

AGENDA NOTE – HRPDC EXECUTIVE COMMITTEE SPECIAL MEETING

ITEM #4: CHESAPEAKE BAY TOTAL MAXIMUM DAILY LOAD (TMDL) – HRPDC UPDATE AND STAFF BRIEFING

SUBJECT:

The HRPDC staff will provide a brief update on HRPDC activities related to the Chesapeake Bay TMDL and Virginia Watershed Implementation Plan (WIP).

BACKGROUND:

At the January 20, 2011 Quarterly Commission meeting, HRPDC staff provided the Commission with an update on the Chesapeake Bay TMDL and outlined the actions that HRPDC staff would take to assist localities in preparing for the requirements of the TMDL. Phase II of the Watershed Implementation Plan is currently due by November 2011, but may be extended to February 2012.

At the HRPDC Retreat in February, HRPDC special legal consultant provided a further briefing to the Commission on the TMDL process and potential alternative methods for achieving the TMDL and WIP.

A further update was provided via the Agenda for the March 17, 2011 meeting.

HRPDC staff will briefly review the region's consideration of the TMDL issue over the past several months, highlighting major decisions and associated documents. Copies of the key documents prepared by the HRPDC staff are attached.

RECOMMENDED ACTION:

This information is provided as background for ongoing discussion by the HRPDC.

Attachments

- 4A: Letter to Secretary of Natural Resources, HRPDC Final Comments on Watershed Implementation Plan, November 5, 2010
- 4B: Presentation: Chesapeake Bay TMDL Update, HRPDC, January 20, 2011
- 4C: HRPDC Memorandum #2011-25 to Hampton Roads General Assembly Delegation, February 2, 2011
- 4D: Letter to Secretary of Natural Resources requesting guidance on Phase II WIP, February 7, 2011
- 4E: Presentation: Final Phase I Chesapeake Bay TMDL – Legal Review and Assessment, HRPDC, February 17, 2011
- 4F: Presentation Notes: Chesapeake Bay TMDL – Waste Load Allocations, HRPDC, March 17, 2011



November 5, 2010

The Honorable Doug Domenech
Secretary of Natural Resources
Commonwealth of Virginia
P.O. Box 1475
Richmond, VA 23218

Re: Comments on Virginia's Draft Phase I Watershed Implementation Plan

Dear Secretary Domenech:

The Hampton Roads Planning District Commission (HRPDC) appreciates the opportunity to submit these joint comments on behalf of the cities of Chesapeake, Hampton, Newport News, Norfolk, Poquoson, Portsmouth, Suffolk, Virginia Beach, and Williamsburg, and the counties of Isle of Wight, Gloucester, James City, Surry, and York ("Hampton Roads Localities" or "Localities") on Virginia's September 2010 draft Phase I Watershed Implementation Plan (WIP).

The cities of Chesapeake, Hampton, Newport News, Norfolk, Portsmouth, and Virginia Beach own Municipal Separate Storm Sewer Systems (MS4s) that operate under individual Phase I MS4 NPDES permits issued by the Virginia Department of Conservation and Recreation (DCR), while the cities of Poquoson, Suffolk and Williamsburg, and the counties of Isle of Wight, James City, and York own MS4s that operate under a general Phase II MS4 permit issued by DCR. At present, Gloucester and Surry are not designated as MS4s, but could be so designated in the future due to population growth or modification of the criteria used to designate MS4s.

A. Concerns with the WIP

The Hampton Roads Localities appreciate Virginia's efforts to incorporate flexibility and cost effectiveness into the WIP; however, the James and York river basin urban runoff sector allocations in the WIP would impose massive financial costs on the Hampton Roads MS4s in what surely would be a futile effort to reduce phosphorus loads by an average of almost 80 percent. As explained below, even with the larger backstop phosphorus allocation proposed by the U.S. Environmental Protection Agency (EPA) (average 54 and 59 percent phosphorus reductions for the James River and York River, respectively), **the Localities would still have to expend an estimated \$9.8 billion, plus the cost of land acquisition, to achieve the backstop sector allocations.** Although the State's proposed credit exchange concept would have helped to reduce the cost of compliance in the near

term, we fear that the WIP's long-term financial consequences could have been even worse for the reasons listed below.

We also appreciate Virginia's efforts to provide relief to the urban runoff sector by proposing to make credits from the point source and agriculture sectors available to assist the MS4s in attaining their sector allocations. However, even if EPA had endorsed the State's credit exchange proposal, it is unlikely that it would have been sufficient to avoid the immense long-term financial consequences associated with an obligation to reduce phosphorus loadings by almost 80 percent for several reasons. First, there is no assurance that the credits would be generated when and where needed; second, those credits generated from excess flow capacity would only be available to the MS4s on a temporary; and finally, the reductions that would be required of urban runoff with the WIP allocations are so great that the demand for credits could exceed the supply, thus driving up their cost and limiting their availability to the Localities, particularly if the Localities are forced to compete with private developers for the credits.

