

Accounting for Growth Work Group Summary Meeting #10: 7/19/2013

In Attendance:

Work Group Members: Tom Ballentine, Bevin Buchheister, Valerie Connelly*, Candace Donoho**, Lynne Hoot, Les Knapp***, Jon Laria, Katie Maloney, Erik Michelson, Shannon Moore, Mike Powell, Alison Prost

*for Pat Langenfelder

**for Cathy Drzyzgula

***for Mary Ann Lisanti

Support Team: George Chmael, David Costello, Kate Culzoni, Dinorah Dalmasy, George Kelly, Brigid Kenney, Dave Nemazie, Susan Payne, Julie Pippel, John Rhoderick, Helen Stewart, Steve Stewart, Joe Tassone

Absent:

Work Group Members: Yates Clagett, Sandy Coyman, Cathy Drzyzgula, Stephen Harper, Pat Langenfelder, Mary Ann Lisanti, Dru Schmidt-Perkins, Josh Tulkin

Support Team: Vimal Amin, Meg Andrews, Dan Baldwin, Lee Currey, Jim George, Dave Goshorn, Doug Lashley, Dusty Rood, Roger Venezia

Public Attendees:

Peter Boussein (Chesapeake Bay Foundation), Andrew Gray (Department of Legislative Services), James Hearn (WSSC), Evan Isaacson (Department of Legislative Services), Jeff Fretwell (Maryland Department of the Environment), Hannah Murray (Rodgers), Phillip Stafford (StateStat)

Welcome and Overview

Facilitator George Chmael welcomed everyone to the tenth (and last) Accounting for Growth (AfG) Work Group (WG) meeting and reviewed the agenda, announcing that the format would consist of first culling up the issue at hand, followed by discussion, if any, necessary to reach a compromise or decision during the meeting – if no conclusion to the question is evident the WG will move to the next topic. Mr. Chmael also reviewed the WG's recommendation report timeline (below). On issues the WG does not reach consensus, the constituents can work together but before their work is entered into the report, the facilitator must be sure the consensus is of the entire WG. The report will include majority and minority positions.

- Immediately State Agencies begin to respond to WG recommendations.
- 7/11-25 Report is drafted. WG members may continue to meet and discuss issues.
- 7/26-8/2 WG review. Edit to include name in the title, use track changes and submit to Ms. Culzoni. Constituent groups are requested to submit one document.
- 8/5-7 Report is finalized; WG reviews and approves. Deadline for WG input.
- 8/9 Report is submitted to MDE.
- Aug-Sept Regulation drafted.
- Mid-September MDE briefs the Environmental Committee.
- by 9/30 Draft regulations are complete.

Calculating the Post-Development Load

The WG clarified the option agreed with by the majority of the WG stakeholders to:

Use edge of stream loading factors where there is a locally impaired segment for the Total Maximum Daily Load (TMDL) -based impairment (nitrogen, phosphorus, or total

suspended solids). Otherwise, use five-basin edge of stream loading factors followed by Land River Delivery factors as the dilution factor for distance from the water body.

During this clarification, an ENGO stakeholder voiced concern of not including Clean Water Act (CWA) §303(d) List of Impaired Waters (303(d)) segments/pollutants as part of the 'impairment' definition; this ENGO had been considering the 303(d) list throughout WG discussions. She stated that it takes too long to make a TMDL after an impairment is listed. Another ENGO added that his concern was not the technicality of being listed or impaired, but the fact that discharge is already leading to impairment indicates that allowing local growth without local offsets will create a trajectory to worsen water quality. He remains in favor of edge of stream loading factors only.

MDE stated that reaching the Bay TMDL requires local water to be far cleaner than the Bay mainstem. MDE also stated that there are only two segments on the 303(d) for nutrients without a TMDL - one of which is a lake being used as a stormwater pond and the other is a 2012 nontidal listing. There are about six 303(d) listed segments for sediments without a TMDL; all models show a better Bay requires better local segments. A Support Team member commented that there are times when a biological impairment turns out to be a sediment impairment. The ENGO reconsidered within context and noted its support adding the recommendation for the entire policy that as additional impairments are listed the TMDL process must be hastened to avoid a long 303(d) list without adequate TMDLs. (The representative from two ENGO sectors were not present.)

