

Resource Management Plan Regulations: Proposed Stage Action

Virginia Soil and Water Conservation Board

March 29, 2012 Meeting

Patrick Henry Building, West Reading Room

Richmond, Virginia

(by David Dowling, Policy and Planning Director)

Introductory Remarks and Overview

Before you today for consideration and action is a proposed stage regulatory action advancing for the Board's consideration new Resource Management Plan regulations. (Version dated Monday, March 19, 2012)

Before explaining the background and specifics regarding the action before the Board today, I wanted to take a minute and explain the status of the regulations before you. The regulations being recommended to you are proposed regulations and not final (See distributed Administrative Process Flowchart – last page - 21). The action before the Board is to allow us to advance this regulation into the formal stages of the regulatory process and to broaden continuing participation. With the Board's favorable consideration of the regulations at today's meeting, this regulation will only be at the mid-way point of a process that will involve additional public comment opportunities as it advances. The Department will be authorized to conduct an economic analysis of the regulations working with the Department of Planning and Budget and following this step, the proposed regulation will be published in the Virginia Register of Regulations and open for a 60-day public comment period. A public hearing will also be held during the comment period. At the conclusion of the comment period, DCR will analyze the comments received, prepare a comment summary/response, develop a final regulation, confer with the Administration, and perhaps hold an additional meeting(s) of the RAP. We are expecting to advance a recommended final regulation to Board in mid-November with supporting documentation for consideration at your December meeting. So again, this is not a final determination today, it is to advance a solid draft of the regulation formally into the public regulatory process so that the Board and Department may benefit from expanded public review and recommendations regarding this important regulation.

From a background perspective on this action, Chapter 781 of the 2011 Virginia Acts of Assembly (HB1830) authorized the Virginia Soil and Water Conservation Board to establish regulations that would specify the criteria to be included in a resource management plan. The concept was to encourage farm owners and operators to voluntarily implement a high level of BMPs on their farmlands in order to be protective of water quality and for them to then benefit from the following legal provision stating that "notwithstanding any other provision of law, agricultural landowners or operators who fully implement and maintain the applicable components of their resource management plan, in accordance with the criteria for such plans set out in § 10.1-104.[8] and any regulations adopted thereunder, shall be deemed to be in full compliance with (i) any load allocation contained in a total maximum daily load (TMDL) established under § 303(d) of the federal Clean Water Act addressing benthic, bacteria, nutrient, or sediment impairments; (ii) any requirements of the Virginia Chesapeake Bay TMDL Watershed Implementation Plan; and (iii) applicable state water quality requirements for nutrients and sediment". The law continued with the following additional provisions that "[t]he presumption of full compliance provided in subsection A shall not prevent or preclude enforcement of provisions pursuant to (i) a resource management plan or a nutrient management plan otherwise required by law for such operation, (ii) a Virginia Pollutant Discharge Elimination System permit, (iii) a Virginia Pollution Abatement permit, or (iv) requirements of the Chesapeake Bay Preservation Act (§ 10.1-2100 et seq.)".

Based on this legislative direction, on March 10, 2011, the Virginia Soil and Water Conservation Board authorized the Department to develop the Resource Management Plan regulations and as part of the regulation

development process, the Board further directed the establishment of a stakeholder group to make recommendations to the Director and the Board on the contents of the proposed regulations. Pursuant to the law, the Board stipulated that the stakeholder group shall include representation from agricultural and environmental interests as well as Soil and Water Conservation Districts and the regulations shall be developed in consultation with the Department of Agriculture and Consumer Services and the Department of Environmental Quality

In accordance with the Board's direction, a nineteen member RAP (See attached list, 2nd to last page – page 20) composed of stakeholder organizations within the agricultural and environmental community, representatives from the Soil and Water Conservation Districts and the Association, as well as those with technical expertise in agricultural planning was assembled. The RAP and the Department were provided technical support from Natural Resources Conservation Service, Farm Service Agency, Virginia Tech, Virginia Department of Agriculture and Consumer Services, Virginia Department of Forestry, and the Virginia Department of Environmental Quality. I also do want to extend our thanks to the RAP members, to our state and federal partners, as well as to our DCR staff, for their assistance with this process, it has been greatly appreciated.

Between June 29, 2011, and February 14, 2012; the RAP held five meetings, and the RAP's three subcommittees met a total of six times. Additionally, two of the subcommittees held a joint meeting. The RAP was charged with helping to develop a set of regulations that would meet the following overarching guidelines:

- Must be protective of water quality
- Must be simple so it doesn't deter operators from participating
- Must be technically achievable
- Must take into consideration the economic impact to the agricultural landowner or operator

The proposed regulations before you today reflect the detailed discussions of the RAP and do set out a balanced process by which farmers may voluntarily implement a high level of BMPs that are protective of water quality and that may be applied towards necessary nutrient and sediment reductions associated with the Chesapeake Bay Watershed Implementation Plan and other TMDLs. As part of the draft Phase II Virginia Chesapeake Bay TMDL Watershed Implementation Plan it is noted "that the implementation of Resource Management Plans and voluntary data collection at the local level will significantly advance the agriculture strategies offered by local governments and SWCDs".

As you will note in the presentation, key elements of the regulations include:

- Establishment of minimum standards of a resources management plan;
- Processes for the development and approval of a resource management plan;
- Processes to ensure the implementation of a resource management plan and for issuance of a Certificate of Resource Management Plan Implementation;
- Processes associated with conducting inspections and ensuring RMP compliance after Certificate issuance; and
- Procedures for the review of duties performed by soil and water conservation districts.

This regulatory action is very important to the Department and the Administration, and we believe that the recommended regulations represent a well balanced program that will be utilized by and beneficial to the farm community and address Virginia's water quality objectives.

Legal Framework for Action

Chapter 781 of the 2011 Virginia Acts of Assembly (HB1830) authorized the Virginia Soil and Water Conservation Board to establish regulations that would specify the criteria to be included in a resource

management plan and sets out the regulatory process by which they shall be promulgated. The proposed regulations meet the intent of § 10.1-104.7 and remain true to the regulatory criteria framework set out in § 10.1-104.8. The regulatory process we are following is in accordance with § 10.1-104.9.

ARTICLE 1.1: Resource Management Plans (§ 10.1-104.7 et seq.)

§ 10.1-104.7. Resource management plans; effect of implementation; exclusions.

