

Comments on the Draft Phase II MS4 Permit

Submitted by the Hampton Roads Planning District Commission
on Behalf of its MS4 Member Jurisdictions

December __, 2012

The following comments on the draft General Permit for Discharges of Stormwater from Small MS4s (the “Permit”) are submitted by the Hampton Roads Planning District Commission (“HRPDC”) on behalf of the HRPDC’s MS4 member jurisdictions (the “MS4 Localities” or “Localities”).

I. Introduction

Although HRPDC and the MS4 Localities appreciate the Department of Conservation and Recreation’s (“DCR’s”) willingness to address many of our concerns during the advisory panel process leading up to publication of the Permit, we continue to have serious concerns with the baseline loading rates in Section I.C. of the Permit. We have expressed these same concerns a number of times during development of the Permit and the Phase I and Phase II Watershed Implementation Plans (“WIPs”), and it is disappointing to see not only that the deficiencies remain unaddressed, but also that our concerns appear to have been largely ignored in both the Permit and the draft Fact Sheet accompanying the Permit (the “Fact Sheet”).

II. The Baseline Loading Rates are Not Accurate and Their Use in Calculating Baseline Pollutant Loads Will Require the MS4 Localities to Achieve Greater Load Reductions than Necessary to Reach Their Bay TMDL Target Loads.

The baseline loading rates are the starting point for determining the baseline pollutant loads for the localities covered by the Permit, and ultimately for determining the load reductions required of the localities. The higher the baseline loading rates, the higher the calculated baseline pollutant loads and the greater the reductions required of the localities. Accordingly, the importance of including accurate baseline loading rates in the Permit cannot be over-emphasized.

Although not fully explained in the Fact Sheet, we understand that the baseline loading rates in Section I.C. of the Permit were calculated using state-derived estimates of the types, numbers, and efficiencies of stormwater best management practices (“BMPs”) installed on the acreage of developed impervious and pervious land in each river basin as of June 30, 2008. These estimates were then used as inputs to the Chesapeake Bay Watershed Model to produce basin-wide 2009 edge of stream (“EOS”) baseline loading rates for each pollutant of concern (nitrogen, phosphorus, and total suspended solids). We have identified three compounding flaws in the approach used to derive the baseline loading rates.

A. The Rates are Based On Flawed State-Derived Estimates and Do Not Accurately Reflect Locally Documented BMP Implementation Levels.

Although DCR has not provided a meaningful explanation of how it arrived at its BMP estimates, it is apparent that DCR’s BMP estimates are inconsistent with Locality-documented BMP implementation data as of June 30, 2008. As you know, during the Phase II WIP process, DCR shared its BMP data with HRPDC and the Localities and asked us to check its data against local BMP implementation data. The Localities found significant discrepancies between local and state BMP data and reported this information to DCR in February 2012, but DCR neither corrected its data nor responded to the Localities’ findings. DCR’s failure to use readily available and updated BMP data prevented it from calculating accurate baseline loading rates.

B. Even if DCR Had Incorporated Accurate Locality Derived BMP Data in the Permit, the Baseline Loading Rates Would Still be Flawed Because they Reflect Average Rates Over the Entire Basin.

Baseline loading rates derived using BMP implementation data averaged over the entire James River basin fail to account for greater BMP implementation by localities that are subject to the Chesapeake Bay Preservation Act (“CBPA”), and therefore, over-estimate loading rates for these localities. As directed pursuant to the CBPA, the 38 Virginia localities in the tidal portion of the Chesapeake Bay Watershed (including 16 localities within the HRPDC), have been requiring developers to offset nutrient and sediment loads since 1990 by installing stormwater BMPs. The tidal localities receive only partial credit for the resulting lower loading rates because the basin-wide average BMP implementation estimates used by DCR to derive basin-wide baseline loading rates simply offset the higher loading rates of those localities in the

non-tidal portion of the basin rather than giving full credit to the localities that actually achieved the reductions.

C. Section I.C. Fails to Provide the Localities with the Opportunity to Take Credit for BMPs Installed After June 30, 2008.

We understand from remarks by DCR staff during the Soil and Water Conservation Board meeting on September 28, 2012 that the failure to provide localities with the opportunity to take credit for BMPs installed after June 30, 2008 was an oversight that DCR intends to correct before the Permit is finalized. While we are pleased that DCR intends to correct this flaw, we are unsure if it intends to provide the public with an opportunity to comment on the amended Section I.C. before the end of the comment period. If not, we urge you to do so. This is an important amendment to the Permit and the public should have an opportunity to comment on the language proposed by DCR.

IV. DCR Has Largely Ignored Earlier Requests from HRPDC and the Localities to Correct the Same Deficiencies in The Baseline Loading Rates Identified in these Comments.

As noted above, HRPDC and the Localities have alerted DCR to the above described deficiencies on more than one occasion in the past. While DCR has responded to a number of our questions related to the baseline loading rates, it has either not responded to others or has provided responses that fail to explain or offer a reasoned explanation and justification for its decisions to develop the baseline loading rates in Section I.C of the Permit using the state basin-wide BMP data and the 2009 Progress Run. Two of the more obvious examples of this are (i) DCR's failure to even respond to the discrepancies in DCR's and the Localities' BMP implementation data identified by the Localities even though the Localities were responding to a request from DCR, and (ii) DCR's reliance on a directive from the Environmental Protection Agency ("EPA") to use the 2009 Progress Run to derive the baseline loading rates rather than exercising its own judgment and discretion to determine whether some other model run would produce more accurate loading rates.

