

Joint Commission on Administrative Rules
Meeting Summary
September 16, 2009; 10 A.M.
Senate Room B, General Assembly Building
Richmond, Virginia

Members Present: Senator Frank Wagner (Chair), Delegate H. Morgan Griffith (Vice-Chair), Senator Henry L. Marsh, II, Senator Stephen H. Martin, Senator John S. Edwards, Senator Ryan T. McDougle, Delegate Christopher B. Saxman, Delegate Robert D. Hull, Delegate R. Lee Ware, Jr., Delegate Robert W. Mathieson, Delegate Thomas D. Gear, Delegate Algie T. Howell, Jr.,

Staff Present: Elizabeth Palen

I. Welcome and Call to Order-Senator Frank Wagner (Chair)

- Meeting was called to order by Senator Wagner at 10:15 A.M.

II. Joseph H. Maroon, Director, Virginia Department of Conservation & Recreation (DCR)

- Discussed key points regarding the Virginia Storm Water Management Program Permit Regulations (see handout).
 - o Storm water runoff is a significant contributor of water quality problems.
 - It contributes to closing of beaches, shellfish beds, channel erosion, downstream flooding.
 - o Many localities have not addressed storm water management.
 - o Storm water is a valuable and recyclable commodity; it should be treated on site and used for other purposes.
 - Addressing storm water management is a key component to improving Virginia's rivers, lakes, streams, and the bay.
 - o Phosphorus is the leading pollutant.
 - 32 percent of the loadings of phosphorus into the bay come from urban and suburban sources.
 - o **Delegate Christopher B. Saxman**— (referencing slides on page 5) *Do these pie charts reflect Virginia's discharges or the entire Chesapeake Bay watershed?*
 - These are bay-wide numbers but Virginia's numbers are very similar.
 - o **Delegate Robert D. Hull**—(referencing slides on page 5) *It sounds like these storm water discharges are the biggest problem, but the chart appears to show the opposite. Nitrogen has the lowest percentage of urban/ suburban sources, half of the phosphorus comes from agriculture, and three-fourths of the sediment appears to come from agriculture. My question is why do you say the percentage from urban/suburban runoff is increasing? It looks like it's a minority of the problem.*
 - Storm water runoff from urban/suburban sources is the only one that is increasing at this point; the other sources are declining. The phosphorus numbers went from 5 percent in 1985 to over 30 percent now. This is a growing problem.

- o **Delegate Hull**—*Are you saying the increase of phosphorus from 5 percent in 1985 to 30 percent now is due to construction?*
 - No, the increase is from urban/suburban sources.
- o **Delegate Saxman**—(referencing slides on page 5) *These are percentages of the total amount from urban/suburban sources, correct?*
 - Yes.
- o **Delegate Saxman**—(referencing slide on page 5) *Of the totals presented here, what is Virginia's impact relative to other states who are a part of the Chesapeake Bay watershed?*
 - Not sure that I have those exact numbers.
 - The EPA is going to give the all of the states a certain allocation that they need to meet. These states will have to develop a strategy that addresses their problems. Virginia is trying to address the problem of storm water runoff as part of its strategy.
- o **Delegate R. Lee Ware, Jr.**—(referencing slides on page 7) *Can you explain the blue markings? Why are those localities blue?*
 - Because the EPA has already designed those localities a MS-4 program. Those localities have been addressing storm water management for some time, and the blue reflects the fact that those localities have permission to deal with storm water management in their jurisdiction.
- o **Delegate Ware**—*Does that mean no new rules will apply to the areas in blue?*
 - No. The blue simply indicates that those localities already have storm water management structures in place, and that they can move forward.
- o **Senator Frank Wagner**—*Will these regulations have an impact on VDOT in terms of either redoing transportation systems or any other operations?*
 - VDOT was part of the technical advisory committee. It falls under the current storm water regulations, and it will fall under the new storm water regulations. VDOT is a major contributor to storm water runoff, so there is an expectation that they will be required to follow these regulations. There will be a cost to VDOT, but if they do not follow the regulations, then there will also be a cost to Virginia's water quality. We are trying to achieve a balance.
- o **Delegate Saxman**—*Do these regulations apply to new school construction?*
 - Yes.
- o **Delegate Ware**—(referencing page 13) *These are only proposed regulations, correct?*
 - The first three listed are part of the proposed regulations that have been published to the public since September. The fourth reflects a bill that was passed by the General Assembly last year, which set up a similar situation to mitigation banks for wetlands.
- o **Delegate Ware**—(referencing page 13) *To clarify, can you tell me which ones are in current use today and which ones would be new? Also, of the ones currently in use today, which ones will continue to be available under the new regulations?*
 - All four of these will be incorporated into what we believe will be the final regulation. As you will see, DCR is recommending an additional fifth option.
- o A lengthy discussion ensued regarding fees.

