

Accounting for Growth Work Group Summary
Meeting #7: 6/14/2013

In Attendance:

Work Group Members: Tom Ballentine, Bevin Buchheister (via conference call), Valerie Connelly*, Sandy Coyman, Cathy Drzyzgula, Stephen Harper, Lynne Hoot, Les Knapp**, Jon Laria, Katie Maloney, Erik Michelson, Shannon Moore, Mike Powell, Alison Prost, Dru Schmidt-Perkins, Josh Tulkin

*for Pat Langenfelder

**for Mary Ann Lisanti

Support Team: Dan Baldwin, George Chmael, David Costello, Kate Culzoni, Candace Donoho, Lee Currey, Jim George, George Kelley, Brigid Kenney, Doug Lashley, Dave Nemazie (via conference call), Susan Payne, Julie Pippel, John Rhoderick, Dusty Rood, Helen Stewart, Steve Stewart, Joe Tassone

Absent:

Work Group Members: Yates Clagett, Pat Langenfelder, Mary Ann Lisanti,

Support Team: Vimal Amin, Meg Andrews, Darrell Brown, Jeff Corbin, Dave Goshorn, Roger Venezia

Public Attendees:

Dinorah Dalmasy (MDE), Brenda Dinne (Carroll County Government), Andrew Gray (Department of Legislative Services), Crystal Heide (Department of Legislative Services) Melissa Schreiber-Stahl (1000 Friends of Md), Mindy Selman (WRI), Craig Ward (Frederick Ward Associates), Ashley Valis (Office of the Governor)

Welcome and Overview

Facilitator George Chmael welcomed everyone to the seventh Accounting for Growth (AfG) Work Group (WG) meeting and reminded the WG that the hours for the current meeting and the next scheduled meeting are extended to six hours (9AM – 1PM), and there are two meetings left – one of which is tentative and scheduled for Monday, July 8th.

Valerie Connelly and Les Knapp attended as WG members for Pat Langenfelder and Mary Ann Lisanti, respectively. Yates Clagett did not have a substitute representative.

Mr. Chmael reminded the WG to use the chosen three baseline alternatives as a framework for the ensuing baseline discussion. This discussion was slotted to be resumed and resolved within this meeting, followed by discussions of load offset permanency and the effective date; although these three topics were discussed, they did not resolve conclusively in the meeting.

MDE Guiding Principles Review

Mr. Tassone (MDE) reviewed the State's considerations and their relationship to the guiding principles, since there had been some confusion about them at the previous meeting and would also serve as a good review of the State's perspective and needs from the regulations; especially in comparison to the current baseline options. Mr. Tassone invited other State input and welcomed clarifying questions as he began to outline the principals the State must follow in writing the new policy.

Mr. Tassone stated the concern that use of the pre-development land use as a baseline will likely compromise some of the State's objectives and principles.

The State's focus is on zero net growth (100% offset for loads not in the watershed implementation plan (WIP)) for four reasons. These reasons elicited a great discussion with dissenting viewpoints from the WG.

In response to the first reason, that the cost of meeting the TMDLs is so high it makes compliance unlikely, it was noted by several members of the WG that they are not interested in recommending a policy which does

more than offset growth and loads not accounted for in the WIP, i.e. policy which both accounts for growth and attempts to ensure a margin of safety for the WIP. Stakeholders noted that their constituency is opposed to any recommendation outside of the U.S. Environmental Protection Agency's (EPA) requirements. It was recommended that MDE increase its outreach to inform the public of the EPA's requirements and also take a hard enforcement stance. MDE must also be able to inform the public of what other states are doing to meet the same requirements.

In response to the second reason, that two out of the four source sectors (stormwater and septic) have trends of increasing loads, there was much discussion.

As Mr. Tassone reviewed the reasons why the State does not consider the inheritance of a former land use's load as a righted load to the new or redevelopment, multiple WG members dissented with this idea.

Mr. Tassone referred to a list of negative results from baseline allocation proposals that use land use change.