A. Notwithstanding any other provision of law, agricultural landowners or operators who fully implement and maintain the applicable components of their resource management plan, in accordance with the criteria for such plans set out in § 10.1-104.8 and any regulations adopted thereunder, shall be deemed to be in full compliance with (i) any load allocation contained in a total maximum daily load (TMDL) established under § 303(d) of the federal Clean Water Act addressing benthic, bacteria, nutrient, or sediment impairments; (ii) any requirements of the Virginia Chesapeake Bay TMDL Watershed Implementation Plan; and (iii) applicable state water quality requirements for nutrients and sediment.

B. The presumption of full compliance provided in subsection A shall not prevent or preclude enforcement of provisions pursuant to (i) a resource management plan or a nutrient management plan otherwise required by law for such operation, (ii) a Virginia Pollutant Discharge Elimination System permit, (iii) a Virginia Pollution Abatement permit, or (iv) requirements of the Chesapeake Bay Preservation Act (§ 10.1-2100 et seq.).

C. Landowners or operators who implement and maintain a resource management plan in accordance with this article shall be eligible for matching grants for agricultural best management practices provided through the Virginia Agricultural Best Management Practices Cost-Share Program administered by the Department in accordance with program eligibility rules and requirements. Such landowners and operators may also be eligible for state tax credits in accordance with §§ 58.1-339.3 and 58.1-439.5.

D. Nothing in this article shall be construed to limit, modify, impair, or supersede the authority granted to the Commissioner of Agriculture and Consumer Services pursuant to Chapter 4 (§ 3.2-400 et seq.) of Title 3.2.

E. Any personal or proprietary information collected pursuant to this article shall be exempt from the Virginia Freedom of Information Act (§ 2.2-3700 et seq.), except that the Director may release information that has been transformed into a statistical or aggregate form that does not allow identification of the persons who supplied, or are the subject of, particular information. This subsection shall not preclude the application of the Virginia Freedom of Information Act (§ 2.2-3700 et seq.) in all other instances of federal or state regulatory actions.

§ 10.1-104.8. Resource management plans; criteria.

A. The Soil and Water Conservation Board shall by regulation, and in consultation with the Department of Agriculture and Consumer Services and the Department of Environmental Quality, specify the criteria to be included in a resource management plan.

B. The regulations shall:

1. Be technically achievable and take into consideration the economic impact to the agricultural landowner or operator;

2. Include (i) determinations of persons qualified to develop resource management plans and to perform on-farm best management practice assessments; (ii) plan approval or review procedures if determined necessary; (iii) allowable implementation timelines and schedules; (iv) determinations of the effective life of the resource management plans taking into consideration a change in or a transfer of the ownership or operation of the agricultural land, a material change in the agricultural operations, issuance of a new or modified total maximum daily load (TMDL) implementation plan for the Chesapeake Bay or other local total maximum daily load water quality requirements, and a determination pursuant to

Chapter 4 (§ 3.2-400 et seq.) of Title 3.2 that an agricultural activity on the land is creating or will create pollution; (v) factors that necessitate renewal or new plan development; and (vi) a means to determine full implementation and compliance with the plans including reporting and verification;

3. Provide for a process by which an on-farm assessment of all reportable best management practices currently in place, whether as part of a cost-share program or through voluntary implementation, shall be conducted to determine their adequacy in achieving needed on-farm nutrient, sediment, and bacteria reductions;

4. Include agricultural best management practices sufficient to implement the Virginia Chesapeake Bay TMDL Watershed Implementation Plan and other local total maximum daily load water quality requirements of the Commonwealth; and

5. Specify that the required components of each resource management plan shall be based upon an individual on-farm assessment. Such components shall comply with on-farm water quality objectives as set forth in subdivision B 4, including best management practices identified in this subdivision and any other best management practices approved by the Board or identified in the Chesapeake Bay Watershed Model or the Virginia Chesapeake Bay TMDL Watershed Implementation Plan.

a. For all cropland or specialty crops such components shall include the following, as needed and based upon an individual on-farm assessment:

(1) A nutrient management plan that meets the nutrient management specifications developed by the Department;

(2) A forest or grass buffer between cropland and perennial streams of sufficient width to meet water quality objectives and consistent with Natural Resources Conservation Service standards and specifications;

(3) A soil conservation plan that achieves a maximum soil loss rate of "T," as defined by the Natural Resources Conservation Service; and

(4) Cover crops meeting best management practice specifications as determined by the Natural Resources Conservation Service or the Virginia Agricultural Best Management Practices Cost-Share Program.

b. For all hayland, such components shall include the following, as needed and based upon an individual on-farm assessment:

(1) A nutrient management plan that meets the nutrient management specifications developed by the Department;

(2) A forest or grass buffer between cropland and perennial streams of sufficient width to meet water quality objectives and consistent with Natural Resources Conservation Service standards and specifications; and

(3) A soil conservation plan that achieves a maximum soil loss rate of "T," as defined by the Natural Resources Conservation Service.

c. For all pasture, such components shall include the following, as needed and based upon an individual on-farm assessment:

(1) A nutrient management plan that meets the nutrient management specifications developed by the Department;

(2) A system that limits or prevents livestock access to perennial streams; and

(3) A pasture management plan or soil conservation plan that achieves a maximum soil loss rate of "T," as defined by the Natural Resources Conservation Service.

§ 10.1-104.9. Regulations under this article.

Regulations adopted by the Board for the enforcement of this article shall be subject to the requirements set out in §§ 2.2-4007.03, 2.2-4007.04, 2.2-4007.05, and 2.2-4026 through 2.2-4030 of the Administrative Process Act (§ 2.2-4000 et seq.), and shall be published in the Virginia Register of Regulations. The Board shall convene a stakeholder group to assist in development of these regulations, with representation from agricultural and environmental interests as well as Soil and Water

Conservation Districts. All other provisions of the Administrative Process Act shall not apply to the adoption of any regulation pursuant to this article. After the close of the 60-day comment period, the Board may adopt a final regulation, with or without changes. Such regulation shall become effective 15 days after publication in the Virginia Register of Regulations, unless the Board has withdrawn or suspended the regulation or a later date has been set by the Board. The Board shall also hold at least one public hearing on the proposed regulation during the 60-day comment period. The notice for such public hearing shall include the date, time, and place of the hearing.

Board Direction and Action Items

In its motion of March 10, 2011, the Board authorized and directed the development of the Resource Management Plan Regulations. Specifically, the Board noted the following:

In accordance with HB1830 of the 2011 General Assembly Session, the Board authorizes the Director of the Department of Conservation and Recreation and the Departmental Regulatory Coordinator to develop proposed Agricultural Resource Management Plan Regulations for the Board's consideration.