Also, we were disappointed to find that the Fact Sheet does not provide a reasoned rationale and justification for using the baseline loading rates in Section I.C of the Permit.

Instead, the Fact Sheet does little more than repeat much of what is in the Permit. Like the Permit, the Fact Sheet suggests that the rationale and justification for the baseline loading rates can be found in Virginia's Chesapeake Bay Watershed Implementation Plan (WIP). *See* Fact Sheet at page 20. However, it is apparent from a review of both the Phase I and Phase II WIPs that they too fail to provide a rationale and justification for the baseline loading rates, and instead, like the Permit, offer only an abbreviated and inadequate explanation of the basis for the rates. Although courts accord considerable deference to an agency's exercise of its discretion, the agency must exercise that discretion in a way that is not arbitrary and capricious. In short, the agency must provide a reasoned rationale and justification for its action. It is not enough for an agency to simply identify the basis for its action as DCR has done here. It must also provide a reasoned rationale and justification for its action by explaining why it selected these rates over other rates and why the rates it selected are preferred over those proposed by others such as HRPDC and the Localities. We respectfully submit that DCR's failure to respond to our concerns regarding the discrepancies in the state and Locality BMP data, its total reliance on EPA's directive to use the 2009 Progress Run to produce the baseline loading rates, and its failure to offer a reasoned rationale and justification for using basin-wide average baseline loading rates is arbitrary and capricious and must be corrected before the Permit is finalized.

V. Use of the 2010 No Action Model Run Would Address the Deficiencies in the Baseline Loading Rates.

DCR can readily correct the above described deficiencies by modifying Section I.C of the Permit to instruct localities to calculate their baseline loads using loading rates from the 2010 No Action Model Run instead of the 2009 Progress Run (the 2010 No Action Model Run reflects pollutant loads without BMPs). Under this approach, localities would also submit data on actual BMP implementation and the resulting pollutant load reductions from these BMPs from 2006 through July 2013 and receive credit for these reductions beyond their calculated baseline loads. This approach would (i) provide for use of the most accurate BMP data in the development of loading rates, (ii) avoid the use of inaccurate basin-wide loading rates because locality-specific

information would be used to calculate more accurate locality-specific loading rates, and (iii) permit localities to obtain credit for all BMPs implemented within the locality up to the effective date of the Permit, which would result in more accurate pollutant load and load reduction calculations.

While we understand that EPA has directed DCR to frame statewide strategies in terms of pounds of pollutants removed from the 2009 Progress Run to meet the statewide TMDL targets, we believe that DCR should view this as a reporting requirement without dictating the way in which a state actually measures reductions by sector. If DCR wishes to comply with EPA's request, it should do so by requiring localities to (i) calculate the number of total pounds of pollutants reduced by achieving a five percent reduction from the 2009 Progress Run, and (ii) then express that load reduction as a percent reduction from the 2010 No Action Model Run. This latter calculation may result in load reductions greater than five percent of the load based on the 2009 Progress Run in the first permit year, however, it is balanced by the fact that localities will be able to credit their documented BMPs from 2006 to 2013 towards this percent reduction. Although those localities that have implemented fewer BMPs prior to the effective date of the Permit will need to achieve greater pollutant reductions than those localities that have implemented more BMPs since 1990, this approach will ensure that the burden is shared fairly by all.

VI. Neither the Permit nor the Fact Sheet Refer to Methodologies for Calculating Nutrient Reductions and Guidance for Developing Action Plans.

Virginia's BMP Clearinghouse (which is still under construction) and the Chesapeake Bay Program's guidance are not consistent with respect to methodologies for calculating nutrient reductions and the differences between some of the methods and calculations are not inconsequential. Therefore, in order to develop consistent and effective strategies for pollutant load reduction, localities need to know which BMPs can be included in their Chesapeake Bay TMDL Action Plans ("Action Plans") and the BMP efficiencies that should be assigned to those BMPs. Localities also need to know the equivalencies that can be used for non-traditional BMPs so that they can use these equivalences to obtain credit for their implementation. Although flexibility is appreciated, localities must have confidence that the methodologies and

equivalencies used for their calculations will ensure compliance with their obligations under the Permit.

A related concern involves the absence of any guidance on the content of the Action Plans required by Section I.C.2 of the Permit. Although Section I.C.2 lists the subjects that must be addressed in the Action Plans, neither it nor the Fact Sheet provide localities with any guidance as to DCR's expectations regarding the minimum acceptable content of the Action Plans. Without such guidance, localities are left to assume what is required of them and thereby risk being charged with non-compliance despite their best efforts to submit and implement complete Action Plans.

By the foregoing, we do not mean to suggest that DCR should try to include the methodologies and guidance in the Permit. To the contrary, we do not believe it would be appropriate to include either the methodologies or the guidance as permit conditions given their technical nature and anticipated length and the need for flexibility. Rather, the Fact Sheet should announce DCR's intention to publish a separate document containing the methodologies and guidance before the Permit's effective date and following public notice and the opportunity for comment. The Maryland Department of the Environment has recognized the need to assist Maryland's localities in fulfilling their MS4 permit obligations and has provided guidance for that purpose. We know of no reason why DCR cannot do the same.

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