- **Senator Wagner**—(referencing fees on page 15) *Is this is a one-time fee that a developer might have to pay or is this an ongoing fee?*
 - The fee here that relates to the construction general permit is a one time fee as long as you are covered by that permit.
- **Senator Wagner**—*Is there anything in these regulations that set up a continuing fee?*
 - Only MS-4 designated jurisdictions are subject to an ongoing municipal fee for there storm water permit; this permit is separate from these regulations.
- **Delegate Hull**—(referencing second bullet point regarding fees on page 15) *In other words, whatever fee is charged, part is given back to the state, and the rest is used by the locality, right?*
 - Yes.
- **Delegate Hull**—Currently, localities that have the permit, i.e. those in the Chesapeake Bay watershed and those in the valley with the urban permits, charge a fee of some type. None of those fees come back to the state in any form, isn't this correct?
 - The fee that those localities charge is a storm water utility fee, which is not impacted by these regulations. Those localities will continue to get 100 percent of that money that they charge to their residents. Any fees regarding storm water utility goes back to the local government to handle however they choose; these regulations have nothing to do with those storm water utility fees. The fees mentioned on page 15 deal with construction projects only.
- **Delegate Hull**—*Are there any parts of these regulations that everyone agrees upon?*
 - Everyone agrees on different parts of it, but we are trying to find more common ground.
- **Delegate Hull**—*If there are certain items that everyone seems to agree on, then I would recommend that only those be adopted so as to enhance existing regulations and put the others off until you can work on them. This is the biggest issue we've had addressed in a meeting, so it is important to work on a consensus.*
 - DCR disagrees. We feel that we have gone a long way to try and address all of the comments.

III. **Kurt Stephenson, Professor, Natural Resource & Environmental Economy; Department of Agricultural & Applied Economy-Virginia Tech**

- Summarized key points resulting from an economic analysis that he performed with his colleague, Bobby Beamer (see handout). The economic analysis was commissioned by DCR.
 - Performed an economic analysis of the regulation as it stood at the end of 2008.
 - His presentation relates only to that original draft regulation; he has not seen any of the current proposed revisions.
 - Analyzed the incremental costs of the proposed regulation above and beyond what the existing regulation required.
 - Discussed five particular findings and conclusions of the report (see handout):

- Incremental storm water control costs:
 - Analyzed storm water control costs for ten developments that were either recently completed or underway.
 - These developments represent a range of commercial and residential types.
 - Estimated cost of needing this regulation: .28 phosphorus standard for new development and a 20 percent phosphorus reduction for new development.
 - Summary points:
 - All developments met the water quality and quantity standards on site.
 - For those developments that needed additional phosphorus control (7 developments), the estimated annual phosphorus reduction cost ranged from 800 dollars to 15,000 dollars per pound per year.
 - Total costs over 25 year period ranged from 11,000 dollars to 215,000 dollars per pound.
 - Crude estimates of long-term maintenance: pursuant to EPA data, about one-fifth to one-half of costs are long-term maintenance costs.
 - **Senator Wagner**—*Can you clarify what a phosphorus control looks like? What does additional phosphorus control entail?*
 - If you have a large enough development, you would need some type of control structure such as a detention basin or a wet pond to capture the run off.
 - Examples of additional controls include a bio-retention area, which is essentially a basin designed to capture and filter water into the ground, and a green roof.
 - **Senator Wagner**—*Is there a manual that defines and shows pictures of these additional controls?*
 - Yes. There is a brief summary in the regulation itself.
 - **Delegate Hull**—*Some soils are naturally high in phosphorus. Were you looking at different soil types during your analysis?*
 - Yes, the runoff reduction model does take soil types into consideration.
 - The regulation emphasizes reducing the volume of runoff in addition to treatment. However, as you move across the state, the ability for infiltration will differ. Those differences would need to be worked out by the local governments.
- Offset provisions in the original regulations
 - There are ways to achieve reductions that will lower costs, e.g. having a pro rata system where the developer pays the administrator who uses that money to offset costs somewhere else.
 - Effectiveness of cost-saving potential of these provisions depends on a few factors:
 - Expanding offset coverage; make offset options more widely available to the developer.
 - Implementation of the offset programs; the way offset programs are implemented will impact the cost-effectiveness of the program.

