

Technical Advisory Committee for Amendment to 9VAC25-890 (MS4 Phase II General Permit)
Meeting #7
03/29/17
DEQ Piedmont Regional Office

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Part II TMDL Special Conditions

A. Chesapeake Bay TMDL Special Condition

1. No comments
2. No comments
3. No comments

Tables 1a-1d – Ed (Suffolk) asked if the tables were intended to be fillable or used as a template

- Jaime (DEQ) stated intent was to fill in table
- Erin (Lynchburg) asked if DEQ’s preference was for permittees to use this table format
- Jaime (DEQ) stated that it is DEQ’s preference but it is not required
- Dan (Charlottesville) asked how to factor in reductions for annual practices such as street sweeping since the existing table format may not capture this information
- Fran (James City County) asked if expanding the table to capture this additional information was an option

- Erin (Lynchburg) suggested adding a column for annual practices
- Peggy (CBF) asked if this annual information could be added as a footnote to the table
- John (Christiansburg) stated that any annual practice reductions can fluctuate year to year
- Fred (DEQ) stated that the table is large to begin with, and the goal is to establish the 40% cumulative reductions. The annual reports and action plans are the appropriate places to demonstrate reductions achieved through implementation of practices
- Jaime (DEQ) proposed dropping the last two columns from the tables and capturing that information in the action plans and annual reports
- TAC consensus to drop the last two columns from the tables
- Pam (Army) suggested adding the formula for the calculations of the items in the columns to the table

4. Jaime (DEQ) stated that the changes were meant to clarify the intent of the 16% language in cases where an alternative methodology was used. Example given of requiring a 50% reduction on all projects, which may or may not equate to the 16% requirement

- Peggy (CBF) suggested changing language to “regardless of methodology”
- Joe (Hopewell) asked “include methodologies for what, to clarify it is demonstrating compliance”

5. Erin (Lynchburg) suggested using the same language for alternative methodologies as in condition 4

- Peggy (CBF) asked if the intent was to give 5 more years at the grandfathered terms
- Fran (James City County) stated grandfathered projects are approved prior to 2018
- Pam (Army) stated projects are done by June 30, 2019
- Fred (DEQ) stated there are two issues, grandfathering and time limits of applicability. Time limits of applicability, permittees received coverage under the 2009 Construction General Permit, projects can exceed the 16% threshold and can go out to 2024. This is a separate issue from grandfathered projects, it is a Construction General Permit issue
- Fran (James City County) asked “will number 5 ultimately go away”
- Jaime (DEQ) responded yes
- ED (City of Suffolk) asked “can programs that were more stringent than 16% get credit” (relates to number 4 as well)
- Jaime (DEQ) responded “this is covered in action plan guidance”

6. Alex (Stantec) asked if the ratios in the table had been double checked

- Jaime (DEQ) stated that the process was still underway
- Dan (Charlottesville) stated that previously stricken language indicated what to do with these numbers. He suggested adding language that clarifies what to do with these numbers

7. Lisa (Aqualaw for VAMSA) asked “is MS4 meant to be here”

8. No comments

9. Ginny (ASCE) commented that “at least two significant digits” leaves room for interpretation and asked if that possibility should be eliminated.

10. Point Source Trading Place Holder Language

- Norm (NVRC) Stated permit is authorizing language. Permittees will be reporting what credits were utilized, don't overcomplicate language. Term credits bought on yearly basis
- Peggy (CBF) asked if it is possible to explain differences in guidance or some other document outside of the permit
- Joe (City of Hopewell) asked if this was really just an accounting problem.
- Allan (DEQ) responded that it was
- Joe (Hopewell) Advocated for keeping language simple because it is an accounting issue
- John (Christiansburg) suggested reporting planned credit purchases and reporting previous years credit purchases
- Fran (James City County) stated ideally if point source credits are used there will be some overreaching agreement that allows for credit usage in each year
- Peggy (CBF) stated ideally the usage of point source credits should be memorialized in agreements prior to the purchasing of credits