MDE noted the fiscal difficulty of a site-by-site analysis and impossibility for precision in cost and data analysis ambiguity. The baseline can not be precise without prescribing a feasible method for precision. It was noted by a WG member that a margin of safety can be built in elsewhere than the baseline. MDE added that this policy only would impact green field, cropland, and forest development.

One WG member noted that although there may be capacity at a wastewater treatment plant (WWTP), a community may choose not to hookup and the WWTP may choose not to accept a new community's load.

Mr. Tassone reviewed the relevant Bay Cabinet conclusions. This led to a discussion of the reliability of the Bay Model, which projections are meant to be applied to a greater area than the Bay Cabinet was referring to (basins).

One WG member asked for the economic analysis considered by the Bay Cabinet of the impact of a zero allocation baseline on developers and jobs versus other baselines. Another asked for the difference in one urban land use to another urban land use (such as low-density to high-density), and another asked for analysis of the rural areas of the state and if such a baseline would halt development there. Mr. Tassone noted that the zero allocation baseline incentivizes redevelopment in specific areas and acknowledged the disincentivizing of new development on green field. MDE noted that there is much urban and suburban opportunity and capacity for development.

Mr. Currey spoke to the uncertainty of the model, noting that the amount of manure in the watershed does not disappear because agricultural land was developed. Nutrient cycles of developed land is currently studied for the Phase III WIP. The idea of a reserve, for later use to ensure future growth capacity or in case further data analysis reveals current TMDLs are not as environmentally protective as initially thought.

MDE noted the potential for the AfG policy to induce a trading market which will decrease the overall compliance costs to local jurisdictions and developers. Options besides a trading market include increased regulation and increased fees over time.

A WG member offered as a solution to the WG's dissent and uncertainty that discussion begin on a short-term policy that might be reviewed in less than five years.

After the WG discussed the applicability of the new decision matrix to assess proposals based on the Guiding Principles and other important factors drafted by Mr. Stewart, it was decided to forego using the matrix and to begin presentation of each WG member's constituency views regarding the three baseline options currently under consideration.

Developers asked about the impact of a zero allocation baseline on their industry and jobs versus other baselines will be economically analyzed for the WG. The Support Team didn't have this information but noted that zero baseline wasn't being discussed as an option anymore.

Support Team ACTION: Ensure the Calculator can show the difference in urban land use to urban land use (such as low-density to high-density).

Work Group members also noted that an economic analysis of rural areas in the state and impact on development under the baseline alternatives would be helpful be provided to the WG.

Stakeholder Perspectives on Each Baseline

The revised language of the local jurisdiction (MACo) proposed baseline was accepted for clarification:

The offset = (the actual post-development load) minus (the allocation in the 2025 WIP for the pre-development land use), except that if the result is a negative number, it resets to zero.

MDE also proposed a revision to the MACo baseline: first, compare the stormwater pre-development load to the post-development load; then evaluate pre- and post-development wastewater loads. The negative numbers are reset and the positive numbers are summed. This was proposed because it is possible that septic systems may undermine the ability to achieve the WIP. It also costs different amounts to offset and reduce stormwater and wastewater loads.

A WG member disputed the validity of this reason, stating that the Bay does not distinguish between sectors, and receives nutrients regardless of the source. He stated that the net pollutant should be considered and not divided into sectors.

The modified MACo baseline proposal may be taken back to the stakeholders' constituents and discussed.

Mr. Rhoderick (MDA) stated that agricultural loads are not as high as the WG might suppose, and cited loads per basin. It was confirmed with Mr. Rhoderick that there is a formula by which each farm is evaluated and the basin load is calculated. Mr. Rhoderick added that the load estimates come from the Bay Model.

With regard to the MACo baseline proposal, the following positions were articulated by the stakeholders:

In Support

- Maryland Municipal League (MML) noted its support and added that if the reference to the original land sector bothered MDE, MML would not oppose a change that yielded the same result.
- The Builder's Association noted conceptual support of the proposal, and the margin of safety included in the proposal by resetting a negative load to zero.

