

Sediment and Stormwater Regulatory Advisory Committee
 Meeting Notes, Page 1
 2/22/17 Tidewater Utilities

RAC Members in attendance:

| SAN 2015 | | |
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| First | Last | Affiliation |
| Dirk | Durstein | Dept. of Justice |
| Doug | Hokuf | New Castle County |
| Connie | Holland | Office of State Planning Coordination |
| Frank | Kea | Secretary Designee - Land Development Consultant |
| Sarah | Keifer | Kent County |
| Lew | Killmer | League of Local Governments |
| Phil | McGinnis | Delaware Association of Realtors |
| Hans | Medlarz | Sussex County |
| Paul | Morrill | Committee of 100 |
| Michael | Riemann | Homebuilders Assn of Delaware |
| Kristen | Travers | Delaware Nature Society |
| Jessica | Watson | Delaware Assn of Conservation Districts |

Interested Parties in attendance:

| SAN 2015 | | |
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| First | Last | Affiliation |
| Jared | Adkins | Kent Conservation District |
| Zac | Crouch | Davis, Bowen & Friedel, Inc. |
| Vince | Davis | DelDOT |
| Ralph | Downard | Duffield Associates |
| Mike | Falkowski | New Castle County Dept of Land Use |
| Sally | Ford | Land Design Inc. |
| Pat | Gleason | EPA |
| Ben | Gordy | representing Preston Schell |
| Kitty | Holtz | Delaware Farm Bureau |
| Scott | Kidner | WRA |
| Stacy | McNatt | New Castle County Special Services |
| Amy | Reed | Landmark Science & Engineering |
| Mark | Strickland | Century Engineering |

Staff Members in attendance:

| SAN 2015 | | |
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| First | Last | Affiliation |
| David | Athey | AECOM |
| Randy | Greer | DNREC |
| Robert | Palmer | DNREC |
| Jamie | Rutherford | DNREC |
| David | Small | DNREC Secretary |
| Elaine | Webb | DNREC |
| Stephen | Wright | DNREC |

The meeting was called to order at 9:06 am by Acting Director Bob Palmer who then provided an Offset Subcommittee update. There will be follow-up for this subcommittee when the principal planner position vacated by Jennifer Walls is filled. That person will be moving forward with the Offset / Nutrient Trading topic.

Secretary David Small was in attendance and thanked the RAC for the time invested into this process over the past couple of years. He appreciates how all members can come together and speak candidly about the issues. It remains to be seen how water quality objectives will be met. He is hopeful that the RAC will get to the point where amended regulations can be taken through the public process.

The agenda of the meeting was modified to cover the standard plan for minor linear disturbances next. Randy Greer reviewed the proposal that had been emailed out prior to the meeting to the RAC and interested parties. Following a question about impervious cover limits for disturbances of less than one acre, the RAC members in attendance concurred on a modified standard plan for minor linear disturbances to delete applicability item 2.b.ii. No new impervious surfaces will be created as part of the construction.

Randy Greer provided an update on the Technical Subcommittee, which has come to concurrence on the wet pond specification but is still in discussions on afforestation and soil investigation procedures. Jared Adkins provided an update on the ad hoc committee's work on the infiltration portion of the soil investigation specification. The ad hoc group committed to distributing their proposal to the Technical Subcommittee by the end of the day 2/22/17 for review by the Technical Subcommittee at the scheduled 3/8/17 meeting.

Sally Ford questioned if setbacks from wells and septic systems have been addressed in the standards and specifications. DNREC staff has met internally with the on-site and water supply section and plan to develop a separate appendix in the Standards and Specifications to address setbacks for all BMPs. If the

setbacks cannot be met on a small site, alternative methods to comply would need to be addressed through either the on-site or water supply sections' methods.

The path forward for publication of the Standards and Specifications was a lengthy discussion. Three proposals were discussed:

Proposal #1: Adopt the Standards and Specifications by reference in the regulation. Within the Standards and Specifications, required elements would be presented in bold font while non-regulatory elements (guidance) would be provided in normal typeface.

