

Meeting Minutes
Tuesday, August 30, 2022

Workgroup to Study Issues Related to Mitigation and Nutrient Credit Programs
DEQ Piedmont Regional Office, Training Room
4949-A Cox Road, Glen Allen, VA 23060

Members Present: Phil Abraham, Chris Boies, Andrew Clark, Jeff Corbin, Justin Curtis, Steven Gallagher (Kelby Morgan's alternate), Charles Hegberg (Jeff Waldon's alternate), Kathy Hoverman, James Hutzler, Rene Hypes, Casey Jensen, Dave Jordan, Mark Killgore, Adrienne Kotula, Terry Lasher, Justin Mackay-Smith, Martha Moore, Evan Ocheltree, Tim Owen, Jennifer Perkins, Bobby Proutt, Nikki Rovner, Peggy Sanner, Bill Street, Chris Swanson, Jessie Thomas-Blate (Serena McClain's Alternate), Shannon Varner, Brian Wagner, Alan Weaver.

Members Absent: Sara Aman, Steven Barrs, George Bryant, Robert Condrey, Brad Copenhaver, Howard Epstein, John Foote, Brent Fultz, Greg Garman, Kirk Havens, Heidi Hertz, Samuel Markwith, Amy Martin, T.J. Mascia, Chris Miller, Randy Owen, Jeanne Richardson, Fritz Schneider, Jennifer Van Houten, Charles Wilson

Other Attendees: Joe Lerch, Karen Johnson, Chris Moore, Steve Yob

DEQ Staff Attendees: Brandon Bull, Melanie Davenport, Dave Davis, Sara Felker, Tyler Monteith, Hannah Schul, Sarah Woodford

The meeting convened at 9:00 AM. The meeting adjourned at 3:45 PM.

Workgroup Directive #1 – Supply and Demand for Mitigation Credits

- 1) Mitigation Working document [Sarah Woodford, DEQ] – Ms. Woodford displayed the Mitigation Working document on the projector screen and the workgroup reviewed the workgroup directive questions and answers related to “Supply and Demand for Mitigation Credits” together. The intent of the Mitigation Working document is that it is DEQ staff's outline for writing the mitigation portions of the legislative report.
- 2) Questions and comments raised by the workgroup members and DEQ staff included:
 - a. One workgroup member stated that large public works projects can skew mitigation credit demand similar to linear transportation projects.
 - b. Regarding a platform for mitigation credit tracking, the workgroup discussed the importance of client and permit information remaining confidential on the platform.
 - c. Demand is variable and can change quickly. One project can completely change mitigation credit availability in a watershed. Construction is often delayed when no mitigation credits are available.

- d. The creation of a public system or platform for tracking real-time available mitigation credits is a future priority of DEQ Director Mike Rolband and may require its own workgroup.
- e. Members requested that historical mitigation credit supply and demand data be included in the report to the legislature. One member requested the introduction of the document to provide information on the mitigation and nutrient programs as many legislators are unfamiliar with the programs. This also should note differences between the two programs, including differences in types of impacts, quantities, and land required for operation of the individual programs.
- f. Legislators need to be aware that even if Virginia statute for mitigation changes, federal law for mitigation may remain the same, ending in no change in the mitigation program.
- g. Regarding staffing, one workgroup member stated that there are efforts by an outside coalition aimed at increasing federal funding for the Corps to hire more regulatory staff positions on a nationwide scale.
- h. Ms. Woodford [DEQ] informed the workgroup that a Memorandum of Agreement (MOA) is being drafted by the Corps, which may result in DEQ assuming lead responsibility for monitoring report coordination, review, and associated credit releases. If you have any questions regarding the MOA, please get in touch with Jeanne Richardson [Corps].
- i. Several members who are mitigation bank sponsors stated that the changes to be brought about by the Corps staff changes and the potential MOA increases the likelihood that they will propose new mitigation banks in the future. They stated that this change would speed the release of credits that are already requested, increase the speed at which new credits are approved and released, and help address supply issues.
- j. The workgroup noted that there could be current and future potential staff workload issues and the need for additional funding and positions at both the Corps and DEQ should be evaluated.
- k. Dave Davis [DEQ] informed the workgroup of DEQ's current development of a DEQ State Surface Water Delineator certification program, two components of which would be a professional wetland delineator (PWD) certification from the Department of Professional & Occupational Regulations (DPOR), and successful completion of a Stream Identification training class. The purpose of this program is to reduce the time necessary to confirm the locations of waters regulated by DEQ. In summary, a DEQ-certified SSWD consultant will submit state waters delineations with a JPA, and VWP staff will accept those delineations as meeting the requirements for a VWP permit. This certification would allow for desktop delineation confirmations with periodic quality control checks by DEQ staff. It has not been determined whether the Corps will accept these confirmations.
- l. The need for the state legislature to consider additional funding for all mitigation program state advisory agencies (Department of Environmental Quality, Marine Resources Commission, Department of Historic Resources, Department of Wildlife Resources, Department of Conservation and Recreation, Department of Forestry) was identified.