Not In Support

- Agriculture noted that it prefers forestry for the equal incentive to develop agriculture and forest lands. Agriculture would prefer not to go beyond a pasture baseline.
- Chesapeake Bay Foundation (CBF) spoke for the environmental nongovernmental organizations (ENGOs) and stated that it does not believe that this baseline meets the Clean Water Act (CWA) requirement of no new loads may be discharged to an impaired watershed. CBF supports the forest baseline since zero is not under consideration. 1000 Friends of Maryland does not support this proposal either, and noted concern over a policy decision which allows a buyer to inherit pollutant rights with the land. The Sierra Club agreed with CBF and 1000 Friends.
- The Chesapeake Bay Commission (CBC) spoke for the public interest stakeholders and stated that it is supportive of the forest baseline, since agricultural operations must account for their greater load; meanwhile development does not provide the same benefits as agriculture and should not benefit from a higher load allocation when converting agricultural lands.

A representative for the developers cautioned the WG and presented their constituency's perspective: agreeing to zeroing out the credit as stated in the MACo proposal as a margin of safety measure is considered a significant concession. It is highly unlikely that their constituents would consider Erik's proposal. It was stated that this concession is a compromise that some of the constituents are willing to make. They do not fully embrace the MACo proposal, but it is the one most likely to succeed with the developer constituency.

Mr. Michelson clarified his proposal: the only change from present conditions made by Erik's proposal is that no credit would be received for converting agricultural land. The developer stakeholder agreed that this loss of credit is a contentious issue for his constituency, who view any net load decrease as a rightful credit. He stressed that the constituents feel as though they are being discriminated against because any other agent that improves the Bay, as they are by achieving a net nutrient decrease, receives a credit.

A Support Team member noted that nationwide, anything done by a developer within the permitted area may not receive a credit, but offsite, adjacent, or other reduction or offset activities on the same property but outside the development footprint will receive credits.

A local jurisdiction stakeholder noted that any policy may be revised and adaptively managed in the future.

The WG noted the example of an older community on septic systems that later was incorporated into an efficient shared facility and received a credit.

With regard to the Erik baseline proposal, and other baselines in contrast to the MACo or Erik proposals, the following positions were articulated and reiterated by the stakeholders:

In Support

Not In Support

- The development community finds the MACo proposal to be the most accurate measure of net change, and any other proposal to be legally vulnerable and beyond the CWA and EPA requirements. Additionally, strictly addressing the legal requirements keeps other agendas out of the policy. Development should be encouraged in areas with the highest loads. It was also noted that it is likely that the policy will only become more restrictive. The 10% credit retirement is an additional margin of safety. The forest baseline disincentivizes economic development in rural areas.
- Local jurisdictions were unsure if this proposal incentivizes agricultural land conversion, acknowledged the need for environmental protection, and stated that this proposal is beyond the TMDL requirements. In contrast to this policy, MACo's policy brings the stakeholders together and does not seek to identify and cancel out bad actors.
- ENGOs prefer the forest baseline. CBF noted that it is a false argument to propose a snapshot look at agricultural loads, which change from year to year, versus a potentially lower but constant load from development. There are cumulative water quality impacts to fragmented land which are not accounted for, unless it is a more restrictive baseline (such as forest). A Support Team member noted the additional impacts of fragmentation and development that are not accounted for in the TMDLs: increased stream temperature, increased road salt, etc. 1000 Friends noted a concern with enforcement of current State policies and legislation, and stated that this policy should be structured to enforce them. One ENGO stakeholder noted that the science is currently on a statewide scale, and the proposal is on a site by site scale, this is complementary to the fact that the interconnected environmental conditions are not impacted on a site by site basis. He proposed that the policy be scaled up to the sector level.
- The CBC public interest stakeholder is in favor of a forest baseline.

It was suggested that the MACo proposal be run through the Calculator as a scenario of a farm in a basin being turned into a development on septic. It was requested that septic be added to the scenario options.

MDE shared that in the suite of policy options available in enforcing the EPA requirements, there is the option of placing an allocation for growth into the urban sector. This would force counties to execute more reductions and new development would be treated the same as existing development.

