



COMMONWEALTH of VIRGINIA

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MEMORANDUM

TO: State Water Control Board Members

FROM: Ellen Gilinsky, Ph.D.; Director, Water Division *Ellen Gilinsky*

Date: January 6, 2011

Re: Proposed Action on a Request to Conduct a Recreation Use Attainability Analysis for Gillie Creek submitted by the City of Richmond

EXECUTIVE SUMMARY

Staff will ask the Board to act on a request from the City of Richmond [City] to conduct a recreation use attainability analysis ["UAA"] for Gillie Creek, in Richmond. Gillie Creek is a small tributary to the tidal James River. Based on staff review of the request and public comment received, staff believes that conducting a UAA for Gillie Creek should proceed subject to certain conditions and in accordance with a schedule consistent with implementation of reasonable and cost-effective best management practices identified in the bacteria TMDL Implementation Plan for Gillie Creek.

I. Background

Gillie Creek was first listed as impaired in 2004 due to excessive counts of E. coli bacteria. In November 2010, EPA approved a bacteria TMDL for the lower James River and its tributaries in Richmond, Henrico, and Chesterfield. Gillie Creek was included in this TMDL. DEQ is beginning the process of developing a TMDL Implementation Plan for this TMDL, with an expected completion date in mid-July of this year.

In July 2006, House Bill 1457 was enacted to amend § 62.1-44.19:7 of the Code of Virginia (Plans to Address Impaired Waters). The amendment is as follows:

If an aggrieved party presents to the Board reasonable grounds indicating that the attainment of the designated use for a water is not feasible, then the Board, after public notice and at least 30 days provided for public comment, may allow the aggrieved party

to conduct a use attainability analysis according to criteria established pursuant to the Clean Water Act and a schedule established by the Board. If applicable, the schedule shall also address whether TMDL development or implementation for the water should be delayed.

A UAA is a structured scientific assessment of the factors affecting the attainment of the use. A UAA study must also ensure that downstream and existing uses are protected and analyze what uses are attainable after implementing effluent limits under §§ 301b and 306 of the Clean Water Act and by implementing *cost-effective* and *reasonable* best management practices for non-point source control. All of these requirements are listed in the federal and state water quality standards regulations (EPA 40 CFR 131.10 and Virginia 9 VAC 25-260-10).

In 1974 as part of the Fulton Bottom Urban Renewal Project work was done in Gillie Creek to efficiently convey floodwaters to the James River. To that end, the entire length of the creek bed within the City of Richmond was channelized and lined with concrete. The channelized/concrete portion of the creek begins approximately 1.6 miles upstream and terminates at the confluence of Gillie Creek with the James River. The land surrounding the channelized segment is either City owned properties, railroad company properties, or industrial-type properties. Though no residential properties abut the channelized portion, the creek flows along the northern boundary of a public park (Gillies Creek Nature Area) for approximately 2,400 feet [see **Attachment 1** for a map depicting land parcel ownership].

II. Proposed UAA Study

In August, 2010, DEQ received from the City a document titled “Reasonable Grounds Documentation to Conduct a Recreational Use Attainability Analysis for Gillies Creek” [**Attachment 2**]. This documentation asserts that attainment of the recreational designated use is not feasible due to the following:

- primary contact is not attainable due to flow and hydrologic modification.
- the City does not believe there is a primary contact use on lower Gillie Creek.
- the City maintains that 95% reductions above the Long Term Control Plan will cause substantial and widespread economic and social impacts.

The City requests to conduct a UAA study for Gillie Creek in an effort to determine if the primary contact use is an existing use and, if not, replace primary contact use with a lesser use category or a temporary suspension of use following rain events. The City is also asking to conduct the UAA concurrent with DEQ’s development of the TMDL Implementation Plan to provide the City the opportunity to determine if the Gillie Creek paved channel CSO waste load allocations in the approved TMDL are “reasonably attainable” in accordance with the Water Quality Standards coordination provisions of EPA’s CSO Policy.

At their September 28, 2010 meeting, the Board directed staff to publish a general notice in the Virginia Register to solicit public comment on whether the documentation submitted establishes reasonable grounds that attainment of the recreation use for Gillie Creek is not feasible and to return to the Board with a summary of comment received.

III. Public Participation

Pursuant to § 62.1-44.19:7 of the Code of Virginia, a notice of public comment period was published in the Virginia Register on October 1, 2010. The comment period ended November 1, 2010. The Notice stated that the Board was seeking comment on the documentation submitted and if it constitutes reasonable grounds that attainment of the recreational use for Gillie Creek is not feasible.

Comments from seven citizens, three environmental organizations, one state agency, two municipal organizations, and the City were received and are summarized in **Attachment 3**. In general, citizen and environmental organizations urge the City and DEQ to implement cleanup plans prior to initiating a UAA. Comment from the City and municipal organizations state there are reasonable grounds to conduct a UAA for Gillie Creek and that a UAA is necessary to determine the existing uses for the creek and direct resources appropriately. Key comment received includes:

- Presence or lack of recreation in the creek is not an excuse to leave a water body in a state of impairment.
- Gillie Creek flows next to a public park and is accessible through the entire length of the park segment.
- Gillie Creek empties to a section of the James River that is accessible to a large population that recreate there and those downstream uses need to be protected.
- The City believes the Reasonable Grounds Documentation to Conduct a Recreational Use Attainability Analysis for Gillie Creek fulfills the statutory mandate for reasonable grounds.
- Virginia and other states have designated uses without regard for attainability and the negative socioeconomic impacts that may be caused by related federal and state implementation mandates.
- The estimated cost of \$300 million to attain recreational use for a channel not used for that purpose is unjustified and unreasonable.

DEQ staff recognizes that an existing use cannot be removed. However, a UAA study can help to more precisely define the existing use. DEQ is prepared to accept the "Reasonable Grounds" document and work with the City and stakeholders to evaluate the recreational use in Gillie Creek, given certain safeguards and a schedule that acknowledges the need for corrective actions in the watershed. The results from this study process will provide information to DEQ about recreational use in Gillie Creek.

IV. Staff Recommendation

Staff recommends the Board:

1. Subject to the condition listed below, grant approval for the City of Richmond to conduct a use attainability analysis for recreational uses in Gillie Creek according to criteria established pursuant to the Clean Water Act and in conformance with 9 VAC 25-260-10.
2. Include in the use attainability analysis a detailed examination of how any change to the recreational use in Gillie Creek would avoid impacting the primary contact recreational use of the James River adjacent to, and downstream of, the confluence with Gillie Creek.

3. Direct the staff to report back to the Board upon completion of the UAA study whether the results of the study are deemed consistent with federal and state regulations and warrant initiating a regulatory process to consider removal of the recreational use or establishing a subcategory of recreational use in Gillie Creek.

V. Presenter Contact Information

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VI. Attachments

Attachment 1 - Map of Gillie Creek and Surrounding Parcels
Attachment 2 – Reasonable Grounds Documentation to Conduct an Aquatic Life Use Attainability Analysis for Gillie Creek, City of Richmond, Virginia
Attachment 3 - Comment Summary

ATTACHMENT 1

ATTACHMENT 2

ATTACHMENT 3