

Response to Questions on the FY 2010 Advertised Budget

Request By: Supervisor Herrity/Supervisor Frey

Question: What are the binding and/or mandated commitments the County has on the penny for stormwater? Specifically what state or federal regulation requires Fairfax County to secure a dedicated source of stormwater funding with regard to the Chesapeake Bay?

Under the current penny tax, the distribution of funds goes first to regulatory compliance, dam safety, flooding that threatens homes (e.g., Bellehaven), and maintenance of existing stormwater structure (e.g., pipes), staff time, but very little for County watershed management plan projects.

Under the proposed organizational structure to create a tax district, but assuming only one penny, would the distribution of the funds be any different under the current structure (penny from general funds)?

Response:

Commitments/Regulations

As regulations tighten, there is a greater focus on urban stormwater, and a steady dedicated funding source is one tool that could help the County demonstrate its intent to comply with permit conditions. While there are no specific requirements to provide dedicated funding sources for permitted municipal separate storm sewer systems (MS4s) in the Federal Water Pollution Control Act (or the Clean Water Act), the Virginia Stormwater Management Law, or the regulations implementing these laws, the federal National Pollutant Discharge Elimination System (NPDES) regulations and Virginia Stormwater Management Program (VSMP) regulations do require permit applicants to provide information about funding to permitting authorities, as follows:

National Pollutant Discharge Elimination System (NPDES) Regulations:

- § 122.26(d)(1)(vi) Fiscal resources. (A) A description of the financial resources currently available to the municipality to complete part 2 of the permit application. A description of the municipality's budget for existing storm water programs, including an overview of the municipality's financial resources and budget, including overall indebtedness and assets, and sources of funds for storm water programs.
- § 122.26(d)(2)(vi) Fiscal analysis. For each fiscal year to be covered by the permit, a fiscal analysis of the necessary capital and operation and maintenance expenditures necessary to accomplish the activities of the programs under paragraphs (d)(2) (iii) and (iv) of this section. Such analysis shall include a description of the source of funds that are proposed to meet the necessary expenditures, including legal restrictions on the use of such funds.

Virginia Stormwater Management Program (VSMP) Regulations:

- 4VAC50-60-380(C)(1)(f) Fiscal resources. A description of the financial resources currently available to the municipality to complete Part 2 of the permit application. A description of the municipality's budget for existing stormwater programs, including

an overview of the municipality's financial resources and budget, including overall indebtedness and assets, and sources of funds for stormwater programs.

- 4VAC50-60-380(C)(2)(f) For each fiscal year to be covered by the permit, a fiscal analysis of the necessary capital and operation and maintenance expenditures necessary to accomplish the activities of the programs under subdivisions 2 c and d of this subsection. Such analysis shall include a description of the source of funds that are proposed to meet the necessary expenditures, including legal restrictions on the use of such funds.

In addition to the above language from the NPDES and VSMP regulations, the current and pre-draft permits also include language regarding stormwater management program funding.

Current Permit:

- Section I(B)(3) Storm Water Management Program Resources. The permittee shall provide adequate finances, staff, equipment, and support capabilities to implement the activities under the Storm Water Management Program, to the maximum extent practicable.

Pre-Draft Permit:

- Section I(B)(2) Permittee Responsibilities. [...] The failure to provide adequate program funding, staffing or equipment maintenance shall not be an acceptable explanation for failure to meet permit conditions.
- Section I(C)(5) Stormwater Management Program Resources. The permittee shall provide adequate finances, staff, equipment, and support capabilities to implement the activities under the MS4 Program Plan. The permittee shall submit as part of its annual report the annual expenditures for the Permit Year (PY) and a budget for the following PY.

It should be noted that EPA has given municipalities an indication of what their inspectors would look for during an MS4 program audit through a guidance document developed to help municipalities review their own programs. The MS4 Program Evaluation Guidance (January 2007, EPA-833-R-07-003) reiterates that Phase I regulations require that annual expenditures and budget for the year following be included in each annual report. The guidance goes on to state that this information should be reviewed to determine if budget changes are being made. It encourages the permittee to provide an explanation for planned changes in funding.

The MS4 Program Evaluation Guidance also states that "Permittees should have an established source of funding for their construction program, including adequate resources for frequent inspections and plan review. [...] If general funds are used to support the program, permittees should ensure that construction inspections are a line-item appropriation not subject to reduction or elimination based on board politics or budget constraints." It contains a similar requirement with respect to the permittee's industrial/commercial facilities program: "Permittees should have an established source of funding for their industrial/commercial facilities program, including adequate resources for frequent inspections. [...] If general funds are used to support the program, permittees should ensure that industrial and commercial inspections are line-item appropriations not subject to reduction or elimination based on board politics or budget constraints."