Struck Language after item 10

- Lisa (Aqualaw for VAMSA) suggested that the language needs to remain in the permit. The language defines what is acceptable. The concern being that during an EPA audit, if something is not identified as acceptable, there is a chance that EPA will argue that use of that item is not appropriate
- Use of guidance was suggested
- Fran (James City County) stated that the problem with guidance is that guidance can change, it can be a moving mark.
- Fran (James City County) asked is there a way to reference a guidance document if it is the core issue.
- Alan (DEQ) asked if using the fact sheet would be acceptable
- Lisa (Aqualaw for VAMSA) stated that using the fact sheet is all well and good but the language should stay. The concern is that in 2-3 years if the permit does not explicitly identify the BMPs or other options (i.e. trading) available, EPA can say that what the permittee is doing does not meet permit requirements
- Jaime (DEQ) asked what about the language is most important
- Dan (Charlottesville) stated that trading is most important and suggested using section 10 to authorize trading and tie it in with reporting requirements
- John (Christiansburg) asked if trading could be added to what was being reported in part 14
- Ginny (ASCE) asked about changing item 10 to allow general trading and calling out point source trading as allowable in b
- Norm (NVRC) concerned with removing cooperative programs related to non-bay items. Wants to ensure cooperative language stays for all activities
- Joe (Hopewell) asked if the struck language was intended to be all encompassing
- Jaime (DEQ) replied no it is not meant to cover all possibilities
- Fran (James City County) asked if the fact sheet could connect everything and cover all the concerns over removing the struck language
- Peggy (CBF) asked if it was really impractical to list everything that is allowable and stated that there is merit to maintaining a list of all approved practices
- Jaime (DEQ) responded that during previous TAC meetings concern was expressed that having a list of approved BMPs was not flexible enough and that if a new BMP was approved that was not on the list, use of that BMP would not be allowed until the next permit cycle

- Peggy (CBF) suggested having a list and language that states any BMP approved by the Bay Program may be used
- Joe (Hopewell) stated that if the desire was to identify all non-typical activities as well, the list will probably keep growing.
- Joe (Hopewell) expressed a preference to remain as flexible as possible but that noted concerns were well taken
- Peggy (CBF) asked if producing a list and also having a Bay Program approved category and a DEQ approved category would be possible
- Peggy (CBF) stated the underlying concern is to not have the process be totally open-ended
- Norm (NVRC) asked if language was used in earlier sections of the permit that details approved practices by all programs, DEQ, Chesapeake Bay, etc.
- Jaime (DEQ) proposed adding language that details trading and BMPs approved by DEQ and the Bay Program may be used
- Joe (Hopewell) asked if alternative methodologies could be added
- Peggy (CBF) responded that approved by DEQ encompasses alternative methodologies
- Jaime (DEQ) Drafted new language for item 10
- Erin suggested changing section 10 to section 11
- Suggestion was made to title section 11 as trading, not point source trading
- Alex (Stantec) asked if there should be a reference to the BMP clearinghouse
- Dan (Charlottesville) stated that he likes the intent of the language but that the use of shall implies that a permittee must do all of the things indicated not pick from among the listed items
- Jaime (DEQ) proposed new language
- Dan (Charlottesville) asked if the intent of b. (newly proposed language) was not just to use a static list but something that a permittee brings to DEQ for approval
- Erin (Lynchburg) stated that the use of “may” is more appropriate than “shall” to ensure flexibility
- Kathleen (DEQ) stated that “may” implies less certainty
- Peggy (CBF) asked if use of expiration date of the permit would be appropriate in the new language
- Jaime (DEQ) replied the new language would be the base condition and that internal refinement would occur

Original section 11, new 12

- Jaime (DEQ) asked by what date should the required update be submitted
 - Peggy (CBF) asked if it was required with the registration statement
 - Jaime (DEQ) replied yes but nothing specifies what is required with that submittal
 - TAC consensus for submittal of the updated action plan within 12 months of the permit effective date
- a. no comments
 - b. no comments
 - c. no comments
 - d. Joni (Alexandria) asked which BMPs were being asked for and how far back can they extend

- Jaime (DEQ) responded from 2006 on
- Alex (Stantec) asked if any reference to the existing guidance document is needed and wanted to clarify that the calculations from the first permit cycle's action plans would not need to be recalculated for the updated action plans

e. Joni (Alexandria) asked if "planned" could be added after "strategies"

- Jaime (DEQ) added language

f. No comments

g. No comments

Original section 12, new 13 – questions on public notice aspects were made in conjunction with comments/questions pertaining to the next sections discussion

Original section 13, new 14 – Fran (James City County) asked if the action plan is enforceable