- m. There was discussion of accelerated credit releases. Ms. Woodford clarified how the Corps' Regulatory Guidance Letter 19-01 does not require the Corps Districts to implement the practice. There was discussion of the financial assurances required in Virginia by the Corps and DEQ, and that accelerated credit releases have been limited to high mitigation credit demand watersheds, thus far. One member suggested accelerated mitigation credit releases be made available in all watersheds in Virginia, not just those in high demand.
- n. The Corps and DEQ are able to adjust current guidance and practice to include alternative mitigation sites and practices, including modified buffer widths and smaller site approval, if deemed appropriate for the program. This also includes impoundment and dam removals. One member discussed how adjustment to current review of mitigation sites (i.e. buffers) may be viewed different than new types of alternative mitigation sites (i.e. Superfund sites), especially in the amount of time required to review the mitigation proposal.
- o. One member said that financial assurance amounts for accelerated releases should be reevaluated. The Virginia statute is broad regarding financial assurances.
- p. Ms. Woodford brought up a potential new solution, originating from DEQ staff. Credit availability letters are non-contractual, but DEQ could put back into VWP permits the requirement to list the mitigation bank or ILF name from which the permittee plans to purchase mitigation credits. This having the intended effect of strengthening the permittee's resolve to purchase from the named mitigation site. Many members noted that naming the specific mitigation bank from which mitigation credits will be purchased in permits is not a desirable practice, especially from a permitting efficiency standpoint because the permit would need to be modified for a change in that name.
- q. The workgroup discussed options for excess mitigation credits from a given permit. Return of excess mitigation credits to the bank sponsor may not be the most desirable option, according to several members. It could be better to sell directly to another permittee. This would create difficulties in mitigation credit tracking. One member expressed concern that a third-party could "warehouse" credits in a given watershed, fix higher prices, and sell for profit in the future. Another member expressed concern with third-party resale, and that it may hinder DEQ's ability to ensure resources are protected with no net loss and in kind mitigation. Another member identified this as a potential issue to be brought up in the public platform workgroup discussed in "d."
- r. The workgroup discussed that the Wetland and Stream Replacement Fund would still be an option for increasing the supply of mitigation credits, even if it is not the highest priority option. DEQ continues to have concerns regarding additional staffing and funding for this program, should it be approved by the Corps as an in-lieu fee mitigation program. The workgroup discussed that it should stay on this list, but recommend that the legislature look into required program structure, staffing, and additional funding requirements.

- 3) Introduction [Sarah Woodford, DEQ] – Ms. Woodford displayed the Mitigation Working document. The intent of the Mitigation Working document is that it is DEQ staff’s outline for writing the mitigation portions of the legislative report.
- 4) [Sarah Woodford, DEQ] The workgroup reviewed the first workgroup directive question and answers related to “Incentivizing Dam Removal Projects in Virginia” together.

What methods are in place or could be developed for promoting the removal of obsolete dams and significant river obstructions by the private sector that maximize the input of private capital and minimize the need for public funding to facilitate the removal?