A discussion was held on the option of reserving credits. What is done when there is a net nutrient reduction and the credits are reset? Who owns the reserve and what should be done with it? Should the credits be used to improve wastewater quality, or for wastewater? EPA will revise the TMDLs as the 2017 and 2025 models are conducted.

Work Group ACTION: The modified MACo baseline proposal will be taken back to the stakeholders' constituents and discussed.

Support Team ACTION: Septic will be added to the Calculator scenario options so that a scenario like a farm in a basin being turned into a development on septic under the MACo proposal can be run through the Calculator.

WG Baseline Discussion and Calculator Demonstrations

The WG briefly considered the post-development load at the 2025 pasture load per basin. The Erik proposal is a post-development load at the average statewide pasture load unless in a basin with a lower load. Mr. Rhoderick noted a possible impact would be to incentivize development in the Potomac basin, which has a higher load than the statewide average. Before further consideration, it would need to be reviewed by the constituents.

A MACo stakeholder reviewed the concept that although loads are most accurate at the basin scale, there are wide delivery ratio differences; and proposed use of land-river delivery ratios for farther counties rather than basin ones. An ENGO stakeholder responded that this would shrink the trading areas. The MACo stakeholder disagreed and stated that instead, a higher number of credits would be needed closer to the Bay. This would also prevent the farthest counties from specializing in cheap best management practice (BMP) industries. Another ENGO stakeholder responded that this argument assumes the primacy of the Bay's water quality over local water quality and cautioned the possible decline in local water quality that could result. MDE stated that credits are calculated at both edge-of-stream and delivered and that one credit is one pound delivered to the Bay annually.

MDE guided the WG through the new streamlined Calculator for the baseline proposals under consideration. The new Calculator was deemed useful by the WG, but it was also requested that the necessary changes, including additional land uses (such as fairgrounds), be made to revise the old, more comprehensive Calculator and both Calculators be distributed to the WG. MDE reminded the WG that they may define redevelopment. A WG member requested urban redevelopment scenarios to evaluate the threshold for redevelopment, and the definitions of land within urban areas – for example a Priority Funding Area (PFA) with tree canopy would be considered forest. MDE will look at the parameters for consideration in defining redevelopment, and the WG will be given a list of all official land uses in all sectors with their nutrient loads – Dinorah will supply these. The WG is interested in investigating the magnitude of urban redevelopment load changes in order to put the development of agricultural land into perspective. One ENGO stakeholder stated that if there is greater redevelopment than new development anticipated, then the WG should focus more on redevelopment since it will have the greater water quality impact. The WG also requested the current development capacity of the State. Mr. Tassone stated that the Statewide long-term trend for residential development 75% of the number of newly improved residential parcels are in PFAs but 75% of the acreage is outside of PFAs. 25% of newly improved residential parcels are 75% converted acreage. Mr. Tassone will provide these numbers by county. Additional information was requested for commercial development.

Work Group ACTION: The post-development load at the 2025 pasture load per basin will be discussed among the stakeholders' constituents.

Support Team ACTION: The changes enacted in the new Calculator will also be enacted on the old Calculator. Additional land uses will be added to the Calculators. Both Calculators will be distributed to the WG before the next WG meeting on 6/28.

Support Team ACTION: MDE will look at the parameters for consideration in defining redevelopment, and the WG will be given a list of all official land uses in all sectors with their nutrient loads.

The Calculator(s) will be able to be used to evaluate urban redevelopment scenarios once redevelopment is defined.

Support Team ACTION: MPA will furnish the current development capacity of the State (residential and commercial, by county) to the WG.