- Jaime (DEQ) replied DEQ's read on the remand rule is that the program plans are an implementation tool, not an enforceable document
- Fran (James City County) asked "the reductions are enforceable but the action plan is a tool"
- Jaime (DEQ) explained the reductions are enforceable having an action plan with all permit components is enforceable
- Fran (James City County) asked "in order to take action against a permittee the item must be in the permit"
- Jaime (DEQ) provided an example "if a permittee has an action plan that meets the reduction requirements but is using a BMP that is not listed as approved, then the action plan is not compliant with the permit conditions. If the permittee makes a change in an approved action plan from one approved BMP to another approved BMP, the action plan is still compliant with permit conditions and will get the reduction credits from the new BMP"
- Joe (Hopewell) asked if an action plan needed to be re-public noticed if a stream restoration BMP was replaced with a bio-retention BMP
- Jaime (DEQ) stated the intent is that the action plan will be implemented as public noticed
- General TAC question – what changes require a new round of public notice, can this be defined in the permit
- Peggy (CBF) stated a concern that wholesale changes to action plans will not be public noticed, providing no opportunity for public input
- Joe (Hopewell) stated that it is not unusual for stream restoration details to change, land acquisition, funding, etc.
- Ashely (Stantec) commented "the annual reports are where any changes to BMPs will be reflected"
- Jaime (DEQ) changed proposed language to address the above concerns
- Lisa (Aqualaw for VAMSA) stated a concern about plan enforceability and how to protect permittees from having an enforceability debate with EPA in the future and suggested that language be included that makes it clear that the plan is not enforceable
- Jaime (DEQ) responded "the enforceability question is addressed in the fact sheet by using the preamble language"

Original 14, new 15 – Joe (Hopewell) asked “changing something in the initial submittal is ok as long as it is documented in the annual report somewhere along the line”

- Norm (NVRC) stated there are two issues, first is a public notice issue and the second is making a substitution in the annual report. If DEQ does not comment on the changed BMP in the annual report, then the BMPs can be used and credits counted
- Erin (Lynchburg) asked “reductions are enforceable, having a plan is enforceable, but a list of proposed BMPs is not, recognizing that there will be a final BMP list that achieves the enforceable reductions”
- General TAC discussion on DEQ approvals of action plans and annual reports
- Peggy (CBF) stated “trying to understand the negative in approvals for annual reports”
- Jaime (DEQ) explained approving something is a case decision which is handled by a different administrative process. Annual reports are not approved, the language used is that no additional information is required at this time

a. Joe (Hopewell) asked if the draft action plans need to be put out for public comment

- Jaime (DEQ) responded that just the second permit cycle requirements need to be public noticed
- Various TAC members indicated that they were going to have an addendum to the existing action plan that covers the requirements for the next permit cycle and that this addendum would be public noticed

b. Jill (HRPDC) asked “if the annual report provides feedback on the 40% reductions why not include all BMPs

- Jaime (DEQ) explained that discussions from previous TAC meetings indicated that members did not want redundant reporting elements. Those items reported in a. are for that reporting year
- Erin (Lynchburg) asked if changes to proposed schedules would be an issue
- Jaime (DEQ) answered schedule changes are ok

B. Local TMDL Special Condition

1. Fran (James City County) asked “where is the language that keeps James City County from having to do an action plan if the TMDL doesn’t say that the permittee is causing or contributing to the source of the impairment”

- Norm (NVRC) stated that the language is trying to address a problem with the TMDL through the MS4 permit. The TMDL needs to be updated
- Lisa (Aqualaw for VAMSA) asked how a action plan could be written in this situation
- Jaime (DEQ) explained that the idea is that for certain sectors there are associated percent reductions
- Norm (NVRC) stated that reductions are based on some factor it is not always an even split
- Jaime (DEQ) identified the larger concern that DEQ can’t issue permit coverage to a permittee if they are not in compliance
- Lisa (Aqualaw for VAMSA) stated that MS4s comply with MEP not WQ.
- Jaime (DEQ) reiterated that DEQ planning staff can’t sign off on something that does not comply

- Fran (James City County) asked how many instances of the issue outlined in B.1.c. exist. Is this just a perceived or potential issue
- Ginny (ASCE) asked from a process perspective isn't it better to re-open the TMDLs and fix them
- Kelly (DEQ) cited the Construction General Permit process where the permittee needs to meet 6 generic criteria if they discharge to a stream with a TMDL but they have no WLA
- Norm (NVRC) indicated that this is trying to get a transfer from the LA to WLA and would argue that this is a bigger issue with ramifications for the Bay TMDL as well. Suggestion for place holder language until the State figures out the entire solution
- Jaime (DEQ) would argue to keep Bay and Local TMDLs separate
- Dan (Charlottesville) stated he echoes all the concerns raised so far and that reverting to implement to the MEP language would cover this situation. If there is no WLA assigned, MEP ensures that WQ is protected
- Peggy (CBF) stated that there are court decisions where relying on just MEP is not enough and that WLA's need to be considered
- Fran (James City County) stated that if new MS4s come online DEQ can target the TMDLs affected by this situation
- Kelly (DEQ) stated that when TMDLs are re-opened DEQ asks the permittee to pay for the new modeling
- Jaime (DEQ) proposed to leave item B.1.c. unresolved at the moment until more DEQ input is obtained

The above discussions touched on all elements of part 1 in general below are the specific comments in relation to parts a. and b.