The regulations shall at a minimum:

1. Be technically achievable and take into consideration the economic impact to the agricultural landowner or operator;
2. Include (i) determinations of persons qualified to develop resource management plans and to perform on-farm best management practice assessments; (ii) plan approval or review procedures if determined necessary; (iii) allowable implementation timelines and schedules; (iv) determinations of the effective life of the resource management plans taking into consideration a change in or a transfer of the ownership or operation of the agricultural land, a material change in the agricultural operations, issuance of a new or modified total maximum daily load (TMDL) implementation plan for the Chesapeake Bay or other local total maximum daily load water quality requirements, and a determination pursuant to Chapter 4 (§ 3.2-400 et seq.) of Title 3.2 that an agricultural activity on the land is creating or will create pollution; (v) factors that necessitate renewal or new plan development; and (vi) a means to determine full implementation and compliance with the plans including reporting and verification;
3. Provide for a process by which an on-farm assessment of all reportable best management practices currently in place, whether as part of a cost-share program or through voluntary implementation, shall be conducted to determine their adequacy in achieving needed on-farm nutrient, sediment, and bacteria reductions;
4. Include agricultural best management practices sufficient to implement the Virginia Chesapeake Bay TMDL Watershed Implementation Plan and other local total maximum daily load water quality requirements of the Commonwealth; and
5. Specify that the required components of each resource management plan shall be based upon an individual on-farm assessment. Such components shall comply with on-farm water quality objectives as set forth in item 4 above, including best management practices set out in HB1830 and any other best management practices approved by the Board or identified in the Chesapeake Bay Watershed Model or the Virginia Chesapeake Bay TMDL Watershed Implementation Plan.

As part of the regulation development process, the Board directs that a stakeholder group shall be established to make recommendations to the Director and the Board on the contents of the proposed regulations. The stakeholder group shall include representation from agricultural and environmental interests as well as Soil and Water Conservation Districts and the regulations shall be developed in consultation with the Department of Agriculture and Consumer Services and the Department of Environmental Quality.

It is believed that the proposed regulations being recommended to the Board today fully meet the Board's direction.

Regulatory Action Process

Actions taken to date:

- **March 10, 2011**, the Board authorized and directed the development of the Resource Management Plan Regulations and establishment of a RAP.
- Regulatory Advisory Panel
A regulatory advisory panel (RAP) was assembled to assist the Department with the development of the proposed regulations. The RAP met on 5 occasions.
 - June 29, 2011**; West Reading Room, Patrick Henry Building
 - November 9, 2011**; VCU Rice Center, Charles City
 - December 16, 2011**; Virginia Farm Bureau Federation Office
 - January 3, 2012**; Virginia Farm Bureau Federation Office
 - February 14, 2012**; West Reading Room, Patrick Henry Building
- Three subcommittees which met individually or in joint session on 7 occasions were assembled to address the following key areas of the regulations:
 - Assessment – Who does it? What does it look like?
 - Plan development – Who writes it? What does it look like?
 - Compliance and auditing process – What makes it certifiable? Who does that?
- Plan Development Subcommittee
 - August 12, 2011**; Dept. of Environmental Quality Piedmont Regional Office
 - September 30, 2011**; Virginia Farm Bureau Federation Office
- Compliance Subcommittee
 - August 15, 2011**; Dept. of Environmental Quality Piedmont Regional Office
 - September 28, 2011**; Dept. of Environmental Quality Piedmont Regional Office
- Assessment Subcommittee
 - August 19, 2011**; Dept. of Environmental Quality Piedmont Regional Office
 - September 30, 2011**; Virginia Farm Bureau Federation Office
- Joint meeting of Assessment and Plan Development Subcommittees
 - September 30, 2011**; Virginia Farm Bureau Federation Office

Throughout this period multiple drafts were circulated and opportunities for comment by members provided. The regulation has also benefitted from the review of the Deputy Secretary of Natural Resources and the Deputy Secretary of Agriculture and Forestry.

Tentative Next Steps for advancing the RMP regulation:

- **March 29, 2012**, Virginia Soil and Water Conservation Board will consider a “**Motion to approve, authorize and direct the filing of proposed regulations**”.

- **April 2012** – Department will complete development of required regulatory forms and analyses and post to the Regulatory Town Hall by the end of April initiating DPB 45-day review. DPB will complete its economic analysis by mid June.
- **June 27, 2012**, Target for submittal of the proposed regulation to the Registrar by submittal deadline.
- **July 16, 2012 - September 14, 2012**, The proposed regulation would be published on July 16th in Volume 28: Issue 23 initiating a 60-day public comment period. At least one public hearing will be held during the comment period, likely in early August.
- **September 2012 – October 2012**, DCR will analyze comments received, prepare comment summary/response, develop final regulation, and confer with the Administration. Recommended final regulation is mailed to Board in mid-November with supporting documentation.
- **Early December 2012**, Virginia Soil and Water Conservation Board will consider a **“Motion to approve, authorize and direct the filing of a final regulation”**.
- **January 2013**, DCR will likely file a final exempt action for publication in the Virginia Register of Regulations (Target January 9th submittal, January 28th publication; Volume 29: Issue 11).
- **February 12, 2013**, “Such regulation shall become effective 15 days after publication in the Virginia Register of Regulations...”

Additional Actions associated with implementing the regulations:

Concurrent to the development of the regulations and following their final adoption, the Department of Conservation and Recreation will be developing necessary implementation and reporting forms, guidance, and initiating RMP developer certifications. DCR will also be working with the local Soil and Water Conservation Districts and the RMP developers to develop program outreach plans for farm operators and owners. Additionally, DCR will be working with the Districts on standardized RMP review and site inspection procedures as well as developing its RMP final certification review procedures and District program review methodologies. We also recognize the funding and workload challenges implementation of these regulations represent.

Interest expressed by EPA and USDA in this regulatory action

Both the EPA and the USDA have been in contact with the Agency regarding this regulatory action and have voiced their support for a program such as this as well as it serving as a model nationally. It is recognized that progress towards agricultural nutrient and sediment reductions is largely going to be dependent on voluntary actions; however, a program such as this may address “ag certainty”.

The EPA has also noted that “[t]his program has great potential for providing substantial incentives to farmers to implement high priority water quality conservation practices that will help the Commonwealth meet its commitments outlined in the Phase II Watershed Implementation Plan. We commend the TAC in its efforts to find the balance in a credible program that engages farmers in a positive way in the Bay restoration efforts.”