Permanency and Brokerage Discussion

The permanency alternatives under consideration were reviewed in the WG's decision matrix. Mr. Kelley responded to brokerage and trading market questions. He spoke about the market conditions for permanent and annual practices. Permanent practices may decrease annual practices. The thirty-year cycle is plausible but most practices are ten- to fifteen-year practices. Ten- and fifteen-year practices are designed to require ten to fifteen years of operations and maintenance (O&M) and then can be reevaluated for functionality after the time span (for example, as with a forest buffer). Easements and restrictive covenants are a separate issue from the practice itself. Easements and restrictive covenants are a policy issue, and may be used to fulfill a permanent development's permanent offset. Although an offset may be planned as a mix of annual, permanent, and long-term practices, it is probably best to secure all the necessary coverage at the time of development and then acquire annual practices to function as annual compliance insurance and manage risk. In North Carolina, the regulatory agency monitors during practice O&M to ensure that the broker and offset are in compliance, and will require replanting/repairs as needed to meet the credit supplied. After the O&M timeframe is complete, there may be an easement or restrictive covenant in place to continue the credit supply, but there is no longer a cost to the developer. Those credits may not be resold. For thirty years, North Carolina credits cost \$20-30 per pound and in Virginia they cost \$90. There is no baseline in North Carolina. In Virginia, there is no thirty-year O&M, only the costs associated with implementing a permanent BMP. According to North Carolina State law, an in-lieu fee is a last resort. In Virginia, some local jurisdictions collected a fee-in-lieu to raise money. Also in Virginia, if a load is from five or less acres OR ten pounds or less AND 75% of the stormwater objectives are met onsite, the remaining 25% may be sourced offsite. The common permanent BMPs are tree restoration, stream restoration, wetland restoration, and septic removal. In Virginia, any agricultural land can be used for tree restoration, in North Carolina only riparian buffers (up to 200 feet) are allowed on agricultural land.

MDE noted a preference for a shorter O&M (benefiting developers) that is countered by the responsibility held by local governments thereafter. MDE added that monitoring would not end after a shorter O&M period, so that it is ensured that the practice is still addressing the load. The price is also important. Trees are less practical in Maryland from a capacity and cost perspective, while 80% of available agricultural BMPs are annualized. Annual practices decrease agricultural conversion to forest, work with the current agricultural trend of land leasing, are less costly, and can be contracted for several years at a time. Mr. Kelley noted the inherent risk of a thirty-year offset need supplied with annualized practices. An agriculture stakeholder noted her concern with agricultural land loss from forest conversion in supplying the need for permanent offsets and risk management. MDA cannot certify those credits and conversion to forest is counter to the guiding principles (taking agricultural land out of production). She added that the risk will likely increase the cheap annual practice costs. However, she stated, she thinks it is likely that a farmer will commit 30% of cropland to a three to five year practice, since that is what many U.S. Department of Agriculture Natural Resources Conservation Service programs require. MACo is in favor of permanent offsets to reduce the local governments' liability for the BMPs after the developer has fulfilled its offset requirements (after the thirty years). There are not funds in place to reimplement failed permanent BMPs by the counties. It was requested that there be both permanent offsets and shorter-term offsets that would last the length of the developer's obligation but not devolve to the county afterwards. MDE will investigate bioswales, green infrastructure and other ten-year covenant practices which may decrease market prices and supplement developer offset portfolios.

In response to the question of trading geography, Mr. Kelley responded that if delivered end-of-stream loads are taken into account, there is no reason that the trading geography shouldn't be statewide to increase the market size and decrease costs. An ENGO stakeholder noted that a difference with Maryland, versus the other trading states, is the number of impaired streams predating the Bay TMDL which may not take on an additional load. This should be considered in the discussion of trading geography. Mr. Kelley agreed that

local TMDLs should drive the trade within a statewide trading geography. The ENGO stakeholder also asked if cover crops and other agricultural practices aren't already covered by farmers' Nutrient Management Plans. An agricultural stakeholder replied, 'some, but not all.' However, MDA noted that cover crops are particularly relied upon to meet the agricultural sector's WIP. If the market demand increases significantly for annualized agricultural practices, cover crops will need to be supplemented by other practices. MDE commented that capacity will be revealed by the market dynamic and five-year contracts of annualized practices may supplement the potentially more costly permanent practices. There is likely to be significant economic incentive for agricultural landowners to contract for five years. Mr. Kelley agreed that where incentive is significant, agriculture supplies credits.

Discussion shifted to the policy alternatives under consideration.