B. Impacts of the Proposed Allocations on the Hampton Roads Localities

Although the Hampton Roads Localities would fare better under EPA's James and York river basin backstop urban runoff sector allocations, the more than 50 percent reduction in phosphorus required to achieve the backstop allocation is still beyond a level that is practicable of attainment.

It is impossible to predict the full extent of the socio-economic consequences of attempting to achieve the backstop allocations because an undertaking of this magnitude has never been tried before. However, we can state with confidence that there is no assurance that the load reductions that would be required to achieve the backstop allocations can be accomplished by EPA's 2025 deadline, and that, on a pound-for-pound basis, the cost would be totally out of portion to any water quality benefit.

On average, the Localities and their residents would have to treat between 68 and 74 percent of the urban land area within their jurisdictions in order to achieve the over 50 percent reduction in phosphorus needed to attain the backstop allocations. It is estimated that it would cost the Hampton Roads Localities approximately \$9.8 billion (\$1.05 billion annualized) to reduce phosphorus loads to the levels needed to comply with the backstop allocations after factoring in the added cost of designing BMPs that would function effectively on the flat, low-lying terrain and in the soils and high water tables that reflect the dominate topography and hydrology in the Hampton Roads area. As explained in the enclosed copy of our comments on the draft TMDL, this equates to an annual storm water fee of \$1,670 per household, and \$720 per person.

Further, this cost estimate does not reflect the added cost of acquiring the land needed for the installation and maintenance of the BMPs required to achieve the backstop allocations. On average, the Localities own less than 15 percent of the 68 to 74 percent of urban land area that would have to be treated to attain the backstop phosphorus allocations. The remaining reductions would have to be achieved with retrofits on private land, and since the Localities cannot force private land owners to retrofit in the absence of redevelopment requiring local land use approvals, the Localities would have to negotiate for the purchase of the land needed for the easements or acquire the land by condemnation. Land acquisition is an expensive and time consuming process that will add greatly to the cost and time required to achieve the reductions.

C. Recommendations

First, the Hampton Roads Localities encourage Virginia to respond to EPA's backstop allocations by revising its WIP to include the additional commitments needed to demonstrate to EPA that the Commonwealth can achieve the draft WIP allocations for the agriculture and onsite septic systems sectors. Such a demonstration would remove the backstop allocations and allow Virginia to distribute a portion of the allocations now assigned to the agriculture sectors to the urban runoff and point source sectors. Should the backstop allocations be removed, it is important that Virginia assign a significant portion of the additional allocations to the urban runoff sector. The Hampton Roads Localities recognize the need to assign some portion of the additional allocations to the point source sector to accommodate long-term growth and to generate credits. However, as explained above, we believe the allocations in the WIP placed too much reliance on credits to offset the consequences of the small allocations to the urban runoff sector and did not reflect a cost-effective and equitable distribution among the two sectors.

As we explain in our comments on the TMDL, time is a more critical factor for the urban runoff sector than it is for any other source sector receiving allocations in the TMDL. This is because the cost of retrofitting existing development is directly related to the Localities' ability to impose retrofit requirements in land use approvals for re-development rather than having to acquire easements for the retrofits and installing the retrofits independent of re-development. The Localities expect that they will be receiving new MS4 permits within the next two years and that these permits will contain conditions based on the Bay TMDLs. Therefore, it is critical that the State include the largest urban runoff sector allocations possible in the final WIP. This will afford the Localities' a greater opportunity to comply with their permits cost-effectively through retrofits required at the time of re-development.

Second, we encourage the State to emphasize in its final WIP the critical importance of federal and state grant funding to assist the localities in achieving the load reductions called for in the final TMDL. As is evident from the cost estimates summarized above, local

The Honorable Doug Domenech
November 5, 2010
Page 4

governments simply do not have the financial resources to implement their responsibilities under the TMDL. This is particularly true in the case of the urban runoff sector where the cost-per-pound of nutrients and sediment removed is far greater than any other source sector and where grant funding for storm water programs has been non-existent. In the absence of significant federal and state grant funding assistance, the urban runoff sector allocations are little more than a recipe for failure and will serve only to expose MS4s to federal enforcement. To protect MS4s, we also urge the State to make clear in its final WIP that the 2025 compliance deadline must be tied to the availability of significant federal and state grant funding for the urban runoff sector.