Resource Management Plan – Simplified Process Overview

Flowchart Cross-reference
(See next page)

1) Owner or Operator expresses interest in RMP process and contacts RMP developer

Step #1

2) RMP developer prepares (or updates) plan and certifies (4VAC-50-70-50)

Step #2

3) Owner of Operator certifies the RMP will be implemented (4VAC50-70-50) and submits for review (4VAC50-70-70)

Step #7

4) Review authority considers RMP (4VAC-50-70-70); District Technical Review Committee (TRC) review in 90 days

Steps #8 and #9

5) Review Authority Approves RMP

Step #13

6) Owner of operator implements RMP

Step #14

7) Owner or operator requests review authority verification of implementation (4VAC50-70-80)

Step #15

8) Review authority affirms adequacy and implementation of RMP (4VAC50-70-80)

Step #17

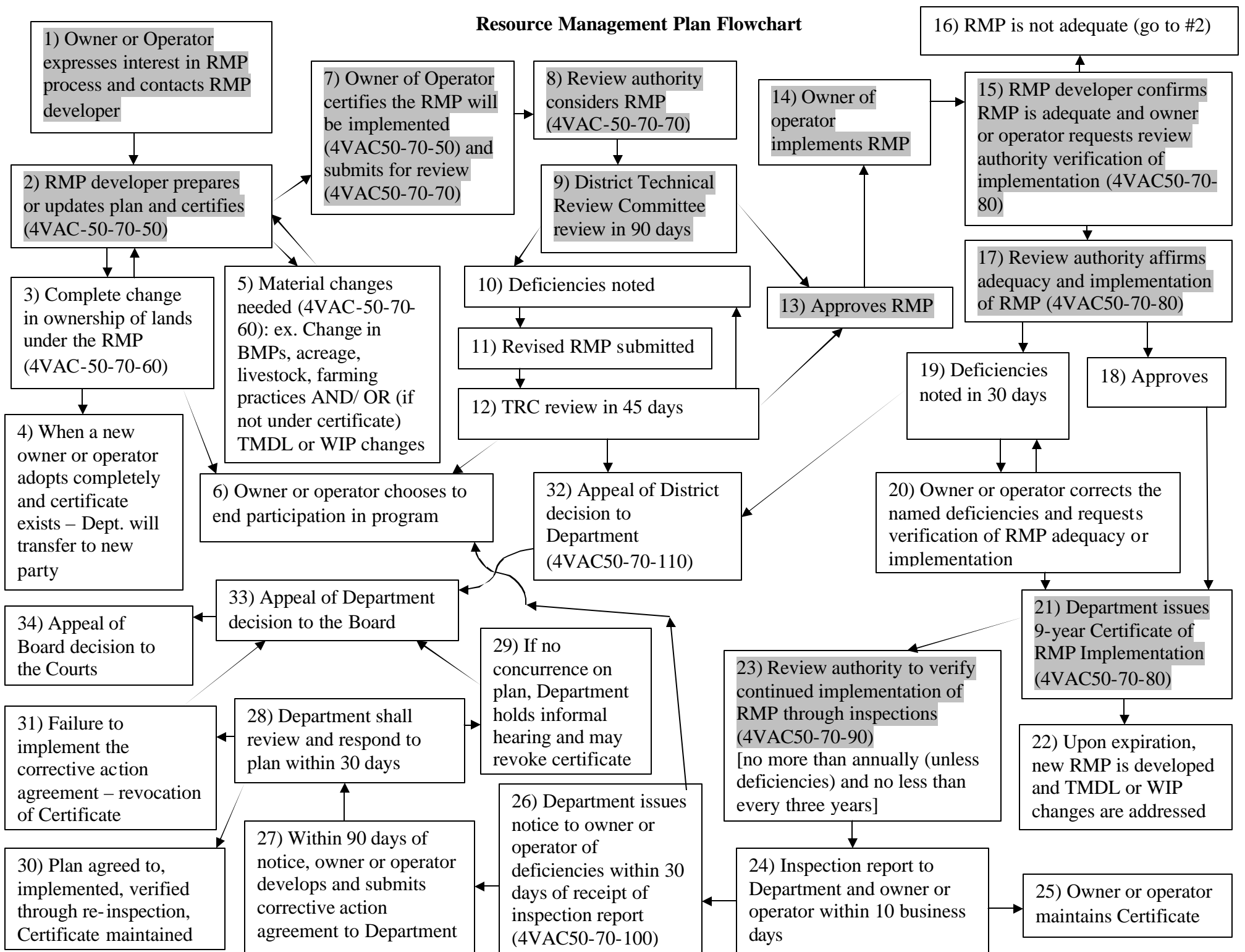
9) Department issues 9-year Certificate of RMP Implementation (4VAC50-70-80)

Step #21

10) Review authority verifies continued implementation of RMP through inspections (4VAC50-70-90) [no more than annually (unless deficiencies) and no less than every three years]

Step #23

Resource Management Plan Flowchart



Resource Management Plan Regulations: Proposed Stage Action – Key Elements

- Establishes a new section (4VAC50-70-10) that sets out **definitions** to be utilized within the new Chapter. These include “Assessment”, “Best management practice”, “Board”, “Corrective action agreement”, “Department”, “Management unit”, “NRCS”, “Operator”, “Owner”, “Person”, “Resource management plan”, “Review authority”, “RMP developer”, “Soil and water conservation district”, “Technical Review committee”, and “Total maximum daily load”.
- Establishes a new section (4VAC50-70-20) that outlines the **purpose and authority** for the chapter and specifies that “these regulations are adopted to clarify and specify the criteria that must be included in a resource management plan and the processes by which a Certificate of RMP Implementation is issued and maintained”.
- Establishes a new section (4VAC50-70-30) that stipulates the **applicability of other laws and regulations** and specifies that “[n]othing in this chapter shall be construed as limiting the applicability of other laws, regulations, or permits, including but not limited to, a Virginia Pollutant Discharge Elimination System Permit, a Virginia Pollution Abatement Permit, a nutrient management plan otherwise required by law, any requirements of the Chesapeake Bay Preservation Act, and any requirements of the Agricultural Stewardship Act”.
- Establishes a new section (4VAC50-70-40) that sets out the **minimum standards of a resources management plan**. Depending on land use and whether the BMP requirements are applicable to the management unit and needed based on an on-farm assessment, the following requirements will apply:
 - For all cropland or specialty crops:
 - A nutrient management plan;
 - A forest or grass buffer between cropland and perennial streams with a minimum width of 35 feet;
 - A soil conservation plan that achieves a maximum soil loss rate to “T”; and
 - Cover crops, when needed to address nutrient management and soil loss requirements.
 - For all hayland:
 - A nutrient management plan;
 - A forest or grass buffer between cropland and perennial streams with a minimum width of 35 feet; and
 - A soil conservation plan that achieves a maximum soil loss rate to “T”.
 - For all pasture:
 - A nutrient management plan;
 - A pasture management plan or soil conservation plan that achieves a maximum soil loss rate of “T”; and
 - A system that limits or prevents livestock access to perennial streams.
- Establishes a new section (4VAC50-70-50) regarding **components of a resource management plan** that outlines:
 - The information to be collected by the RMP developer when developing the RMP,
 - Specifies the components to be included in a resource management plan such as the BMPs that are necessary to achieve the minimum standards set out in 4VAC50-70-40 and a schedule for the implementation of those BMPs, and
 - Includes RMP developer and owner or operator certifications.
 - The RMP developers certify whether “the RMP is true and correct in their professional judgment”.