- The proposed regulation does not limit the way in which offset reductions can be achieved.
- The changes for land development incentives:
 - The storm water regulation is aimed at achieving phosphorus reduction on site. The phosphorus loads and reduction requirements are directly proportional to the amount of impervious surface on the development site.
 - The proposed revision increases phosphorus reduction on redevelopment sites from 10-20 percent.
 - The cost and feasibility of achieving these reduction requirements for high density developments is uncertain, but higher costs will create a disincentive for density development.
 - **Senator Wagner**—*Has there been any consideration of a fee-exemption for projects that we wish to encourage?*
 - Yes.
- Local government administrative costs:
 - Proposed regulation will increase the storm water administrative costs.
 - Estimate of administrative costs was difficult to determine, but came up with the following numbers:
 - “Blue” areas: need an additional staff of 100-170.
 - “Red” areas: need an additional staff of 27-40.
 - State oversight needs an additional staff of 30.
- Incremental benefits:
 - Benefits of both storm water quantity and quality are contingent on long-term maintenance and the performance of storm water practices over time.

IV. David B. McGuigan, Ph.D.-Associate Director, Water Protection Division, Environmental Protection Agency

- Provided the EPA’s perspective on the new regulations (see handout).
- Acknowledged two major issues:
 - The regulations must guarantee that future development can continue to occur; and
 - Costs must be dealt with now, when it is most cost-effective to do so.
- Emphasized that these issues must be addressed now instead of leaving the problems to future generations.
- Mentioned the Clean Water Act, and the EPA’s role (see handout).
- Discussed the proposed storm water regulations and their relationship to the NPDES Program (see handout).
- Provided specific comments and concerns regarding Virginia’s storm water regulations (see handout).
 - EPA supports the utilization of offsite controls. However, EPA believes these controls must be used with discretion; they must be used in a way that ensures water quality will be protected.
 - EPA believes that the 20 percent redevelopment standard needs to be re-examined.

- Maryland, for example, has a 50 percent standard. EPA believes we need to look at whether a 20 percent redevelopment standard will meet the necessary water quality goals.
- **Delegate Hull**—*If the board approves the 20 percent standard, will the EPA reject it?*
 - State regulations are state regulations. The issue would then become whether those with permits can rely on the state standards in order to meet the water quality requirements. If the standards prove adequate, then those regulations can be relied upon. If, however, the standards are inadequate, then each individual permit would need to be examined.
- **Delegate Hull**—*Do the current standards that are in place meet the EPA's requirements?*
 - Probably no, they do not. More stringent standards need to be put in place to meet the EPA's water quality goals.

V. **Barrett Hardiman, Vice President of Regulatory Affairs, Home Builders Associations of Virginia**

- Addressed four main topics (see handout):
 - The cost associated with regulations.
 - When Dr. Kurt Stephenson and Dr. Beamer conducted their economic analysis of these new regulations, some information was unavailable.
 - They did not have the implementation devices that are going to be used to implement these regulations, specifically a spreadsheet developed by the Center for Watershed Protection. The spreadsheet calculated runoff volume, which had not been finalized at the time the economic analysis had been performed.
 - They did not have many of the efficiencies that were attached to some of the BMPs that were going to be used to reduce the phosphorus.
 - Implementation of these regulations will be extremely expensive.
 - Calculated the annualized cost of the implementation of the BMP, which can range from 30,000 to 3 million dollars per pound of phosphorus.
 - Discussed the process by which HBAV arrived at its findings.
 - Addressed HBAV's concerns with the .28 standard.
 - The .28 standard was derived from the Virginia tributary strategies, which is a document developed by DEQ in 2000 to reach the phosphorus and nitrogen goals as set by the Chesapeake Bay program.
 - A number of assumptions are made in the document that HBAV believes are unrealistic.
 - The phosphorus number being attributed to urban land is inflated.
 - The standard the regulations are trying to reach is unreasonable and not based on what is actually happening in the watershed.
 - Recommended that the members look at the water quality assessments that are sent by DEQ and DCR to the EPA every two years.
 - The .28 standard has been established based on numbers that are flawed; the .28 is not the right standard for urban development.
 - Addressed comments made by other speakers.