Finally, we encourage Virginia to take full advantage of the existing model capabilities to credit existing management practices that the State has not previously catalogued or reported to EPA. We also urge the State to formally request that EPA directly account for nutrient reductions attributable to filter feeders. It is apparent that EPA has made very little effort in the draft TMDL to incorporate additional, more cost-effective opportunities to achieve the basin-wide allocations. Crediting load reductions attributable to filter feeders such as oysters and menhaden and adopting an aggressive, targeted approach to reducing nitrogen loads from air deposition would reduce the need for other sectors to make more expensive nutrient reductions. Other cost-effective opportunities such as a federal commitment to funding the cost of installing wide-spread forested buffers should also be given serious consideration. Currently, neither the TMDL nor Virginia's WIP addresses any of these opportunities in a meaningful way. We urge the State to press EPA to remedy this deficiency when it establishes the final TMDL.

Thank you for the opportunity to submit these comments, and please let us know if you have any questions.

Sincerely,



Stan D. Clark
Chairman

Attachments: Comments on the Draft Chesapeake Bay TMDL by the Hampton Roads Planning District Commission on behalf of the Hampton Roads Localities

Copies: Mr. Anthony Moore, Assistant Secretary of Natural Resources
Mr. David Johnson, Director, Department of Conservation and Recreation
Hampton Roads Planning District Commission

Chesapeake Bay TMDL Update

Presented to
Hampton Roads Planning District Commission
January 20, 2011



Whitney Katchmark
Principal Water Resources Planner

Attachment 4B



EPA accepted Virginia's Watershed Implementation Plan

- No backstops but 25% urban land must be retrofitted with high efficiency BMPs.
- BMPs will be required on most agricultural lands and Virginia will create regulatory program if voluntary programs don't work.
- HRSD will need to make significant upgrades to wastewater treatment plants in the region.
- Some homeowners will need to upgrade to better septic systems or hook up to the sewer system.



Subcommittee Input

- HRPDC staff will develop 1-2 page briefing papers on TMDL issues written to inform the public on what is required and why.
- Legislative approach:
 - HRPDC staff will send Commissioners and legislative liaisons updates on bills relevant to Bay TMDL with short description on the impact on localities.
 - HRPDC staff will share briefing papers and updates on locality costs and challenges with Congressional delegation staffs.



Next Step: Legal Options

- City and county attorneys have been invited to discuss the merits of appealing the Bay TMDL next week.
- Legal consultant to HRPDC, Dave Evans with McGuire Woods will lead the discussion.



Next Step: Program Option

- Phase II WIP due November 2011
- EPA's expectations for Phase II WIP:
 - Divide target nutrient reductions into a finer geographic scale (counties, sub-watersheds)
 - Identify specific controls and practices that will be implemented, no later than 2017, to meet interim water quality goals.
- State has not identified a process to develop Phase II WIP.



Regional Approach to Phase II WIP

- HRPDC staff recommends creating Regional Framework to coordinate data collection, data analysis, and policy development.
 - Long-term objective: Identify what programs and projects localities would need to implement so localities can budget for implementation.
 - Short-term objective: Compare model data to local data (impervious cover, BMPs, septic tanks) and analyze the pollution loads based on those two sets of data.