- The owner or operator attests that they are the “responsible individual to be implementing the RMP in its entirety” and “shall adhere to the RMP”.
 - The owner or operator is also allowing “the review authority to conduct inspections of properties within the management unit as needed to ensure the adequacy of the RMP in accordance with 4VAC50-70-70” and agreeing to contact the RMP developer regarding “potential material changes” and the review authority regarding “a complete change in owner or operator of the management unit(s) under a RMP”.
- Establishes a new section (4VAC50-70-60) that outlines processes associated with making **revisions to a resource management plan**
 - Upon notification of the RMP review authority of a change in owner or operator of the management unit with a signed RMP where it involves the complete transfer of one or more RMPs and any Certificate of RMP Implementation:
 - The review authority shall contact the new owner or operator within 60 days of the new owner or operator assuming control of the management unit regarding implementation of the RMP and any necessary revisions.
 - The new owner or operator, following consultation with the review authority may elect to:
 - Implement and maintain the provisions of the existing RMP;
 - Request a RMP developer revise the RMP; or
 - Choose not to continue implementing a RMP.
 - Upon notification of the RMP developer by the owner or operator with a signed RMP that changes in the management unit or implementation of the RMP may create needs for revision, the RMP developer shall review the RMP (within 30 days) to determine if material changes to the management unit require a revision of the RMP.
 - The section provides a listing of the material changes to the management unit that may require a revision of the RMP.
 - A RMP developer will determine if revision of the RMP is required.
 - When the RMP developer determines that revision of the existing RMP is not necessary, the RMP developer shall provide such determination to the requesting owner or operator in writing.
 - When the RMP developer determines that revision of the existing RMP is necessary, the owner or operator may elect to:
 - Request the RMP developer revise the RMP as necessary to fulfill RMP requirements; or
 - Choose not to continue implementing a RMP whereupon the RMP for the management unit shall no longer be valid.
 - The section specifies that when a new or modified watershed implementation plan is issued for the Chesapeake Bay or a new or modified local approved TMDL is issued which assigns a load to agricultural uses, a RMP covering land with waters that drain to such TMDL shall be deemed sufficient when the RMP has been revised to address the new or modified TMDL and the owner or operator agrees to implement the revised RMP, except when the owner or operator already holds a Certificate of RMP Implementation.
 - When an owner or operator holds a Certificate of RMP Implementation that has not expired, the owner or operator may continue operation of the RMP without such revisions for the lifespan of the Certificate of RMP Implementation so long as the owner or operator is deemed to be fully implementing the RMP.
 - When an owner or operator with a revised RMP fulfills all RMP and Certificate requirements, and the owner or operator holds a Certificate of RMP Implementation that has not expired for the

management unit addressed by the revised RMP, the owner or operator may request that the department revoke the existing Certificate of RMP Implementation and issue a new Certificate of RMP Implementation. Upon verification that all requirements have been satisfied, the department shall issue a new Certificate of RMP Implementation in a timely manner.

- Revision of a RMP by a RMP developer requires:
 - If a Certificate of RMP Implementation has not been issued, the revised RMP shall be provided to the review authority and shall be subject to all specified review requirements.
 - If a Certificate of RMP Implementation has been issued by the department and its duration has not expired, such existing Certificate of RMP Implementation shall remain valid for the balance of time remaining since it was originally issued by the department or a new Certificate of RMP Implementation may be issued where appropriate.
 - An existing or new owner or operator shall sign a revised RMP.
 - When a valid Certificate of RMP Implementation has been issued by the department for the management unit, the RMP developer shall provide the review authority and the department with a copy of a revised RMP.
- Establishes a new section (4VAC50-70-70) that outlines the processes associated with **review of a resources management plan**. The process shall include the following:
 - Upon completion of a new or revised RMP, the owner or operator, or the RMP developer on behalf of the owner or operator, shall submit the RMP to the review authority.
 - Each soil and water conservation district shall establish a Technical Review Committee that will ensure the RMP fully meets the minimum standards of a RMP and the components of a RMP. The section also specifies the timelines for conducting the review and how the review will be handled if multiple districts are involved.
 - RMPs received by the department where no local soil and water conservation district exists must fully meet minimum standards of a RMP and the components of a RMP and shall be reviewed by the department. The section also specifies the timelines for conduction the review.
 - When a RMP is determined by the review authority to be insufficient to meet minimum standards set forth in 4VAC50-70-40 and the components specified in 4VAC50-70-50 such review authority shall work with the owner or operator and the RMP developer to revise the RMP.
 - Where a RMP is deemed sufficient the notification issued to the owner or operator and the RMP developer by the review authority shall include approval of the plan and its implementation.
 - When an owner or operator is aggrieved by an action of the review authority, the owner or operator shall have a right to appeal.
- Establishes a new section (4VAC50-70-80) establishing the process for the **issuance of a Certificate of Resource Management Plan Implementation**. The process shall include the following:
 - Prior to issuance of a Certificate of RMP Implementation for a management unit, confirmation shall be made by the RMP developer that no revision of the RMP is required and as such is adequate, and verification of the full implementation of the RMP shall be completed.
 - The owner or operator shall request the verification of RMP implementation by the review authority in a format provided by the department. Such verification submittal shall include a complete copy of the RMP including any referenced plans and authorizations for the review authority and the department as specified to conduct onsite inspections.
 - When the local soil and water conservation district has determined the RMP to be adequate and fully implemented, the lead soil and water conservation district board shall affirm such adequacy and implementation, and submit the required documentation to the department for action. Upon receiving such documentation supporting that the plan is adequate and has been fully implemented, the department shall issue a Certificate of RMP Implementation.