Developers and MACo are in favor of only using edge of stream for TMDLs. MACo reminded the WG that not every 303(d) listed impairment becomes a TMDL because further investigation does not merit a TMDL. Developers added their concern with the ability to comply with a non-existent baseline for 303(d) impairments. MDA agreed that credit generation and offset calculations become difficult when 303(d) impairments are included in the policy.

Agricultural stakeholders confirmed their favor for the MACo/MML/Developer proposal.

Setting the Fee-in-Lieu

MDE stated that the original fee-in-lieu range (\$2,600 to \$3,000) was based on septic upgrade costs, not including the administrative fee, using the zero baseline. A detached single family home now requires zero offsets. The price discussed at the last meeting included all permanent practices, administrative fees and O&M, including those which are unlikely to be used based on cost. The current MDE estimate for an appropriate fee-in-lieu, including 20 years of costs and land acquisition and an increased agricultural administrative cost, is \$4,500 to \$4,600.

MACo spoke about Frederick County, where there are 36,000 septic systems and about 15 are being upgraded each year. The County's TMDL requires 13,762, although more could be upgraded. Based on this great supply, she questioned why the fee-in-lieu should be higher than the cost of upgrading septic.

MDE stated that statewide there are over 426,000 septic systems. The Watershed Implementation Plan (WIP) requires 181,000. It is not expected that the State will upgrade all 181,000, since it is hoping to find cheaper offsets on the market.

The State is supportive of a fee-in-lieu higher than a septic upgrade. This will account for the increased estimated cost of agricultural credit administration.

An ENGO stakeholder reviewed Anne Arundel County's WIP. Using the most cost-effective strategies: septic retrofit to sewer, septic upgrades, pond retrofits, and stream and outfall restoration. Including installment and easement (no land acquisition), with 25% operations and management (O&M) cost, the weighted average was \$3,600. If the local government receives money, as Anne Arundel County does in the form of a stormwater utility fee, the costs for O&M are paid and the practice is effectively permanent.

Another ENGO reminded the WG of the agreed-upon three-year review and stated that this cost will be revised and takes some pressure off of setting an exactly right fee. MACo responded with the concern

that the fee has the potential to drive others out of business, to which the ENGO responded that the first few years will consist of grandfathering.

Mr. Kelly (a credit aggregator) reminded the WG that the fee-in-lieu is a deterrent to not purchasing credits. A Developer stakeholder noted their constituents concern for an excessive fee in the worst case scenario and their fear that the market will not develop. He further stated that if the WG does not agree with a \$3,000 fee-in-lieu, then it doesn't agree on baseline. The baseline already provides conservatism; it does not need to be built into the fee. Developer constituents are amenable to giving up a credit via the baseline but where an offset required and the fees are greater than \$3,000 – that is beyond their accommodation. If the fee is greater than \$3,000 then the baseline must change.

Support Team member Mr. Stewart calculated that a nitrogen pound fee-in-lieu would cost \$1,100 and a pound of phosphorus \$11,000 in his county based on information available. These numbers include design and production but not other things like O&M and land acquisition.

MACo stated that Frederick County reforestation including project management costs \$1,500-\$2,000 per pound of nitrogen.

Mr. Kelly shared that, as in other beginning markets, the true cost is not known in the first few years and setting the fee-in-lieu is a guess; but the fee must remain higher than the market price if the fee-in-lieu is meant to function as a last resort. If it is too low, it won't work. An ENGO agreed, stating that a high fee-in-lieu is beneficial because it creates a pressure to decrease market costs. MDE agreed that a too-low price point undermines the market.

When asked, Mr. Kelly stated that the North Carolina fee-in-lieu is \$20 per pound; North Carolina development is required to go to a bank even if the fee-in-lieu is too low. It is set as the true cost of a forest buffer including O&M, credit verification and certification, and land cost plus an increase. The offset requirement went into effect in 2005 and there is still development eight years later.