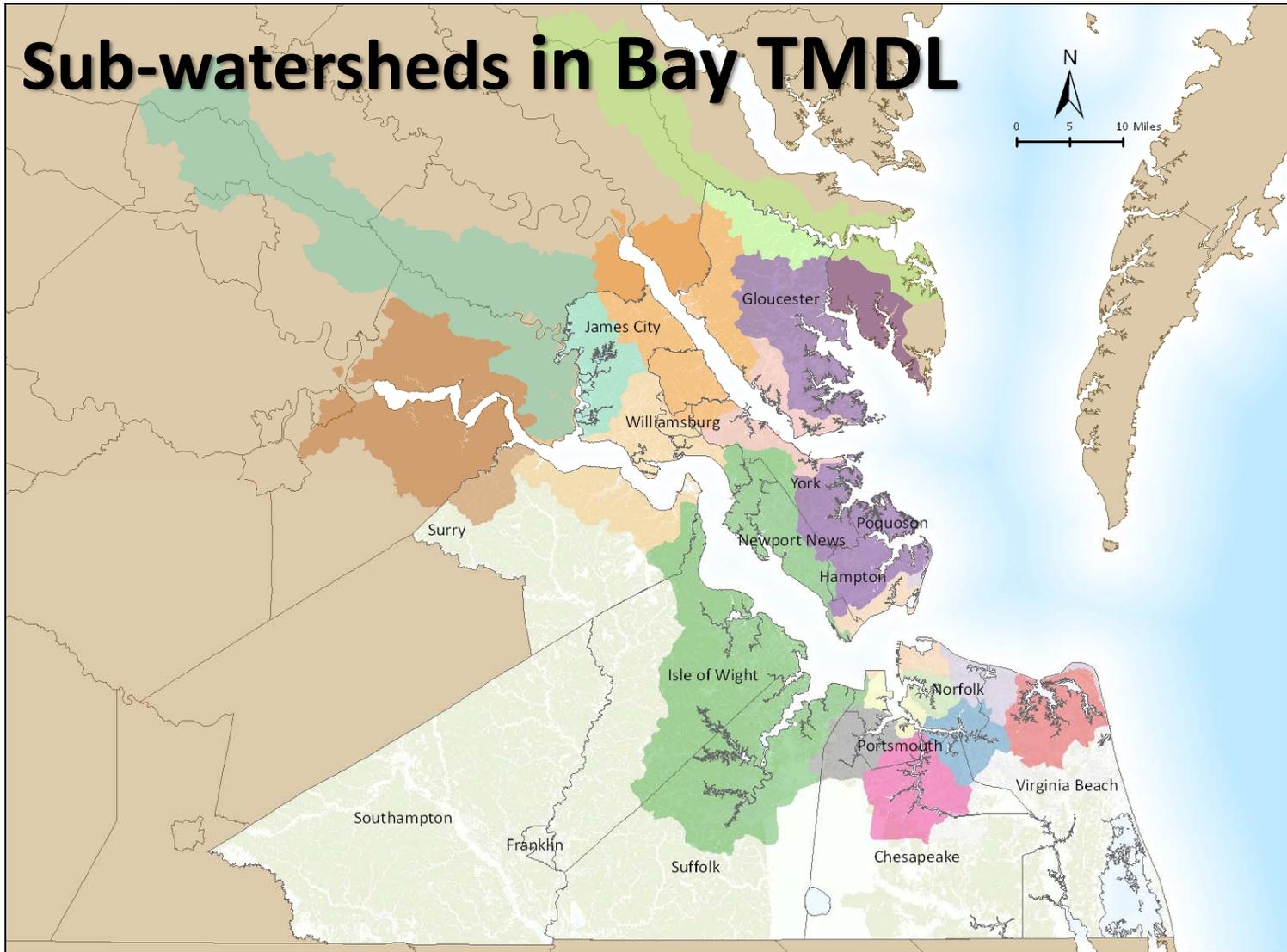


Phase II WIP – initial steps

- Develop regional framework for data collection:
 - What do localities need to know?
 - What data is available and who has it?
 - What data do localities already have?
 - Alternatives for collecting missing data including cost estimates.
 - Develop regional data standards.
- Develop regional framework for data analysis:
 - Who runs model with different data sets?
 - Define assumptions (pollutions loading rates)
 - Evaluate implementation strategies.



Sub-watersheds in Bay TMDL





Actions

- Approve Chesapeake Bay TMDL resolution.
- Authorize HRPDC staff to develop a Regional Framework for Phase II WIP.
- Authorize HRPDC staff to establish steering committee of source sector representatives.



STAN D. CLARK, CHAIRMAN • THOMAS G. SHEPPERD, JR., VICE CHAIR • JAMES D. MCREYNOLDS, TREASURER
DWIGHT L. FARMER, EXECUTIVE DIRECTOR/SECRETARY

MEMBER JURISDICTIONS

February 2, 2011

CHESAPEAKE

Memorandum 2011-25

FRANKLIN

To: Hampton Roads Virginia General Assembly

GLOUCESTER

BY Dwight L. Farmer, Executive Director/Secretary *DF*

HAMPTON

RE: Chesapeake Bay TMDL Implementation

At its Quarterly Commission Meeting on January 20, 2011, the Hampton Roads Planning District Commission adopted the enclosed resolution regarding the Chesapeake Bay TMDL. On December 29, 2010, the Environmental Protection Agency finalized a Total Maximum Daily Load (TMDL) for the Chesapeake Bay that requires local governments to significantly reduce nutrients and sediment loads to the watershed. HRPDC estimates that it will cost Hampton Roads localities \$2.5 billion to implement the required urban stormwater retrofits.

ISLE OF WIGHT

JAMES CITY

NEWPORT NEWS

NORFOLK

The member localities of the Hampton Roads Planning District Commission adopted this resolution to encourage the Commonwealth to provide leadership in achieving the goals of the TMDL by developing state programs to implement the most cost effective nutrient reductions and by committing the financial resources necessary to pay for the restoration of the water quality in the Chesapeake Bay. The resolution endorses the "Hampton Roads Statement of Legislative Principles Regarding the Implementation of the Chesapeake Bay TMDL". A copy is attached to the resolution and was also provided to you previously. Several legislative proposals have been drafted to address the TMDL implementation. We would appreciate your consideration of these principles when evaluating legislation.