- Where the department is the review authority, the department shall determine adequacy and full implementation of the RMP. If the RMP is determined to be adequate and fully implemented, the department shall affirm such implementation by issuing a Certificate of RMP Implementation.
 - If the resource management plan is not adequate or has not been fully implemented, the review authority shall provide the owner or operator with written documentation that specifies the deficiencies of the RMP. The owner or operator may correct the named deficiencies and request verification of RMP adequacy or implementation at such time as the shortcomings have been addressed.
 - A Certificate of RMP Implementation shall be valid for a period of nine years.
 - Upon the expiration of the Certificate of RMP Implementation, a new RMP may be prepared by a plan developer for the management unit upon request by the owner or operator. The RMP must conform with all existing TMDL implementation plans applicable to the management unit to include the Chesapeake Bay and any local approved TMDL, which assign a load to agricultural uses and impact any portion of the management unit. The plan developer shall ensure the new RMP also complies with the current minimum standards of a RMP.
 - The department shall maintain a public registry on the agency's website of all current Certificates of RMP Implementation in accordance with confidentiality provisions specified in an exemption to the Freedom of Information Act.
- Establishes a new section (4VAC50-70-90) outlining how periodic **inspections** of a management unit that has been issued a Certificate of RMP Implementation shall be performed. The section specifies that:
 - Inspections may be performed by the review authority or the department.
 - Onsite inspections shall occur no less than once every three years but not more than annually on lands where an active Certificate of RMP Implementation has been issued provided that no deficiencies have been noted that require more frequent inspections or re-inspections.
 - Upon the completion of the inspection, an inspection report shall be completed in a format provided by the department, to document the implementation of the RMP on the management unit and shall identify any identified deficiencies that may need to be addressed through revision of the RMP.
 - Where deficiencies are noted it authorizes the department to proceed pursuant to the section on compliance.
 - All inspections or re-inspections conducted in accordance with this chapter shall occur only after 48 hours of prior notice to the owner or operator unless otherwise authorized by the owner or operator.
- Establishes a new section (4VAC50-70-100) regarding **compliance** and outlines how deficiencies identified through an inspection shall be provided to the owner or operator and how a corrective action agreement shall be developed, reviewed, and subsequently agreed to unless otherwise revoked through inability to reach an agreement, failure of the owner or operator to fully implement the agreed upon corrective action agreement, or upon a request from the owner or operator. Timelines for every step of the process are provided in the section.
- Establishes a new section (4VAC50-70-110) on **appeals** that sets out the process for an owner or operator that has been aggrieved by any action of a soil and water conservation district and any party aggrieved by and claiming the unlawfulness of a case decision of the department or of the board upon an appeal to it.

- Establishes a new section (4VAC50-70-120) on **reporting** and specifies when BMP data collection shall occur and how this information is reported in the Virginia Agricultural BMP Tracking Program or any subsequent automated tracking systems made available to soil and water conservation districts by the department. The section also specifies timelines for reporting data and the protections offered to specified data in accordance with the Freedom of Information Act. It also specifies what the department may do with the reported information.
- Establishes a new section (4VAC50-70-130) that speaks to the **review of duties performed by soil and water conservation districts**. The section specifies that:
 - The department shall periodically conduct a comprehensive review of the RMP duties performed by each soil and water conservation district to evaluate whether requirements set forth by this chapter have been satisfactorily fulfilled.
 - The department shall develop a schedule for conducting periodic reviews and evaluations.
 - Each district shall receive a comprehensive review at least once every five years; however, the department may impose more frequent, partial, or comprehensive reviews with cause.
 - The section also speaks to how programmatic deficiencies will be addressed.
- Establishes a new section (4VAC50-70-140) that sets out the **RMP developer qualifications and certification** process. The section also outlines certification revocation procedures.
- Establishes a new section (4VAC50-70-150) that **advances the adoption of RMPs** by directing the department and districts to encourage and promote the adoption of RMPs among the agricultural community.

Economic Impacts

As part of the regulatory submittal for this proposed regulation, the Department is required to prepare an economic impact analysis of the proposed regulation for DPB's review. The Department has requested the RAP to provide comments on economics impacts to the Agency by April 1st. The Code provision directing this analysis is appended below.

§ 2.2-4007.04. Economic impact analysis.

A. Before delivering any proposed regulation under consideration to the Registrar as required in § 2.2-4007.05, the agency shall submit on the Virginia Regulatory Town Hall a copy of that regulation to the Department of Planning and Budget. In addition to determining the public benefit, the Department of Planning and Budget in coordination with the agency shall, within 45 days, prepare an economic impact analysis of the proposed regulation, as follows:

1. The economic impact analysis shall include but need not be limited to the projected number of businesses or other entities to whom the regulation would apply; the identity of any localities and types of businesses or other entities particularly affected by the regulation; the projected number of persons and employment positions to be affected; the impact of the regulation on the use and value of private property, including additional costs related to the development of real estate for commercial or residential purposes; and the projected costs to affected businesses, localities, or entities of implementing or complying with the regulations, including the estimated fiscal impact on such localities and sources of potential funds to implement and comply with such regulation. A copy of the economic impact analysis shall be provided to the Joint Commission on Administrative Rules;

2. If the regulation may have an adverse effect on small businesses, the economic impact analysis shall also include (i) an identification and estimate of the number of small businesses subject to the regulation; (ii) the projected reporting, recordkeeping, and other administrative costs required for small businesses to comply with the regulation, including the type of professional skills necessary for

preparing required reports and other documents; (iii) a statement of the probable effect of the regulation on affected small businesses; and (iv) a description of any less intrusive or less costly alternative methods of achieving the purpose of the regulation. As used in this subdivision, "small business" has the same meaning as provided in subsection A of § [2.2-4007.1](#); and

3. In the event the Department cannot complete an economic impact statement within the 45-day period, it shall advise the agency and the Joint Commission on Administrative Rules as to the reasons for the delay. In no event shall the delay exceed 30 days beyond the original 45-day period.