1.a. – Norm (NVRC) asked if permittees could get more than 12 months as certain jurisdictions will have a significant number of adjustments to make

- General TAC suggestion for 24 months
- Erin (Lynchburg) stated that 24 months is better than 12 particularly because of other deliverables due on the same 12 month deadline

1.b. – Ginny (ASCE) suggested that if a. was moved back to 24 months, this time frame should be moved back as well

- Dan (Charlottesville) asked how to split responsibility for aggregate WLAs among multiple MS4s
- Fran asked if the TMDL breaks out contribution areas
- Peggy asked when reductions are assigned how is it broken out
- Jaime (DEQ) asked for suggested solution
- Fred (DEQ) asked if the local TMDL action plan guidance addresses this question and what kind of TMDLs fall in this category
- TAC Consensus any of them can be in this category
- Fran (James City County) stated that TMDL documents are done differently with differing assumptions, etc. It is a difficult situation to deal with
- Fred (DEQ) asked if the existing permit requires local TMDL action plans and what language was used there
- Norm (NVRC) stated that aggregate allocations are given to the sector not individual MS4s the issue is figuring out the loads to reduce
- Jaime (DEQ) proposes to leave language as is and modify it for semantics

- Pam (Army) asked how to do the math for bacterial TMDLs, should they just list the programmatic elements
- Joe (Hopewell) asked how DEQ will evaluate someone submitting a plan that breaks out aggregate numbers
- Jaime (DEQ) explained that DEQ would look at the methodology used
- Norm (NVRC) stated that most TMDLs were developed using the Census urbanized area
- Jaime (DEQ) explained that some were done that way
- Fran (James City County) stated that she had no issue with the word aggregate in part a. and asked what are MS4s required to do for b.
- Fred (DEQ) asked if TMDLs for 2013-2018 are still using aggregates

2. Jill (HRPDC) asked if the language should say progress in implementing BMPs instead of reducing pollutants to address permittee concerns on how effectiveness will be measured.

- Jaime (DEQ) adjusted the language
- Joe (Hopewell) asked if the language should say consistent with the requirements of the TMDL
- Jaime (DEQ) changed the language

3.

a. No comments

b. No comments

c. No comments

d. Skipped

e. Dan (Charlottesville) asked what is meant by address significant sources, isn't that what the TMDL study did

- Norm (NVRC) stated that is a significant amount of work and asked why do a watershed analysis if the TMDL study already did one
- Jaime (DEQ) explained the sources were categorical not individual sources of pollutants

f. Pam (Army) asked if bacteria activities could be tied back to the MCMs the permittee is already doing

- Jaime (DEQ) explained that was allowed to receive credit for bacteria reductions

g. No comments

h. No comments

i. No comments

4. Bacteria

a. No comments

b. No comments

Table 5 – Lisa (Aqualaw for VAMSA) asked for more flexibility to be added

- Norm (NVRC) stated the problem with the table is it is very restrictive and echo's Lisa's request for flexibility
- Erin (Lynchburg) stated that the source for the list includes more options than presented in Table 5
- Jaime (DEQ) explained that some options weren't included because the permittees were already supposed to be doing them as required by the permit
- General TAC consensus – Table 5 categories need broadening and Lisa will provide examples

5. Local Sediment, Phosphorous, Nitrogen and Benthic

a.i. Dan (Charlottesville) asked if this was meant to be additive

- Jaime (DEQ) changed language

a.ii. No Comments

a.iii. No comments

b. no Comments

c. Joni (Alexandria) asked how the calculations are to be done, what loadings should be used

- Jaime (DEQ) explained that appropriate efficiencies for source should be used and use the more restrictive of the potential loading rates
- Norm (NVRC) stated that benthic isn't a pollutant and relies on a surrogate
- Jaime (DEQ) changed language

d. Norm (NVRC) stated that not all TMDLs assume that the WLA can be reached and asked how this will be handled. This is setting the stage for getting meaningless numbers, particularly if benthic is left in

- Lisa (Aqualaw for VAMSA) asked if the word "proposed" is appropriate and agrees with Norm that it will be very difficult to come up with an estimate
- Fred (DEQ) explained that DEQ has an obligation to have some idea of where we are going

6. PCBs

a. No comments

b. Pam (Army) asked which DEQ office

- Jaime (DEQ) explained the DEQ regional office

7. Lisa (Aqualaw for VAMSA) suggested using the language from the Chesapeake Bay section for which plan is to be public noticed

8. No comments

9. No comments