POQUOSON

PORTSMOUTH

SOUTHAMPTON

SUFFOLK

Thank you for your consideration.

SURRY

WSK/fh

Enclosure

VIRGINIA BEACH

WILLIAMSBURG

YORK



**HAMPTON ROADS PLANNING DISTRICT COMMISSION
RESOLUTION 2011-01**

RESOLUTION OF THE EXECUTIVE COMMITTEE OF THE HAMPTON ROADS PLANNING DISTRICT COMMISSION REQUESTING THE GOVERNOR OF VIRGINIA AND THE VIRGINIA GENERAL ASSEMBLY TO SUPPORT LEGISLATION TO ACHIEVE THE GOALS OF THE CHESAPEAKE BAY TOTAL DAILY MAXIMUM LOAD BY DEVELOPING STATE PROGRAMS TO IMPLEMENT THE MOST COST EFFECTIVE METHODS OF REDUCING NUTRIENT AND SEDIMENT LOADS AND COMMITTING THE FINANCIAL RESOURCES NECESSARY TO FUND THE RESTORATION OF WATER QUALITY IN THE CHESAPEAKE BAY

WHEREAS, on December 29, 2010, the Environmental Protection Agency finalized a Total Maximum Daily Load (TMDL) for the Chesapeake Bay that requires local governments to significantly reduce nutrients and sediment loads to the watershed.

WHEREAS, local governments and wastewater utilities in the Hampton Roads region are responsible for implementing policies and programs to restore the water quality in the Chesapeake Bay watershed.

WHEREAS, the Hampton Roads Planning District Commission provided extensive comments on the EPA's draft TMDL and Virginia's Watershed Implementation Plan on November 8, 2010.

WHEREAS, EPA has stated that more prescriptive and expensive requirements will be applied to urban stormwater and wastewater permit holders if Virginia's Watershed Implementation Plan is not fully implemented.

WHEREAS, the potential cost implications for the urban stormwater, wastewater, and agricultural sectors are significant and it is in the interest of local governments to support the legislation needed to enable Virginia's Watershed Implementation Plan to be successfully implemented.

NOW THEREFORE, BE IT RESOLVED, the Executive Committee and member localities of the Hampton Roads Planning District Commission hereby request the Governor of Virginia, the Virginia Senate and Virginia House of Delegates that legislation be adopted which supports the "Hampton Roads Statement of Legislative Principles Regarding the Implementation of the Chesapeake Bay TMDL".

PASSED AND APPROVED by the Executive Committee and member localities of the Hampton Roads Planning District Commission the 20th day of January 2011.

A handwritten signature in blue ink, appearing to read "Thomas B. Shepperd", written over a horizontal line.

Thomas Shepperd
Vice Chairman

A handwritten signature in blue ink, appearing to read "Dwight L. Farmer", written over a horizontal line.

Dwight L. Farmer
Executive Director/Secretary

Hampton Roads Statement of Legislative Principles Regarding Implementation of the Chesapeake Bay TMDL

On December 29, 2010, the Environmental Protection Agency finalized a Total Maximum Daily Load (TMDL) for the Chesapeake Bay that will require local governments to significantly reduce nutrients and sediment loads to the watershed. The member localities of the Hampton Roads Planning District Commission have developed the legislative principles described below to encourage the Commonwealth to provide leadership in achieving the goals of the TMDL by developing state programs to implement the most cost effective nutrient reductions and by committing the financial resources necessary to pay for the restoration of the water quality in the Chesapeake Bay.

Agriculture Programs

HRPDC supports a well-financed and fully staffed state program to address the problem of non-point source runoff from agricultural operations. The program should effectively encourage implementation of priority best management practices such as nutrient management planning, use of cover crops, continuous no-till farming, development of forested riparian buffers, and livestock stream exclusion.

Alternative Onsite Sewage Systems

HRPDC supports state regulations for alternative onsite sewage systems that clearly define responsibility and liability for proper operation; have a means to finance future repair and replacement costs; and ensure that sufficient and appropriate testing occurs to protect groundwater standards and alert owners to potential problems at the earliest possible moment.

Chlorophyll-*a* Study

HRPDC concurs with and supports the elements contained in the Draft James River Chlorophyll-*a* study plan contained in Virginia's Watershed Implementation Plan (WIP). Successful completion of this study plan is considered essential to address the acknowledged deficiencies of the water quality standard and the associated modeling framework.