A developer stakeholder representative noted the need for a permanent offset for a permanent load but expressed concerns about a permanency requirement on the market. He interpreted Mr. Kelley's responses to the WG's questions to imply that the market won't function because no one will make a permanent commitment and because the required commitment increases market demand beyond capacity. He suggested financing the enforcement mechanism and restrictive covenants that allow multiple enforcers (instead of easements) to decrease dependency. Although it was countered that North Carolina has all permanent practices, it was also considered that North Carolina does not have a baseline.

A local government stakeholder suggested the fee-in-lieu set up a cover crop fund. Another stakeholder noted the possibility that the fund may not be completely used, thus not accounting for the entire load.

The WG briefly discussed the importance prices have on the policy decisions and the simultaneous need to have market conditions before a price can be reasonably assured. It was requested that MDE review the sources for the urban offset cost sheet.

MDE reviewed the current concept to determine a timeframe for which the developer must offset the load, and after the developer has finished its offset obligation, the public becomes responsible for the load. The TMDL requires the load to be offset permanently. MDA noted that after the developer's offset has finished, the public will take on an estimated additional two million pounds per year – some of which may be accounted for in permanent practices under easement. MACo is concerned about becoming locally responsible for loads

One WG member asked how the perpetual monitoring and verification will be conducted and compliance enforced after the developer's obligation is concluded. He proposed that there might be an opportunity for a secondary market to manage those practices. MDA replied that there is annual verification and a public report. Mr. Kelley commented that in stream restoration there is a transparent 'rivet' process whereby the credit exchange is public information. Another WG member stated that it would be wiser to address this issue in the future, since thirty years is a distant time and technology may change.

Option 1: Offsets must be definably permanent (as an easement or restrictive covenant) and O&M for the offset must be guaranteed in perpetuity.

In Support

- ENGOs. One ENGO stakeholder suggested the alternative of a ten-year O&M.
- MACo and MML

ENGOs and MACo agreed that if an alternative is considered, the plan for the loads in perpetuity must be a part of the regulation to account for the water quality impact and costs of the practice. A development representative noted that it may be useful to distinguish that a permanent offset does not preclude a mixed portfolio of credits. MDE agreed that a mixed portfolio would lead to a better market.

Not In Support

- Agriculture stated a concern with this practice eliminating annualized practices from the major part of the offset portfolio.

Option 2: Offsets to last for a minimum of 30 years; broker or aggregator can guarantee the term with approval of MDE with financial and other assurances; *with option* of local government to take over responsibility; with some solution of who takes over responsibility for the load if the local government declines

In Support

- Alternative 1 from Matrix Options developed by subcommittee that leaned to development community

Not In Support

Option 3: Offsets must be definably permanent (as an easement or restrictive covenant) and O&M for the offset must be guaranteed to last for a minimum of 30 years; broker or aggregator can guarantee the term with approval of MDE with financial and other assurances; during 30 years, the development could be exempt from or receive credit toward the local jurisdiction's stormwater utility fee. The developer pays the utility fee.

Option discussed but no definitive decisions on level of support by WG members. Constituencies are asked to review Option 3 and provide feedback at the next meeting.

Response:

An ENGO stakeholder proposed that in jurisdictions with a stormwater utility fee, if the credit aggregator/broker installs a practice and the jurisdiction agrees to maintain it, this creates a permanent practice which is permanently protected. The BMP prevents the development from being subject to the fee. The homeowners paying the stormwater fee would fund the practice. MDE stated that a shared public responsibility would be a best-case scenario (as the struck text).

MACo proposed striking the reference to the stormwater utility fee (in red text above). Otherwise, it agrees with a thirty year obligation and permanent offset. It will review this option with its members. Developers will also review this concept with their constituents.

MACo also noted that a permanent easement or restrictive covenant does not cover enforcement, and suggested that the WG revisit the topic of enforcement.

Support Team ACTION: Information on bioswales, green infrastructure and other ten-year covenant practices will be provided to WG which may decrease market prices.

Support Team ACTION: MDE will review the sources for the urban offset cost sheet.

Support Team ACTION: A report outline will be reviewed in the next meeting to identify differences on separate issues.

Next Steps

The next meeting will be held on June 28, 2013 at 9:00 a.m. at MDE.

Public Comment

None.