certification Procedures, Management Plans, Financial Assurances, Appeals

Mr. Wagner suggested in Section A that the preliminary application be referred to as a “prospectus stage.”

Ms. Snead said the form would be provided by the department.

Mr. Varner asked how extensive the form would be.

Ms. Snead said that may change over time.

Mr. Fults suggested that “application acceptable” be changed to “substantially complete,” or “feasible.” He said that perceptions of the term “acceptable” vary.

Ms. Geisler said that the first step needed to be defined with specific criteria. She said that there was a need for flexibility, but there should be specific triggers to measure.

Mr. Herzog suggested that there might be multiple application processes to accommodate term-limited vs. perpetual credits.

On Section B, Ms. Jennings asked why only certain types of projects were listed. She asked if the land use controls in place as of July 1, 2005 should be used.

Ms. Snead said that was the baseline for the land use conversion process.

Mr. Goodman asked if proof of insurance was required with the application.

Mr. Stoneman asked where the records would be housed and whether they would be subject to the Freedom of Information Act (FOIA).

Ms. Snead said that the information would be subject to FOIA unless prohibited by other regulations.

Mr. Stoneman said that because of competition for the land much of this information is closely guarded by farmers.

Mr. Goulet asked Mr. Stoneman to give an example that would be a problem for farmers.

Mr. Stoneman said that of concern were the requirements that describe how much land is there. Because of competition farmers are reluctant to give out that information.

Ms. Martin noted that from the Farm Service Agency that plat numbers are non-FOIA-able and are projected by the federal government.

Ms. Jennings said that it would be a slippery slope if the general public was blocked from seeing information about the quality of credits and compliance.

Mr. Fults said that he wanted farmers to participate in the program but one of the biggest national hurdles was the lack of transparency. He said that it would be good to remember that this program was for filling participants and not a requirement. He said that he would believe that if a landowner willingly provides information he is not shielded by law. He said that if farmers were shielded from providing information that private industry should be as well.

Mr. Baxter said it was a question of what the Department was able to release according to the law.

Under section B2 Administrative completeness review, Ms. Jennings said that to create public transparency there needed to be more than a posting on the agency website. She said that to be successful the program would have to be publicly transparent.

A member asked if the notice would just be a public notice or if comment would be solicited.

Mr. Baxter said that the General Assembly included the requirement that the public be notified. He said the agency currently did not have any specific guidance.

Mr. Pomeroy said that he would not be opposed to a more effective notification process.

Ms. Geisler noted that the applicants need to be informed of the criteria they are expected to meet.

4VAC50-80-70. Credit calculation procedures.

This section had not been drafted at the time of the meeting.

4VAC50-80-80. Credit certification procedures.

It was suggested that “Only these released certified credits are available for sale” be set off as a Section C and should further discuss what should be done when credits are released.

It was noted that there would be further discussion regarding the registry at the May meeting.

4VAC50-80-90. Management plan.

A member noted that “environmentally sensitive features” is defined in state regulations. The member asked if staff wanted to be that specific in terminology.

Ms. Snead said that should also be included in the definitions of this section.

It was noted that it was difficult to evaluate this section without addressing Part IV and the inspection language.

Ms. Geisler noted that in Section D that invasive species were not addressed. She said that it is important to know what invasives are under control when information is submitted.

Ms. Beyer said that was noted in the application.

Ms. Rovner noted that the issue of invasive species is covered in the rules for mitigation banking.

It was noted that this section was intended to allow the sale of credits already approved. It is providing the option for a mitigation banker to sell nutrient credits. This is still subject to the Mitigation Banking Instrument.

4VAC50-80-100. Financial assurance requirements.

Ms. Snead said that this was taken directly from the law.

Mr. Fults asked if the rates would be pre-determined.

Ms. Snead said that staff would review that.

4VAC50-80-110. Appeal process.

There were no comments regarding this section.

Ms. Snead said that staff had quite a bit of editing to do. She asked that additional comments be sent to DCR staff by March 8. She said that staff would distribute a new draft prior to the March 20 meeting.

It was noted the following sections still need to be drafted:

- Part III 4VAC50-80-70 Calculation Procedures
- Part IV Compliance and Enforcement (Inspections, Enforcement, Penalties)
- Part V Fees
- Part VI Local Water Quality

Ms. Jennings said that it had been helpful to have the draft to review in advance of the meeting.

It was determined that at subsequent meetings the language would be projected on the screen so that members could see suggested edits.

Public Comment

There was no public comment.

Next Meeting

The next meeting was scheduled for Wednesday, March 20. Written comments were due to Ms. Snead and Ms. Vucci by March 8.

Posting of Materials

Information will be placed at <http://www.dcr.virginia.gov/lr3.shtml>

There was no additional business and the meeting was adjourned.