Expand Authority for Tree Canopy Requirements

HRPDC supports the amendment of Virginia Code Section 15.2-961.1 to allow all Virginia localities to adopt an ordinance containing a set of tree canopy preservation requirements based on development density. Section 15.2-961.1 was adopted during the 2008 General Assembly session and is currently applicable only to the localities within Planning District Eight. Increasing the urban tree canopy is an inexpensive method to reduce nutrient loading through runoff reduction and will allow localities to reduce the cost of achieving nutrient reductions for urban stormwater.

Expansion of Chesapeake Bay Preservation Act

HRPDC supports an amendment to the Chesapeake Bay Preservation Act that would expand the coverage of the Act from "Tidewater" to the entire Chesapeake Bay Watershed.

Expansion of Nutrient Credit Exchange Program

HRPDC supports expansion of the Chesapeake Bay Watershed Nutrient Credit Exchange Program (Code of Virginia at §62.1-44.19:12) to include on-site systems and urban stormwater for new and existing development and in order to allow the most cost effective reduction of nutrients to improve water quality in the Chesapeake Bay and its tributaries.

Lawn Fertilizer

The HRPDC supports Virginia's effort to control the amount, timing, and composition of fertilizers applied to urban lands, but opposes any effort to require local governments to administer this program. This issue should be addressed by a state-wide turf grass fertilizer restriction, similar to the phosphate ban in laundry soap and dish detergent, which is outside of the permitting process.

Restoration of Funding to PDCs

HRPDC supports the overall funding of Virginia's Planning District Commissions at a level of \$0.35 per capita or a minimum of \$100,000 per commission, whichever is greater. It is likely that the Department of Conservation and Recreation (DCR) will rely on PDCs to facilitate the development of locality specific nutrient reductions in Phase II of the State's Watershed Implementation Plan.

State Fees on City Services (water, sewer, solid waste)

HRPDC strongly opposes the imposition of a state fee, tax or surcharge on water, sewer, solid waste or any service provided by a local government or authority to finance the nutrient reductions imposed by the Chesapeake Bay TMDL.

Unfunded Mandates

HRPDC opposes unfunded mandates by the Commonwealth. When funding for a mandated program is altered, the mandate should be suspended until full funding is restored. When legislation with a cost to localities is passed by the General Assembly, the cost should be borne by the state, and the legislation should contain a sunset clause providing that the mandate is not binding on localities until funding by the Commonwealth is provided. Furthermore, HRPDC opposes the shifting of fiscal responsibility from the state to localities for existing programs. Any unfunded mandate or shifting of responsibility should be accompanied by a full fiscal and program analysis to determine the relative costs to the state and to the locality and to assure the state is meeting its full funding responsibility before taking effect.

Water Quality Funding

HRPDC supports dedicated and adequate state appropriations to the Water Quality Improvement Fund to make full and timely payments under point source contracts. Additionally, HRPDC requests the General Assembly address costs associated with anticipated permit requirements for Municipal Separate Storm Sewer Systems (MS4s) in light of expected requirements of the Chesapeake Bay TMDL.

February 7, 2011

MEMBER JURISDICTIONS

CHESAPEAKE

The Honorable Doug Domenech
Secretary of Natural Resources
Commonwealth of Virginia
P.O. Box 1475
Richmond, VA 23218

FRANKLIN

GLOUCESTER

RE: Virginia's Chesapeake Bay TMDL Phase II Watershed Implementation Plan

HAMPTON

Dear Secretary Domenech:

ISLE OF WIGHT

The staff of the Hampton Roads Planning District Commission (HRPDC), on behalf of the HRPDC Regional Stormwater Management Committee, requests that Virginia develop guidance and expectations for local governments regarding development of the Chesapeake Bay TMDL Phase II Watershed Implementation Plan (WIP). While the HRPDC appreciates the considerable time and effort that DCR and partner agencies dedicated to the development of Virginia's Phase I Watershed Implementation Plan for the Chesapeake Bay TMDL, we have concerns with the delay in State coordination with local governments on the development of a Phase II WIP.

JAMES CITY

NEWPORT NEWS

NORFOLK

POQUOSON

EPA expects Virginia to develop a Phase II Watershed Implementation Plan that divides load allocations and aggregate wasteload allocations among smaller geographic areas, or facilities or sources where appropriate. This Plan will require a significant amount of time for development and intensive stakeholder involvement and negotiation, and a quick start will benefit all those involved. As MS4 permit holders, the members of the Regional Stormwater Management Committee have a special interest in the Phase II WIP as it will influence the requirements in their future permits.

