Nutrient Scientific Advisory Board Meeting #39 Minutes

Friday, May 1, 2015
TJCOG- 4307 Emperor Blvd, Suite 110, Durham, NC 27703
9:30 am -12:00 pm

Attendees
Members: Patricia D'Arconte, Matt Flynn, Sally Hoyt, Josh Johnson, Michael Layne, Grady McCallie, Andy McDaniel, David Phlegar, Forrest Westall, Michelle Woolfolk (John Cox's alt).

Non-Members: Andy Sachs (facilitator), Amin Davis & John Huisman (DWR); Carolyn Bachl (City of Raleigh), Steve Bristow, Kathryn Hobby, & Jennifer Mitchell (Wake Co); Tom Davis (Orange Co), Mike Dupree & Jessica Pope (Durham Co); Julie Henshaw (DSWC), Melissa Hodges (Butner), Keith Larick (Farm Bureau), Alix Matos (Cardno), Dan McLawhorn (Raleigh), Don O'Toole & Sandi Wilbur (Durham); Justin Gray & Frank Park (Guilford Co), Robert Patterson (Morrisville), David Phlegar (Greensboro), Haywood Phthisic (LNBA), Cy Stober (PTRC).

Agenda Topics - DWR Stormwater Rule Revisions

- Existing Development
- New Development
- State & Federal
- Goals
- Trading/Nutrient Offset
- Wastewater
- Agriculture & Fertilizer Management
- Definitions
- Other Rule Revisions

Materials
- NSAB #39 Meeting Plan
- Concepts for Draft Nutrient Trading Rule Revisions – For May 1, 2015 NSAB Meeting
- Nutrient Strategy Proposed Rule Revisions PowerPoint Presentation

Convene
The group's facilitator Andy Sachs convened the meeting, and the Board members and participants introduced themselves. Andy stated that the standard Ground Rules for the NSAB would be suspended during this meeting to facilitate discussion of the proposed DWR stormwater rule re-adoptions.

John Huisman (DWR) began the discussion by informing the group that DWR would be presenting proposed nutrient rule revisions during the May 19th stakeholder meeting, which is part of the informal re-adoption process. However, there would be further opportunities for stakeholders to comment during the next year during the formal re-adoption process.

Nonpoint source pollution (NPS) nutrient rule revisions generally involved: updating rules content with actions taken (particularly with Neuse & Tar-Pam), incorporating SL changes, clarifying/

removing language regarding actual implementation elements, and addressing stakeholder concerns raised. John conducted an overview PowerPoint presentation of DWR's proposed stormwater rule revisions for Existing Development (ED), New Development (ND), and State/Federal. After a short break, John continued a PowerPoint presentation of DWR's other proposed nutrient rule revisions, including the strategy goals, Trading/Nutrient Offset, Wastewater, Agriculture & Fertilizer Management, and Strategy Definitions.

After each group of rule revisions was presented Andy then opened up the group discussion, which took the form of a question & answer period, in which John fielded the following questions/comments. Several of the comments and questions require additional follow-up by staff and will be considered as public comments on the proposed rule revisions are reviewed and future revisions to address comments are made. Key questions and comments made by NSAB members included the following:

Existing Development Stormwater

Q: In Falls DWR has proposed a revised timeline for local governments submitting their Stage I local programs but has not addressed how this revised timeline affects Stage 1 implementation and the short time left between Stage I and Stage 2 implementation. Suggestion was made that DWR consider adjusting timelines accordingly.

A: Staff recognizes the implementation timelines for ED need further attention and have requested stakeholders to provide comments on the implementation timelines for Falls Stage I and Stage II. The current rule revisions recognize changes in timelines as a result of the continued work on the BMP toolbox, but input is requested on how this may impact a reasonable timeline for the start of Stage II.

Q: Rule language in Jordan ED Rules that refers to offsets "in perpetuity" is not as clear as language in original rule.

A: The intention was to clarify the duration of nutrient offsets. Staff will look into the proposed language and clarify as needed.

New Development Stormwater

Q: Why maintain onsite treatment requirement when LG's have desired to implement regional BMP's?

A: Regional BMP's are still an option, but site-specific requirements must still be maintained in the rule. Staff plans to look at adding additional rule language to the New Development Rule that would make provisions for allowing qualifying municipal regional BMPs as an option while preserving the onsite reduction requirements for non-regional BMP projects

Q: Why was the one BMP minimum included in the Neuse & Tar-Pam New Development Rules?

A: To avoid creating nutrient hotspots. Also management strategies for Neuse and Tar-Pam currently have significantly lower onsite nutrient treatment requirements than in Falls and Jordan watersheds.

Q: By changing nutrient offsets to be perpetual in nature are you converting them from a unit rate to a bulk rate.

A: Yes, because the pounds of reduction are tied to a unit of time and nutrient offsets would be measured in terms of pounds offset per acre per year.

Q: Clarification requested regarding how DWR will address treating stormwater on redevelopment projects (only getting reductions from the net increase in BUA) and how it may affect existing development requirements.
A: NPS staff will look into clarifying the redevelopment rule requirements language and evaluate it for any possible unintended consequences.