Workgroup comments included:

- a. One member mentioned the DCR Dam Safety Program as a program that incentivizes removal as an available option for obsolete dams.
 - b. Workgroup members discussed other workgroups or partners involved in discussion regarding barrier removal, namely the Virginia Community Flood Preparedness Fund, the Virginia Stream Barrier Removal Task Force, and the Chesapeake Bay Fish Passage Workgroup.
 - c. One member mentioned that grant programs always look favorably upon and encourage matching funds for barrier removal projects from partners like the private sector and state governments.
 - d. One member mentioned that it can be difficult for private and public partnerships to allow for mitigation credits to be sold for profit by the private sector.
- 5) [Sarah Woodford, DEQ] The workgroup reviewed the second workgroup directive question related to “Incentivizing Dam Removal Projects in Virginia” together.

What are your recommendations regarding the extent to which there is a scientific basis from a water quality and fish benefit perspective to expand existing service area limitations for mitigation credits generated by the removal of obsolete dams and significant river obstructions?

Workgroup comments and discussion included:

- a. Workgroup members stated that fish passage was thoroughly discussed in the three meetings but water quality was not.
- b. Several members questioned whether there is a scientific basis from a water quality perspective, especially in an adjacent river watershed. Challenging to prove there are no water quality impacts, if mitigation is accepted from adjacent river watersheds.
- c. One member asked the group to consider not just fish benefits, but benefits to benthic macroinvertebrates and other non-fish aquatic life.
- d. One member asked the definition of significant river obstruction.
- e. One member wanted to know whether the department could consider actual benefits to adjacent river watersheds, on a project-by-project basis.
- f. Several members asked what the “conditions” would be, in the second statement. DEQ staff replied that the appropriate conditions might be formulated by the workgroup, if there was general consensus on the second statement.

- g. One member suggested that the department might try a test project in Virginia.
- 6) The following two statements were tested for consensus:
- a. There is a scientific basis from a water quality and fish benefit perspective to justify expanding existing service area limitations for mitigation credits generated by the removal of obsolete dams and significant river obstructions into adjacent river watershed boundaries.
 - i. Strongly Agree - 8
 - ii. Can Live With It - 11
 - iii. Strongly Oppose – 7

 - b. Provided appropriate conditions are established, there is a scientific basis from a water quality and fish benefit perspective to justify expanding existing service area limitations for mitigation credits generated by the removal of obsolete dams and significant river obstructions into adjacent river watershed boundaries.
 - i. Strongly Agree - 9
 - ii. Can Live With It - 13
 - iii. Strongly Oppose – 4

Workgroup Directive #3 - Retiring Farmland for Nutrient Credits and Nutrient Service Area Revisions

- 7) Introduction [Sara Felker, DEQ] – Ms. Felker gave an overview of the content discussed at the previous workgroup meetings on July 7, 2022 and August 8, 2022, as well as a reminder of the three workgroup directives the workgroup was tasked with.

- 8) Around the Table Questions [Sara Felker, DEQ]:

What are the potential impacts of restricting the generation of nutrient credits on any parcel of important, prime, or unique farmland acquired for generating credit?

What would the effect be of requiring nutrient credit purchases from the same HUC, if available, before looking at adjacent HUCs?

Are there other changes in the nutrient credit trading regulations and/or underlying statutory authority to reduce the loss of important, prime, or unique farmland?

Questions and comments raised by the workgroup members and DEQ staff included:

- a. One member felt that the items that had been tested for consensus from the previous workgroup meeting were sufficient recommendations in the interim until the mapping effort for prime agricultural soils has been completed.
 - i. Members from the workgroup tasked with developing the Prime Agricultural Soils data layer felt they were on track for their initial deadline of 12/1/22 to have at least some sort of map provided.