PORTSMOUTH

SOUTHAMPTON

SUFFOLK

SURRY

The HRPDC and its local governments are willing partners in the development of the Phase II WIP, but we cannot begin to prepare for the investments needed to implement the requirements of the Chesapeake Bay TMDL without significant guidance and resources from Virginia agencies especially DCR. At a minimum Virginia should provide the following information to local governments:

VIRGINIA BEACH

WILLIAMSBURG

YORK

1. Methodology used by Virginia or EPA to develop segmentshed allocations. Segmentshed load allocations were not included in Virginia's Phase I WIP, but they are included in the TMDL in Appendix Q. Localities need to know how these allocations were determined and if there will be flexibility to modify them as part of the Phase II WIP development.

2. Baseline stormwater management facilities for each locality that were included in the '2009 Progress Load' model run as BMPs.
3. Guidance on how WLAs will be determined for small MS4s given the likelihood that permit boundaries could be expanded beyond the urbanized area as part of EPA's ongoing stormwater rulemaking.
4. Guidance on planning tools that local government can use to determine the impact of potential management actions. Local governments need guidance on the tools that are appropriate to use for evaluating implementation alternatives and compatible with inputting future management scenarios into the Bay Model.
5. Guidance on how Virginia's HUC 6 watershed boundaries will be reconciled with the Chesapeake Bay TMDL segment sheds.

We are aware that the Chesapeake Bay Watershed Model is undergoing revisions that will impact the specific load reductions that will be required to meet the TMDL. However, we urge Virginia to begin the process of developing the Phase II WIP prior to the release of the new loads in June 2011. There is a significant amount of work that can be accomplished even without revised loading targets. As a Regional agency that was actively involved in the development of Virginia's Tributary Strategies, the Hampton Roads Planning District Commission looks forward to working with the State to coordinate local government involvement in the development of Virginia's Phase II WIP.

Sincerely,



Dwight L. Farmer
Executive Director/Secretary

JLT/fh

Copy: Mr. Anthony Moore, Assistant Secretary of Natural Resources
Mr. David Johnson, Director, Department of Conservation and Recreation
Mr. David Paylor, Director, Department of Environmental Quality



Final Phase I Chesapeake Bay TMDL Legal Review and Assessment for the Hampton Roads Planning District Commission

David E. Evans
Partner
McGuireWoods LLP
Richmond, Virginia

Confidential Under the Attorney-
Client Privilege and Work
Product Doctrine

HRPDC Comments

- Comment #1:** Failure to provide reasonable assurance for the urban runoff sector
- Comment #2:** Legal authority to establish a deadline in the TMDL
- Comment #3:** Failure to provide reasonable opportunity to comment
- Comment #4:** Flaws in the Phase 5.3 model
- Comment #5:** Modeling predictions do not justify use of James River chlorophyll-a criteria

Relevant Considerations

- **Issues and Standards on Review**
 - Did EPA abuse its discretion by acting arbitrarily and capriciously?
 - Did EPA act in excess of its legal authority?
 - Did EPA commit procedural error?
- **Factors to Consider in Deciding Whether to Appeal**
 - Likely impact of EPA's action
 - Likelihood of success on appeal
 - Remedy if successful on appeal
 - Litigation costs weighed against above factors
 - Political considerations

EPA's Responses to HRPDC's Comments

Comment #1: EPA has not provided reasonable assurance that the urban runoff sector allocations can be achieved.

EPA's Response:

- Allocations have been revised significantly based on Virginia's final WIP and in response to comments.
- EPA is confident that its comprehensive, iterative process for determining allocations and making needed adjustments will be successful.
- EPA's Accountability Framework will also help to ensure that the allocations are achieved.

Legal Analysis - Comment #1

EPA's Responses to HRPDC's Comments

Comment #2: EPA does not have the legal authority to establish a deadline in the TMDL.

EPA's Response to Comment #2

–“In light of the Bay's importance, the delays so far in reaching those targets, and EPA's belief that this job can be done in the projected time, the staged 2017/2025 implementation framework is both lawful and reasonable.”

–The TMDL by itself is not a self-implementing mechanism and does not contain an implementation plan.

–The implementation plan is set forth in the WIPs and the Accountability Framework.

Legal Analysis - Comment #2

EPA's Responses to HRPDC's Comments

Comment #3: EPA failed to provide a reasonable opportunity to review and comment on the basis for the proposed allocations.

EPA's Response to Comment #3

–EPA believes that the public was given an adequate opportunity to participate and comment considering “all the circumstances of this TMDL, including the considerable transparency of the process to date and EPA's considerable efforts to engage in public outreach.”

–EPA believes it made information on the Scenario Builder and other essential models available.