Finally, the guidance states that an ideal program would include a strategy for public education and participation that would outline how much is to be budgeted to implement the strategy. The guidance acknowledges that the strategy is not specified in the NPDES regulations. Although guidance does not carry with it the same implications as regulations, and a lack of certain items in the guidance does not necessarily constitute an automatic violation of MS4 permit requirements, an auditor may still document these items and make recommendations for improving the program.

It should be noted that MS4 permittees have been required to meet standards through implementation of Best Management Practices (BMPs), rather than through meeting strict numerical water quality standards, at least up until recently. It is in the best interest of permitted municipalities to demonstrate that they are funding BMP implementation at a level that is adequate to achieve the discharge goals of the permit. Indeed, the permittee is required to implement the provisions of the permit Stormwater Management Program (or MS4 Program) to the maximum extent practicable. As described above, Fairfax County's current MS4 permit contains a specific requirement to "provide adequate finances, staff, equipment, and support capabilities to implement the activities under the Stormwater Management Program, to the maximum extent practicable."

The MS4 permit program is based on an iterative approach to meeting water quality goals (as described in the Preamble to the NPDES Phase II regulations). Generally speaking, the expectation is that as time goes on and as permits are reissued, permittees will do more to implement the program and do a better job of reducing pollutants in MS4 discharges to the maximum extent practicable. Because of the progressive nature of the program, the municipality would be responsible for justifying reductions in MS4 program resources. Under its MS4 permit, Fairfax County is allowed to add components, controls, or requirements to its program at any time with written notification to DCR, but is not allowed to subtract them. If the County finds a given BMP ineffective or unfeasible, the County must first make a request to DCR to replace the BMP with one that is expected to be effective for achieving the goals of the BMP that is being replaced. Cutting funding to a program or a component of the program could be viewed as regressive unless the County could demonstrate that a more cost effective solution will be implemented that is expected to meet permit requirements.

Stormwater Management Division staff are not aware of any cases in which an MS4 program was fined only for failing to provide adequate funding to its program. However, the penalties for permit violations can be considerable and should be taken into consideration when making any changes to the program that could affect implementation of any component of the program. Federal and Virginia law allow for both civil and criminal penalties, and EPA has recently demonstrated its willingness to pursue enforcement actions. For example:

- The Hawaii Department of Transportation was required to pay a \$1 million penalty and spend an estimated \$50 million to address Clean Water Act storm water violations at highways and airports in Hawaii.
- The City of Dallas, Texas negotiated a civil penalty of \$800,000 and agreed to another \$2.7 million in projects and management changes. A major issue in this case was that the City "failed to implement, adequately fund and adequately staff the City's stormwater management program."
- The Lexington-Fayette Urban County, Kentucky was fined \$425,000 and agreed in a consent decree to \$250-\$300 million in projects to fix a combination of wastewater and stormwater problems.

- The City of New Castle, Delaware and Delaware DOT were jointly fined \$275,000 and agreed to fund another \$1 million in projects after they failed to obtain their NPDES permit in 2001.

Current Distribution of Funds

The current priorities for funding are based on those previously established by the Board, where permit compliance is the first priority - projects mandated by state or federal regulations, and projects that address critical/emergency dam safety issues. Based on this approach, staff has recommended utilizing available funding by first funding operations which provides first response to failures and emergencies, and performs at least the minimal level of effort to relieve the emergency. The second and third priorities are the efforts to meet minimal, or come as close as possible to compliance with, Dam regulations and the MS4 permit. Beyond this effort, staff has recommended balancing the "Infrastructure Reinvestment" effort with the "Project Implementation" effort. The Project Implementation effort includes addressing flooding, as well as implementation of watershed projects. All staff, operational, and the specific monitoring, inspection, reporting and other MS4 requirements are estimated in total to cost \$15 million. Based on an approximately value of one penny generating \$20 million in revenue annually, the remaining \$5 million would be available for dam repairs, infrastructure reinvestment, and project implementation.

It should be noted that the MS4 permit requires localities to have a stormwater management program that includes maintenance and operation of the existing systems, and programs to improve water quality. The permit does not currently define levels of service. Therefore for example, the County can propose that the program be similar to the level of effort prior to the penny, where the County operated and maintained 1,500 miles of pipes with a five year surface inspection cycle and schedule repairs of failed areas. The permit at this time does not specifically require a proactive reinvestment program. Thus reinvestment is assigned a lower priority than monitoring specifically identified in the permit.

One further issue that does not show in the County Executive's presentation, is that if the Service District is established effective July 1, 2009 as proposed, the taxes will only be collected one time in FY10, so the effective rate to residents will be \$0.0075, which is less than the current penny. For this one year the stormwater program will be required to manage with half the proposed revenue.