One MACo stakeholder expressed concern that a mandate to go to the market even if the fee is low could be harmful if the market is monopolistic. The WG has not seen the costs of credit certification and verification.

MDE stated that the majority of development in the State will not be subject to this policy. A Developer stakeholder stated that there was pushback to this comment among constituents, even after demonstrations with the Calculator tool of areas and types of development most likely to be impacted.

When asked, Mr. Stewart stated he would prefer not to do additional projects with fees-in-lieu and would rather use the established market and available credit offsets.

Two ENGOs are in favor of a \$3,500 fee-in-lieu with a triennial re-evaluation to use a rolling three-year average. Reviews begin once there are three years of costs to evaluate. MACo agreed to a triennial review and asked for the public works exception to consider the \$3,500 fee-in-lieu. MDE is in favor of the rolling average and stated that if it found that the fee-in-lieu was retarding the market, it would be adjusted. Developer stakeholders agreed to discuss with constituents the \$3,500 fee-in-lieu with the re-evaluation and rolling three-year average, but ultimately are in favor of a \$3,000 fee-in-lieu with the triennial evaluation and rolling average. A fee-in-lieu over \$3,000 still compromises Developer stakeholders agreement on the baseline. An ENGO cautioned that this process could result in a higher fee-in-lieu. Agricultural stakeholders are in favor of the triennial review and rolling three-year average. (All stakeholders agreed to a triennial re-evaluation which will use a rolling three-year average.)

MDA advised the WG to consider a 10% add-on to the average cost because there is a 10% credit retirement associated with buying credits on the market.

MDE advised the WG to consider setting the fee-in-lieu at a percent above the average market price. A Public Interest stakeholder advised deferring this proposal to the future advisory committee convened for the three-year review.

The WG generally agreed that the U.S. Environmental Protection Agency's (EPA) guidance for a 2:1 credit ratio would not apply to the State's Accounting for Growth policy since it is adequate where the guidance seeks to inject conservatism.

Developers agreed with an ENGO that the first three years costs should include WIP projects.

An Agricultural stakeholder asked if the market average lowers, when would more expensive practices be bought/implemented – the fee-in-lieu will be less than the practices.

ACTION: The WG will discuss with their constituents and send the facilitators their positions on setting the fee-in-lieu.

Administration of a Proportional Fee (Threshold Issue)

The WG has agreed to a reduced fee for 5,000 ft² to an acre of disturbed land when applicable (ex. intensified land use, increased load) and a developer does not need to comply with the rest of the permit once the fee has been paid.

A Developer stakeholder noted that this area is not subject to stormwater permitting. These kinds of development are likely to have less than a pound load and include any structure built within that range, including sheds, garages, etc. The fee would be administered with the building permit and adjustable under each jurisdiction. Another Developer stakeholder proposed charging a percent of the fee-in-lieu proportionate to the area (percent) of an acre disturbed.

Mr. Kelly asked if the developer could pay for offsets or offset onsite instead of paying the reduced fee. The WG generally agreed with this concept.

MDE noted that the fee-in-lieu will be based on pounds. This proposal is based on the percentage of one pound.

MACo asserted that local governments retain the right of first refusal for this reduced fee.

Applicability Trigger

An Agricultural stakeholder inquired if crop changes and agricultural land use changes would trigger the policy as it currently stands. She noted that under the current language simply plowing would trigger the policy; and stated that such a trigger would lead to agriculturalists hoarding credits to account for a potential barn.

An ENGO stakeholder asked who pays for the offsets that agriculture might incur, if not by the nonpoint agricultural source.

The WG agreed that this issue should not fall under the exceptions of the policy and should remain at the trigger.

MDE proposed that a change in land use alone does not trigger the policy.

The trigger was edited to include,

Change in land use alone does not trigger the offset policy. Changes in agricultural
Changes in agricultural activities such as changes (other than buildings/structures) in
crops do not trigger the offset policy.

Additional comment: An Agricultural stakeholder reminded MDE that it had not yet supplied the agricultural constituents with policy language about not increasing load offset requirements when a practice installed in good faith is later determined to have a lower efficiency.

