

CHESAPEAKE BAY and WATER RESOURCES POLICY COMMITTEE
777 North Capitol Street, N.E.
Washington, D.C. 20002

MINUTES OF January 18, 2013 MEETING

ATTENDANCE:

Members and alternates:

Chair Penny Gross, Fairfax County
Bruce Williams, City of Takoma Park
Shelley Aloi, City of Frederick (by phone)
Meo Curtis, Montgomery County
Jerry Maldonado, Prince George's County
Karen Pallansch, Alexandria Renew Enterprises
JL Hearn, WSSC
Andrew Fellows, City of College Park
Cathy Drzyzgula, City of Gaithersburg
J Davis, City of Greenbelt
Libby Garvey, Arlington County
Shannon Moore, Frederick County
Tim Lovain, Alexandria
Tim Stevens, City of Falls Church
Allan Rowley, Arlington County
Martin Nohe, Prince William County

COG Staff:

Chuck Bean, Executive Director
Stuart Freudberg, DEP Director
Heidi Bonnaffon, DEP
Karl Berger, DEP
Steve Bieber, DEP
Tanya Spano, DEP

Visitors:

Jack Frye, Chesapeake Bay Commission
Lisa Ochsenhirt, Aqualaw
Kate Bennett, Fairfax County
Fred Rose, Fairfax County

1. Introductions and Announcements

Chair Gross called the meeting to order at approximately 9:00 a.m. She announced that Mr. Karimi and Ms. Aloi had agreed to serve as vice chairs for the District of Columbia and Maryland, respectively, in 2013 – pending their appointment by the COG Board Chair.

She also introduced Chuck Bean, COG's new executive director, who introduced himself to committee members.

2. Approval of Meeting Summary for November 16, 2012

Members approved the draft summary of the November 2012 meeting.

3. Review of COG Board Policy Briefs

Mr. Berger noted that the COG Board at its January meeting had approved a series of legislative priorities for 2013, including one on water quality protection. He briefly reviewed the text, which was developed in consultation with the committee chair, and provides specific requests of federal and state governments.

Mr. Bean briefly noted COG plans for legislative advocacy during the current general assembly sessions in Maryland and Virginia. He provided an overview of the policy briefs from other sectors and how COG's Board plans to strategize around these briefs.

4. Achieving Regulatory Flexibility in Permitting

Ms. Ochsenhirt, an attorney with Aqualaw LLC, discussed how local governments can seek more regulatory flexibility in negotiating their water quality permits, particularly their MS4 permits for stormwater, for which state and federal permitting agencies are seeking greater commitments from local governments. In addition, EPA is conducting more audits of stormwater permittees and levying fines for noncompliance. She noted the example of Huntingdon, W. Va., and relatively small city that was just fined \$156,000 for violations of its stormwater permit.

There are three main mechanisms for achieving stormwater permitting flexibility, according to Ms. Ochsenhirt. The first is to emphasize the “maximum extent practicable (MEP)” clause in permits, which can be used to take into account specific local concerns, such as how fast projects can be implemented or the ability to finance. She noted some permittees have developed their own program conditions based on MEP and it’s important to do this as early in the permit cycle as possible (ideally, at time of permit renewal application), and to document which actions you are able to take. Ms. Ochsenhirt said Frederick County has provided a good example of how to document a program based on MEP considerations.

The second method of obtaining permit flexibility is through a variance, according to Ms. Ochsenhirt. Permitting agencies can grant temporary exception to permit requirements based upon widespread social-economic impacts, under certain conditions. However, an appeal for variance must be made before the end of the comment period for the draft permit.

Lastly, permitting authorities can adjust an implementation schedule under certain extenuating circumstances. She noted that implementation schedule adjustments have often been used in the wastewater arena, for example, in the schedule for certain plants to achieve their enhanced nutrient reduction limits for nitrogen in Maryland.

Discussion: Ms. Gross noted that there is inconsistency in what is expected in local governments. Fairfax County, she said, is trying to do what it is supposed to do, but there’s no guarantee that this won’t change next year and the county will be asked to do something different. Ms. Ochsenhirt said that permit conditions are the same as contract provisions and should not be aspirational in nature.