B. Agencies shall provide the Department with such estimated fiscal impacts on localities and sources of potential funds. The Department may request the assistance of any other agency in preparing the analysis. The Department shall deliver a copy of the analysis to the agency drafting the regulation, which shall comment thereon as provided in § [2.2-4007.05](#), a copy to the Registrar for publication with the proposed regulation, and an electronic copy to each member of the General Assembly. No regulation shall be promulgated for consideration pursuant to § [2.2-4007.05](#) until the impact analysis has been received by the Registrar. For purposes of this section, the term "locality, business, or entity particularly affected" means any locality, business, or entity that bears any identified disproportionate material impact that would not be experienced by other localities, businesses, or entities. The analysis shall represent the Department's best estimate for the purposes of public review and comment on the proposed regulation. The accuracy of the estimate shall in no way affect the validity of the regulation, nor shall any failure to comply with or otherwise follow the procedures set forth in this subsection create any cause of action or provide standing for any person under Article 5 (§ [2.2-4025](#) et seq.) or otherwise to challenge the actions of the Department hereunder or the action of the agency in adopting the proposed regulation.

To date the only anecdotal fiscal information that was provided in the one of the RAP meetings is as follows:

“The cost of having a resource management plan implemented was also discussed. As an example, a phase 1 conservation plan on 300 acres, may cost over \$30,000. The legislation requires that economic costs to the operator be taken into account when developing the regulations. It was stated that it needs to be very clear to the operator that there is a responsibility to maintain the best management practices over time. It was also noted that as best management practices are voluntarily maintained in the ground, the state would be potentially saving money on [agricultural BMP cost-share] implementation which would allow for funding to be available for oversight of the resource management plans.”

Potential Remaining Issues

While these regulations reflect the detailed discussions of the RAP they do not represent complete consensus on all of the components set out in the regulations before you.

Based on comments received from the RAP on the last version of the regulation prior to development of the proposed version before you today, we suspect that you may hear comments on a few key issues where consensus was not found. I would like to take a moment and share with you what some of those key issues are and why the department is advancing for your consideration the recommended language. Key issues include the following:

- 1) It has been suggested that the department needs to provide assurance that the BMPs specified in the minimum standards of a resources management plan (4VAC50-70-40) equate to reaching the load allocation for agriculture for the Chesapeake Bay TMDL and the requirements of the Chesapeake Bay TMDL WIP.
 - Where applicable to the RMP management unit and needed based on an assessment, the following practices shall be applied: a nutrient management plan; a forest or grass buffer between cropland and

perennial streams with a minimum width of 35 feet; a soil conservation plan that achieves a maximum soil loss rate to “T”; cover crops when needed to address nutrient management and soil loss requirements; and a system that limits or prevents livestock access to perennial streams. This equates to an extremely high level of treatment on most farms. It is the intention of the regulations to allow a farmer flexibility in choosing a wide variety of specific BMPs offered to address nutrient management and soil loss requirements and the department is comfortable that if the program is widely voluntarily adopted that the practices employed will meet the necessary target reductions.

- Additionally, to gain further insight into this request, DCR utilized the Virginia Assessment and Scenario Tool (VAST) to develop a Resource Management Plan Scenario using a series of assumptions.
 - Row Crop:
 - Nutrient Management – 95% (of acres available)
 - Grass Buffers – 35’ average width – 95%
 - Cover Crop – 50%
 - Conservation Tillage – 95%
 - Soil Conservation BMPs (Terraces, Diversions, etc) – 95% above fall line
 - Hay:
 - Nutrient Management – 95%
 - Grass Buffers – 35’ average width – 95%
 - Soil Conservation BMPs (Terraces, Diversions, etc) – 95% above fall line
 - Pasture:
 - Nutrient Management – 95%
 - Stream Access Control with Fencing – 35’ average width – 95%
 - Prescribed Grazing - 95%
 - Soil Conservation BMPs (Terraces, Diversions, etc) – 95% above fall line
 - When the VAST estimates for the RMP scenario are compared to WIP I scenario:
 - Nitrogen loads meet the WIP I.
 - Phosphorus loads meet the WIP I.
 - Sediment loads meet the WIP I.
 - When VAST estimates for RMP scenario compared to WIP I model outputs:
 - Nitrogen reductions are at 99.7% of WIP I.
 - Phosphorus loads meet the WIP I.
 - Sediment reductions are at 72.4% of WIP I.
- Conclusions
 - It is impossible to accurately predict the actual mix of BMPs that would be associated with broad RMP adoption. The scenario above is a conservative assumption and utilizes the lowest efficiency for types of practices that may be utilized (example – efficiency for grass buffer versus forested buffer).
 - The RMP scenario appears to be sufficient based on our analysis to meet the WIP I loads.
 - An official model run would be needed to fully verify the VAST estimates.

2) There is concern for the 9-year duration of the Certificate of Resource Management Plan Implementation.

- It should be noted that during the duration of this Certificate, material changes, non-TMDL related, are required to be addressed in a revised RMP. Additionally, CBF has suggested a 6-year Certificate. The department has recommended a 9-year certificate as first, it simply represents 3 nutrient management plan cycles. It should also be pointed out that this timeframe is not inconsistent with Board’s stormwater general permit requirements that allow a permittee to operate up to two additional permit cycles under current standards (an additional 10 years) if they maintain

general permit coverage. The 9 years was also viewed as a middle of the road approach as the agricultural community originally wanted a longer duration. Additionally, for a farmer to want to participate in this voluntary program which is key to its success, a longer certificate period was advisable.

- 3) It has been suggested that the requirement that “onsite inspections shall occur no less than once every three years on lands where an active Certificate of RMP Implementation has been issued” is an inadequate schedule to assure that Virginia is meeting its two-year milestones and 2017 commitments for reductions in nitrogen, phosphorus, and sediment loads from the agriculture sector in the Chesapeake Bay watershed.
 - If the program is heavily prescribed for, a three year rotation is a very reasonable schedule from a workload perspective. The language also gives authority for more frequent inspections if the capability exists. CBF has requested inspections no less than once every two years or annual verification from the owner or operator that a RMP is being fully maintained.
 - The department and the agricultural community are not favorable to an annual verification as compliance would likely be low and enforcement of such a provision would be difficult. It is the object of the regulations to keep the program as simple as possible and have as little burden on the farmers as possible while still maintaining a sound voluntary program that will advance significant reductions.
 - As to the issue of three years versus two, again the regulations already provide authority to conduct inspections more frequently. Other compliance programs also have similar or greater inspection frequencies. For example, the AFO/CAFO inspection program includes a baseline inspection frequency of once every 3 years, which may become more frequent if compliance issues are present, or less frequent to no more than once every 4 years if all is in order.
- 4) There is concern that the regulations do not immediately “suspend” a certificate of an owner or operator when deficiencies in implementation of their plan have been observed during an inspection.
 - Although the law prescribes that an owner or operator must fully implement and maintain an RMP to be afforded a Certificate, the department believes that instead of initially suspending a Certificate, that a preferred alternative to address maintenance of the RMP is to place the owner or operator under an agreed upon corrective action agreement, through a prescribed process, until such time as the owner or operator is back in full compliance or it becomes necessary to revoke the certificate. Suspension of the Certificate would likely make the owner or operator subject to modifying their RMP to address new TMDLs, potentially result in additional costs to the owner of operator, and is not in keeping with the collaborative approach advanced in the regulations to implement this voluntary program.