Local Public Works Projects Exception Criteria

MACo spoke, noting the impact that fee-in-lieu and baseline conversations would have on the local government need for a public works (NOT a public benefit) exception.

An ENGO reminded the WG of last meeting's proposal by local government to be exempt from offsetting public works and picking up the load through the county WIP. MACo stated that society should be obligated to pay for the offsets of public works project. MACo agreed with the ENGO that there is a greater regulatory hook with individual permits than with the WIP.

Another ENGO requested that when the conversation resumed that the public works projects be defined as local and/or state.

The discussion was deferred.

Infill Definition

The WG previously agreed that there should be a definition and greater clarity for use of the term 'infill' in the baseline.

MACo is currently in favor of a modified Maryland Department of Planning (MDP) definition. MACo is also in favor of strengthening the definition to include pre-existing built infrastructure and prohibiting adjacent or greenfield development.

ENGOS do not agree with the MACo proposal and would like to have a plan for the entity accountable for the load exempted from developers in the proposal. Agricultural stakeholders do not want to become accountable.

The Sustainable Growth Commission (SGC) will discuss the MDP definition on Monday. The SGC is a similarly composed WG of stakeholders and will advise MDE of a consensus.

Trading Geography

One ENGO proposed adding that the anti-degradation review must occur for all water bodies to the MACo/MML/Developers proposal. The ENGO concern is that the MACo/MML/Developers proposal leads to degradation and the ENGO stakeholders are interested in preventing or halting any impairment caused by the AfG policy.

MACo responded that the anti-degradation review is specific to high quality water bodies with a specific use designation and asked how it would be implemented.

MDE stated that there is an anti-degradation policy for high quality (Tier II) water bodies, and it is currently limited thereto. It is being reviewed and will likely require more than environmental site design to the maximum extent practicable. The program uses the indicator biological index to assess degradation.

MACo agreed that anti-degradation review should be considered but the implementation needs to be determined.

MDE stated that the stormwater regulations are sufficient to protect streams between impaired and high quality, but possibly not sufficient to protect high quality streams.

An ENGO suggested treating a high quality stream as an impaired water body.

A Developer added that the EPA will review trades for impact on water quality.

Two ENGOS are still in favor of the precautionary principle (basin-first, then state) (not the MACo/MML/Developer proposal). Agricultural and two of three Public Interest stakeholders agree. (The third Public Interest stakeholder abstains.)

The WG agreed to revisit the trading geography policy in three years with hot spot scrutiny of development; this requires MDE and MDP commitment.

MACo, MML, and Developers are in favor of the statewide-first policy; CBF is in agreement if there is an anti-degradation modification made.

Credit Certification, Verification, and Transparency

An ENGO asked what the MDE schedule is for an urban practice trading program. Would MDE be able to certify credits in January 2014? MDE replied that it would not be a challenge.

Another ENGO requested specifics on the details of the trading programs; her concern is that the WG consensus is on too broad principles. She stated that it is possible that she may object to draft regulations that were derived from the agreed-to principles.

The first ENGO proposed that MDA work with the WG and MDE to refine the MDA's agricultural trading program and create the MDE trading program before policy implementation. MDE stated that is the expectation. MACo agreed to and there were no WG objections to this proposal.

Cross-Sector Trading to Meet the TMDL

The WG agreed to neither prohibit nor endorse cross-sector trading and that more discussion needed to occur on the subject.

General WG Recommendations

- As additional impairments are listed on the 303(d) list, the TMDL process must be hastened.
- Establish a stakeholder WG to review AfG program issues at least yearly, such as trading geography and the fee-in-lieu policy, and fully every three years. Consider using the Bay Restoration Fund (BRF) committee, which meets throughout the year, as the review mechanism for AfG policy. This would require ensuring that the BRF is representative of all impacted stakeholders.
 - A triennial audit of the fee-in-lieu policy which uses a three-year rolling average of market price. At the first audit the method of setting the fee-in-lieu and perhaps changing it to a percent above the average market price will be considered.
- It was recommended that a public education strategy/communication program be created, disseminating information about the AfG and the WIP to local governments and the public from the State.
- A comprehensive State review using adaptive management two to three years after implementation

Public Comment

None.