Mr. Fellows stated that it is not good to have to pay fines, but, on the other hand, society needs to address water quality issues, and it is not a viable position for local governments to do nothing. In regard to fines, Ms. Gross said it would be good if EPA allowed the money being collected from jurisdictions to be used in the specific area where the water quality violation occurred.

Ms. Gross asked Mr. Fellows, who attended a recent meeting on affordability between representatives of the U.S. Conference of Mayors and EPA officials, to brief the committee. Mr. Fellows said the mayors expressed a lot of anger and frustration over what they described as the lack of flexibility and high costs of EPA’s water-based regulations, particularly for so-called combined sewer overflows or CSOs. However, he noted, he has not observed the same level of anger and frustration in the Washington region. Mr. Fellows also noted that the mayors expressed concern with EPA’s use of a two-percent median household income threshold as a measure of affordability because of the wide variation in income levels in their jurisdictions. The elected officials also want EPA to understand that local government face many other mandatory costs other than the ones imposed by EPA.

Ms. Gross said she was unable to attend the meeting as a representative of the National Association of Counties, but CBPC member Shannon Moore of Frederick County did so and supplied information on the extent of the costs facing local governments as a result of the Chesapeake Bay TMDL. She, too, noted that EPA fails to take into account the overall financial pressures facing local governments.

Ms. Garvey asked if Congress has a role to play on this issue. In response Mr. Freudberg, who also attended the

Conference of Mayors-EPA meeting, noted that EPA's flexibility on the affordability issue is limited by the language of the Clean Water Act (CWA). For this reason he said, some observers believe the problem can be resolved only by amending the CWA.

Mr. Fellows noted that EPA Deputy Administrator Bob Perciasepe said at the meeting that more use of green infrastructure techniques to manage stormwater could reduce the burden of stormwater costs facing local governments.

In conclusion, Ms. Gross asked for the sense of the committee on a recommendation that COG continue to work with the Conference of Mayors and other groups on this issue. The committee concurred.

5. Update on Accotink Creek Litigation

Ms. Bennett briefed the committee on a decision by a U.S. District Court January 3, which found that EPA exceeded its authority in trying to regulate stormwater as a pollutant. The suit was brought by Fairfax County and the Virginia Department of Transportation in response to a flow-based TMDL that EPA issued for the Accotink Creek watershed in the county. The court said that while sediment is a pollutant, flow is not and could not be used as a surrogate. This was EPA's first attempt at issuing a flow based TMDL in Region 3 and its fourth attempt nationwide. In their court filings the plaintiffs claimed that the flow-based TMDL would have cost Fairfax County more than \$150 Million and VDOT more than \$70 Million. Ms. Bennett said that EPA has 60 days to appeal the Court's decision.

Discussion: Ms. Gross noted that the case was decided on the narrow grounds of whether EPA could regulate flow as a pollutant, not on the overall merits of TMDL-based regulations. She said the county expects EPA to establish a more typical sediment-based TMDL in the watershed and is prepared to spend money on restoration efforts.

6. Update on State Legislation

Mr. Frye, Chesapeake Bay Commission, provided an overview of water quality-related legislation being proposed in the current Virginia and Maryland general assembly sessions. He discussed several bills in particular. COG staff has since tracked these bills by and provided updates the respective CBPC members in each state. (See the *COG staff summary of status of 2013 Virginia General Assembly legislation, budget proposals addressing Chesapeake Bay restoration issues (1/28/13)* and *COG staff summary of status of 2013 Maryland General Assembly legislation addressing Chesapeake Bay restoration issues (2/15/13)* at:

http://www.mwcog.org/calendar/detail.asp?EVENT_ID=8223&MONTH_CHOICE=3&DAY_CHOICE=22&YEAR_CHOICE=2013

7. Meeting Schedule and Committee Focus for 2013

Members approved the proposed 2013 meeting schedule and list of priority topics recommended by staff. Ms. Gross noted that there two departures from the normal practice of the committee: moving the March meeting date to March 22, one week later than usual, and scheduling the July meeting day for July 24 as a joint meeting with COG's Climate, Energy and Environment Policy Committee (CEEPC).

8. New Business

COG staff provided updates on Chesapeake Bay Program developments and other water resources issues in the form of handouts. The members did not have questions or comments.

9. Adjourn

The committee will meet next on March 22, one week later than usual.

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