Having outlined these key issues, the proposed regulations being recommended to you today by the Department reflect a reasonable balance and a sound process and the Department recommends that the Board approve and advance the proposed regulations as presented. This will allow for the regulations to be published and then be subject to a broader round of comments during a 60-day public comment period to see where further adjustments to the language may be warranted before the final regulations are advanced to the Board for consideration this fall. There is certainly time and opportunities for parties to come together on the items outlined above or those that you may hear during the comment period and we strongly feel that getting this regulation into a formal regulatory process and on the street will help advance those conversations.

With that overview of the regulations and the process, we are happy to answer any questions, or turn it back to you Madame Chairwomen for public comment and Board action. A motion for your consideration is provided on Page 18.

VIRGINIA SOIL AND WATER CONSERVATION BOARD

March 29, 2012 Meeting
at the Patrick Henry Building, West Reading Room
Richmond, Virginia

Motion to approve, authorize and direct the filing of proposed regulations related to the Board’s Resource Management Plan regulations (4VAC50-70-10 et seq.)

The Board approves these proposed regulations and authorizes the Director of the Department of Conservation and Recreation and the Departmental Regulatory Coordinator to submit on the Virginia Regulatory Town Hall the new proposed Resource Management Plan Regulations and any other associated documents to the Department of Planning and Budget for review and upon approval to the Registrar of Virginia for publication. The review of the regulations shall be conducted in accordance with modified Administrative Process Act procedures set out in § 10.1-104.9 of the Code of Virginia (see section below motion).

As part of the process, the Board further authorizes at least one public hearing to be held by the Department following publication of the proposed regulations in the Virginia Register of Regulations and that the Department make provisions to receive public comment concerning the proposed regulations. Upon the closing of the public comment period, the Department is authorized to make revisions to the proposed regulations in response to the comments received and to hold additional stakeholder group meetings as it deems necessary.

The Department shall follow and conduct actions in accordance with the modified Administrative Process Act procedures set out in § 10.1-104.9 of the Code of Virginia, the Virginia Register Act, the Board’s Regulatory Public Participation Procedures where applicable, the Governor’s Executive Order 14 (2010) on the “Development and Review of Regulations Proposed by State Agencies” where applicable, and other applicable technical rulemaking protocols.

This authorization extends to, but is not limited to, the posting of the approved action to the Virginia Regulatory Town Hall and the filing of the proposed regulations and documents with the Virginia Registrar’s Office, the holding of at least one public hearing during the 60-day public comment period, as well as the coordination necessary to gain approvals from the Department of Planning and Budget and the Virginia Registrar of Regulations.

The Board requests that the Director or the Regulatory Coordinator report to the Board on these actions at subsequent Board meetings.

Motion made by: _____

Motion seconded by: _____

Action: _____

Susan Taylor Hansen
Chairman

David A. Johnson
Director

Note: § 10.1-104.9. Regulations under this article.

Regulations adopted by the Board for the enforcement of this article shall be subject to the requirements set out in §§ 2.2-4007.03, 2.2-4007.04, 2.2-4007.05, and 2.2-4026 through 2.2-4030 of the Administrative Process Act (§ 2.2-4000 et seq.), and shall be published in the Virginia Register of Regulations. The Board shall convene a stakeholder group to assist in development of these regulations, with representation from agricultural and environmental interests as well as Soil and Water Conservation Districts. All other provisions of the Administrative Process Act shall not apply to the adoption of any regulation pursuant to this article. After the close of the 60-day comment period, the Board may adopt a final regulation, with or without changes. Such regulation shall become effective 15 days after publication in the Virginia Register of Regulations, unless the Board has withdrawn or suspended the regulation or a later date has been set by the Board. The Board shall also hold at least one public hearing on the proposed regulation during the 60-day comment period. The notice for such public hearing shall include the date, time, and place of the hearing.

Requirements of §§ 2.2-4007.03, 2.2-4007.04, 2.2-4007.05, and 2.2-4026 through 2.2-4030:

§ 2.2-4007.03 – Board proposes regulation and publishes general notice of opportunity for oral or written submittals.

§ 2.2-4007.04 – DBP economic analysis.

§ 2.2-4007.05 – Completion and submittal of Town Hall form that discusses the regulatory action.

§§ 2.2-4026 through 2.2-4030 – Right for judicial review where specified.

Regulatory Advisory Panel

Members

Mr. Hobey Bauhan
Virginia Poultry Federation

Mr. Daniel Belin
Ecology and Environment, Inc.

Mr. Paul Bodenshtein
Ag Systems, Inc.

Mr. R.O. Britt
Murphy Brown

Ms. Katie Frazier
Virginia Grain Producers Association

Ms. Donna Johnson
Virginia Agribusiness Council

Mr. Brad Jarvis
Virginia Tech – Cooperative Extension

Ms. Ann Jennings
Chesapeake Bay Foundation

Ms. Stephanie Martin
Virginia Department of Conservation and
Recreation

Mr. Bill McKinnon
Virginia Cattleman's Association

Mr. Eric Paulson
Virginia State Dairymen's Association

Mr. Jacob Powell
Virginia Conservation Network

Mr. Tom Simpson
Water Stewardship, Inc.

Mr. Matt Shreckhise
Shreckhise Nurseries

Mr. Wilmer Stoneman
Virginia Farm Bureau

Mr. Bill Street
James River Association

Ms. Meaghann Terrien
Three Rivers Soil and Water Conservation District

Mr. Don Wells
Virginia Association of Soil and Water
Conservation Districts

Mr. Charles Wootton
Piedmont Soil and Water Conservation District

Technical Support

Mr. Brian Benham
Virginia Tech

Ms. Emily Horsley
Farm Service Agency

Mr. Darrell Marshall
Virginia Department of Agriculture and Consumer
Services

Mr. Matt Poirot
Virginia Department of Forestry

Mr. Chad Wentz
Natural Resources Conservation Service

Mr. Neil Zahradka
Virginia Department of Environmental Quality

Modifications to the Standard Regulatory Process for Administrative Process Act