Q: In the redevelopment requirement, suggest changing 'improvement' to 'product'.
A: NPS staff will look into this.

Q: How will DWR enforce BMP maintenance and financial assurance requirements if a developer sells land to another developer?
A: Current language in the model programs requires BMP maintenance agreements. The Legal financial assurance requirements added in the rule text revisions are simply meant to ensure that the financial backing is there to ensure a BMP can be repaired or replaced in the future to continue achieving the intended nutrient reductions for the stated duration. However, NPS staff will check these provisions.

Q: If DWR plans to add additional local governments to the Neuse and Tar-Pam New Development Rule the Division should notify the local governments directly and include language in the rule text that lays out the timeline for these newly subject entities to develop and submit local programs to begin implementing the requirements of the rule.
A: Good suggestion. Staff will look to revise the rule language accordingly.

Q: Comment was made that all local governments in the Neuse and Tar-Pam basins should be subject to the requirements of the rule.
A: Staff explained that the decision to add local governments was based on criteria that looked at overall population growth, location in the basin relative to a waterbody, and whether or not they implement Stage II or post construction Stage II stormwater requirements.

Goals Rule

The primary concerns expressed during the discussion about proposed revisions to the Falls and Jordan Goals rules were associated with allowable load numbers being removed from both rules. The following questions and comments listed below directly relate to this concern. NPS staff agreed to consider each of these concerns.

- Has DWR considered the implications of removing load numbers from an EPA perspective?

- Removing load numbers from the rules changes LG load allocations and is problematic. How does the removal of allowable loads translate to the requirements under the Existing Development and New Development rule requirements? Does it make sense to change the baseline loads?

- Is there a way to implement this requirement outside of the rulemaking process?

- A TMDL is already approved for Jordan Lake. New modelling creates moving targets.

- DWR should consider setting a new baseline year with reductions relative to this more current year.

- DWR should leave the allowable load values in rule and include a provision or process of updating the allowable loads that does not involve rulemaking, such as referencing updated allowable loads in the Basinwide Plans.

Trading & Nutrient Offsets

Q: DWR should consider allowing LG's to get credit for fixing illegal discharges otherwise local governments have no incentive to make these types of repairs a priority.
A: NPS staff will consider this.

Q: Concern expressed that private banks may oppose LG's receiving nutrient crediting for doing stream restoration projects.
A: Concern noted.

Q: Comment was raised about how the rule makes the distinction between trading and nutrient offset in the definitions in the Rule. The interpretation of session law concluding that nutrient offset banks are not considered compensatory mitigation projects. This Division interpretation should be made available or referenced in the rule to avoid confusion in the future.
A: Staff will consider this suggestion.

Q: The definition of trading includes a reference to "sale" or "selling" of credits. It is problematic if trading requires that there must be a sale. In some cases local governments would perform trades through intergovernmental agreement that do not involve a financial transaction or "sale".
A: Staff will look into this.

Wastewater

Q: Comment was made that the updates to the Wastewater Rules should try to capture as much history as possible since treatment plants have made significant investments in treatment technology that should be recognized.
A: Comment noted and will be shared with DWR's NPDES staff working on wastewater rule revisions.

Q: Is DWR proposing to change trading rule to allow trading between point and nonpoint sources? That is preferable.
A: NPS staff will talk with DWR wastewater staff to further discuss the idea of nonpoint to point source trades.

Agriculture

Q: Why was WOC given approval authority instead of DWR for approval of trading from Agriculture?
A: DWR relies on the WOC for technical input regarding credits for agriculture practices. The rules charge the WOC for developing the criteria for trades and to submit a program to DWR for approval. Follow up comment from NC Farm Bureau stated that the agriculture community is not philosophically opposed to trading. Ag concern is that if 'low-hanging' fruit gets traded away, agriculture won't be able to meet its nutrient reduction requirements.

Q: The revised language in the purpose section of the rule needs to be clarified. If the intention is to require agriculture to adjust the baseline each year the language should clearly state that.
A: Staff will look into clarifying the proposed rule text.

Definitions Rule

Q: Recommend including a definition for "development". The current rules define existing development and "new development".
A: Staff will review the current definitions to determine to asses if further definition is needed.

General Questions & Comments

Q: How much input will EPA have on proposed Rule Revisions associated with TMDLs and EPA-approved nutrient management strategies?
A: Staff are currently looking into this. John will be meeting with Cam Mcnutt (DWR Modelling Unit) to discuss this issue next week and will report back to group with more information.

Q: Concern raised about NPS staff changing Session Law requirements during Rule Revisions.
A: Neither NPS staff nor anyone else can change Session Law requirements. Staff will plan to review all proposed rule changes to ensure they do not conflict with any requirements established through Session Law.

Q: Concern about implications of revised riparian buffer rules on sewer easements.
A: Concern noted.

Wrap Up

An NSAB Board member stated that the EMC will assign hearing officers at stakeholder meetings and public comments will be included as a part of the public record. John concluded the discussion by reminding the group that the Nutrient Rule Revisions are currently in the informal stage and there will still be plenty of additional opportunities for stakeholder comment during the formal process.

Future Meeting Dates

- Future meeting dates were not discussed. NPS staff will follow up with the group.