Proposal #2: Adopt only the required (bold) elements of the Standards and Specifications by reference in the regulations. Provide a separate full document (bold and non-bold together) as guidance maintained on the DNREC website.

Proposal #3: Adopt the required (bold) elements directly into the regulatory language. Provide a separate full document (bold and non-bold together) as guidance maintained on the DNREC website.

Comments and ideas on the three proposals included the following:

- The bold sections of the Wet Pond specification is fairly clear but the bold font of the Afforestation specification is less clear without the non-bold text.
- The use of "should" and "may require" would sound like a requirement to the court. Due to the outcome of the Baker case we can no longer adopt technical guidance by reference.
- The minimum standards, which would be the bold elements in the proposals, are what the designers use and this stifles engineering practice.
- Flexibility and freedom in the design will increase plan review time and make for non-standard plans.
- Some states have an exception in their Administrative Procedures Act that does not require technical guidance to be included in those procedures. Delaware does not have this exception.
- Guidance is everywhere on stormwater BMPs. All you need to do is an internet search. Why do we need to provide additional guidance?
- What stops us from having a guidance document that is not published? The answer is the Baker decision, which says that is not allowable.
- All three proposals are legally defensible; the RAC needs to decide the best option for our purposes.
- We should follow DeIDOT's lead on adoption of standards.
- Convene the RAC annually to review and subsequently publish the top 5 projects of the previous year to use as design examples. This does not answer the concerns of the delegated agencies

and it is believed that other designers will not take the time to look at those designs. Time of design and plan review is a critical element.

- Publish a preamble to the regulations to bring clarity to what is regulatory and what is not.
- The bold vs. non-bold would need to be perfect because the court said that (1) the regulation needs to stand alone and (2) guidance cannot have any hidden requirements.
- Call guidance something else such as “acceptable design alternatives”

Proposal #3 was the consensus of the RAC for the path forward but more discussion ensued. It was questioned whether an amendment to Title 7 rather than the APA would allow the Technical Document to be published. It was stated that there is not likely to be legislative support to make changes to the APA nor Title 7, Chapter 40, even with a recommendation from the RAC. The proposal going forward that was concurred by the RAC is to amend Delaware Administrative Code 5101 Sediment and Stormwater Regulations to include required elements from the standards and specifications and to make available on the DNREC website a separate document containing both the required and recommended elements (bold and non-bold). This separate document will not be published in the Register of Regulations. The separate document will be reviewed annually by the RAC. If the annual review of the separate document results in changes to bold text, those changes must be made to regulatory language and follow full APA procedures. If the annual review of the separate document results in changes to non-bold text, those changes will be publicly noticed for a period of 30 days. If comments are made the comments will be addressed as necessary. If a public hearing is requested during the public notice period, public hearing procedures will be followed. A preamble will be written to describe the bold and un-bold. Legal counsel will determine if this preamble needs to be included in the regulations and/or separately as a disclaimer in the separate document.

The proposals discussed were only discussed in the context of the Standards and Specifications for Post Construction Stormwater BMPs but applies to other elements of the current Technical Document. The RAC concurred that the Delaware Erosion and Sediment Control Handbook would be adopted fully by reference in the regulations. The Handbook must be dated and referenced by that date. It was suggested that the Handbook be subjected to a 5-year review to coincide with Construction General Permit cycles. All other articles of the Technical Document were generally discussed for inclusion into the regulations. Staff will go through the articles and have something prepared for the next RAC meeting.

The timeline was discussed. To complete the regulations by October 2017 to go to publication in the State Register before the end of the calendar year, the Technical Subcommittee would need to meet every two weeks and cover 2-3 specifications per meeting. It was suggested that prior to covering these specifications that staff would take the first cut at pulling out the required elements and bolding them so that discussion could focus only on those elements. All of the documents would still be open for discussion.

The next RAC meeting will be tentatively scheduled for Wednesday, April 19, 2017. It will be held in the afternoon so that the RAC meeting does not conflict with the WIAC meeting in the morning. Following no public comment, the meeting concluded at approximately 11:10am.