Legal Analysis - Comment #3

EPA's Responses to HRPDC's Comments

Comment #4: The Phase 5.3 model and model inputs are not sufficiently developed to produce reliable predictions.

EPA's Response to Comment #4

–The models have been thoroughly reviewed and vetted and are fully capable of supporting the TMDL.

–Five generations of the watershed model have been applied to management decisions in the Chesapeake Bay region for over two decades.

–Fluctuations in the extent of developed lands in different versions of the model are due to changing technology and methods for mapping developed lands.

Legal Analysis - Comment #4

EPA's Responses to HRPDC's Comments

Comment #5: The modeling predictions do not justify use of the chlorophyll-a criteria as the basis for the James River basin allocations.

EPA's Response to Comment #5

- The model is well calibrated and appropriate for application to assess the James chlorophyll-a standards.
- The model can't be “unstable.” There is no “unstable” programmed in its code.
- While a “knee of the curve” analysis is interesting, it has no standing unless its recommended loads achieve Virginia's water quality standards, and the Tributary Strategy loads fail to do so.

Legal Analysis - Comment #5

Summary

- **Timeframe**
 - No hard deadline to file an appeal
 - Recommend filing by the end of March or soon thereafter if you wish to appeal



Discussion

Chesapeake Bay TMDL - Waste Load Allocations

Mr. Chairman, Members of the Commission:

Want to briefly alert you to an issue/area of staff concern with the Chesapeake Bay TMDL and the Stormwater Discharge Permits held by the region's large localities.

In previous presentations, staff has discussed the Stormwater Permits that have been issued by the state to the six large communities in Hampton Roads: Chesapeake, Hampton, Newport News, Norfolk, Portsmouth and Virginia Beach, as well as the permits issued to the region's six medium-sized communities: Poquoson, Suffolk and Williamsburg and the Counties of Isle of Wight, James City and York. These permits are required by the federal Clean Water Act.

Over the last several months, the staff and Commission have addressed the Chesapeake Bay TMDL in detail. To refresh your memory, a **TMDL or Total Maximum Daily Load** is the maximum amount of a pollutant that can be discharged to water body and still allow the water body to meet water quality standards. The TMDL is translated into a **Waste Load Allocation or WLA** for each permitted discharge. This is the specific amount that the individual permit holder may discharge.

The EPA included individual Waste Load Allocations in the Bay TMDL for the 11 large stormwater systems in Virginia, including the six large systems in Hampton Roads

Having a Waste Load Allocation means each locality has been given a specific amount of nitrogen, phosphorus, and sediments that its stormwater system can discharge into the Bay tributaries.

DCR (Virginia's Department of Conservation and Recreation) is moving forward with issuing new stormwater permits based on these nutrient allocations.

In parallel to the WLA issue, the states have been charged with developing their Phase II Watershed Implementation Plans, which are to include an allocation of the total pollutant loads to localities or subwatersheds and to sectors, such as agriculture or urban stormwater, within the localities or subwatersheds. It is assumed that this effort will result from a cooperative process and will entail some degree of flexibility.

By including individual WLAs in the final TMDL, EPA has preempted the state Watershed Implementation Plan process.

These developments raise significant concerns for the region – both those localities with stormwater permits and those that do not have permits but that will be governed by the WIP.

CONCERNS:

1. The WLAs were not included in the draft TMDL that the Commission reviewed and

commented upon in November. Therefore, there has been no opportunity for public review and comment on this element of the TMDL.

2. EPA has not issued guidance on how the WLAs are to be incorporated into the permits.
3. Inclusion of the WLAs in the TMDL and the stormwater permits is a significant change to the permits – they will become numeric rather than the programmatic permits under which localities currently operate. Localities need some assurance that their investments, which are expected to be, as presented earlier, in the billions of dollars over the next 14 years, will meet both permit requirements and “advance the ball” in terms of meeting Bay cleanup goals. Absent EPA guidance, this appears problematic.
4. There are continuing questions about the accuracy of the WLAs, in light of issues raised about the land use information included in the watershed model, as well as the accuracy of the model itself. EPA has at least tacitly acknowledged this issue by indicating that the model will be rerun with new data and loadings will be revised if the new runs warrant it.
5. Finally, the inclusion of the WLAs in the TMDL and the inclusion of the WLAs in local stormwater permits conflicts directly with the agreed-upon process for developing the state watershed implementation plan.

CONCLUSION:

As indicated in the Agenda Note, the staff has provided this briefing and outline of concerns with the WLA-stormwater permit issue and the apparent conflict with the WIP process as background for the Commission. The issue will be addressed in further detail during the Special Meeting, addressed in the rest of Agenda Item #17.