VI. Larry Land, Director of Policy Department, Virginia Association of Counties (VACo)

- Provided comments on behalf of VACo, which has monitored the development of these proposed regulations and is aware of the difficulties involved (see handout for full comments).
- VACo's proposals are consistent with the comments made by Mr. Hardiman for the Home Builders Association of Virginia and the Virginia Association of Municipal Stormwater Agencies.

VII. Joe Lerch, Director of Environmental Policy, Virginia Municipal League (VML)

- Provided comments on behalf of VML (see handout).
- Covered two overall points:
 - Cost to administer the local program will be expensive and will not be covered by fees; local governments will have to rely on real estate taxes.
 - Full-time employees will need to be hired.
 - Local governments will need greater flexibility in administering this program.
- Offered three recommendations on behalf of VML:
 - Separate the administration of the VSMP from the technical requirements to treat the discharge from post-construction stormwater runoff.
 - Permit local governments to assume the VSMP General Permit for construction activities beginning July 1, 2010, but maintain the statutory deadline for assuming administration of the technical criteria for stormwater quality and quantity.
 - Strengthen the state and local financial commitment to achieve clean water goals by empowering localities to permit and adopt their own fee schedules for reviewing, inspecting, and maintaining stormwater BMPs for post-construction runoff.
 - This recommendation pertains to the one-size-fits-all fee for reviewing post-construction.

VIII. Ann Jennings, Executive Director, Chesapeake Bay Foundation

- Provided comments on behalf of the Chesapeake Bay Foundation (see handout).
- Addressed three issues raised in the public comment period:
 - The water quality benefits of stormwater management;
 - The potential for stormwater regulations to incentivize sprawling development; and
 - The economic impact of stormwater management.
- Distributed a letter signed by 62 organizations that support the proposed regulations (see handout).
- Concluded presentation with a few final requests:
 - When reviewing the underlying legislation and regulations, consider the lifetime benefits of storm water management on our local water quality.
 - Also consider the full costs associated with urban and suburban development both on taxpayers and local governments if storm water runoff is not adequately controlled.

- Finally, strike the proper balance between facilitating future development and charting Virginia's own course in providing clean water for all of its citizens.
- **Delegate Hull**—*Are you suggesting that the algal blooms and the decline in fisheries is all due to urban and suburban storm water runoff?*
 - No. The algal blooms and the decline in fisheries is due to nutrient pollution; the sources of that pollution are waste water treatment facilities, runoff from farm lands, from developing lands, and from already developed lands.
- **Delegate Hull**—*Do you believe the current Chesapeake Bay Act standards currently in place are inadequate?*
 - The standards have acted to prevent further degradation, but we need to move beyond what that Act imposed in order to ultimately revive the Chesapeake Bay.
- **Delegate Hull**—*Do you have any position on the fees that were discussed earlier?*
 - Our general position is that we hope local governments could retain the fees they need to run an effective program both in issuing permits on a timely basis and in following up and ensuring compliance. The Chesapeake Bay Foundation did not calculate any exact figures regarding these fees.

IX. Public Comment

- David Anderson, Esquire, represents clients concerned with the Chesapeake Bay and the proposed regulations. Expressed concern with the .28 standard as it is applied outside of the Chesapeake Bay watershed to southern rivers.
 - No data has been heard that would demonstrate a nutrient problem with the southern rivers or, if there is a nutrient problem, the magnitude of the problem.
 - In his opinion, there is no rational basis for applying the standard outside of the watershed area.

X. Meeting was adjourned at 2:00 P.M.