1. Preliminary results have shown that approximately 17% of open land in Virginia is has prime agricultural soils after land that's already developed and the DOF forestry layer have been removed.
- b. One member reiterated the view that localities should be given the ability to set a cap of allowable land conversion activities on prime agricultural soils.
- i. One member felt that allowing for localities to restrict land conversions on an individual basis was less restrictive than having a state wide ordinance that limits land conversion activities on prime agricultural soils.
- c. While there was no consensus on creating geographic trading restrictions, the Workgroup indicated that there should not be trading restrictions between counties.
- d. Representatives from groups that use nutrient credits, including homebuilders associations, expressed concern that the storm water program depends on the ability to use nutrient credits and any restrictions that limit supply will have a detrimental effect on development around the state. They requested any restrictions that reduce the supply of nutrient credits be balanced with access to additional nutrient credits, such as opening up the service area to include the entire tributary or state. Further concern was expressed that there would be even fewer nutrient credits available if the 0.41 lbs P/ac/yr requirement for the stormwater is lowered.
- e. One member noted that the benefits and detriments of land conversion projects may be viewed subjectively by county residents and that it is important to remember that not everyone views them as a nuisance project. Many may feel that land conversions are a positive activity that brings a benefit to their county.
- f. A question was raised regarding whether or not each nutrient bank is required to have a forestry management plan. DEQ noted that yes, every land conversion project and they are publicly available upon request.
- g. One member noted that in her opinion landowners should be allowed to convert their agricultural land to forest if they want to. However, a government agency should not be further incentivizing land conversion activities on prime agricultural soils, particularly when it is being done to offset urban development in other localities. Others in the workgroup noted that other government programs also exist that promote agricultural land preservation and conservation.
- h. One member brought up the idea of potentially allowing for the creation of a nutrient bank with statewide applicability, where a nutrient bank could provide nutrient credits to development projects that would otherwise be purchasing nutrient credits from an adjacent HUC that contains a high percentage of prime agricultural soils. Others felt that this is similar to expanding the service area to the entire tributary and wondered if the Local Water Quality Guidance in the Nutrient Trading Program would limit this.
- i. A question was raised as to whether there was a way to quantify what the higher cost would be to developers should land conversion nutrient credits be limited to non-prime agricultural soils?
- j. It was proposed that, as a compromise, localities could set a limit on land conversion within their locality, if service areas could be expanded to allow for purchases within the entire tributary.

- k. A concern was also raised around what would happen if land was incorrectly labeled as containing “prime agricultural soils.” Excluding this land unnecessarily from participating in the program via land conversion activities would limit a farmer’s ability to profit from his land. While restrictions may not be desirable, if enacted, farmers, landowners and bankers should be afforded a mechanism to rectify any incorrect designations of “prime agricultural soils.”
- l. The workgroup asked about whether localities received notification of new nutrient banks. DEQ staffed answered that new applications are listed on the DEQ website but not sent out for public notice. Localities are alerted when a nutrient bank receives an approval and/or a nutrient credit release.
- m. Members suggested that localities could have the opportunity to provide input while the nutrient bank application is being reviewed by DEQ. However, the legislature would need to change the law or regulation to allow DEQ to consider the impact to “prime agricultural soils” in order for it to be part of the review criteria and the goal is to limit land conversion activities on these lands.
- n. Members discussed alternative ways for farmers to benefit from prime farmland instead of participating in the program. VDACS staff discussed the Farmland Preservation Fund, which is money given to localities to purchase development rights on private lands. Because funding has been low for this program, localities are not able to compete with the possible monetary benefits of participating in the nutrient trading program. Many in the workgroup suggested that increasing this fund and the ability of a locality to purchase easements to meet their goals.
 - i. It was additionally noted that easements put in place by localities could include restrictions on participating in the nutrient trading program. Additional restrictions could also be put on private property transactions if the landowner legally implements that restriction prior to the sale or as a condition of the sale.

9) The following item was tested for consensus:

- a. The Commonwealth should increase funding of the Farmland Preservation Fund to incentivize conservation of prime farmland through local purchasing of development rights (PDR).
 - i. Fully Support – 16
 - ii. Partially Support – 6
 - iii. Oppose – 0

Next Steps

- a) Ms. Woodford requested comments be submitted no later than September 15th in writing.
- b) Draft meeting minutes will be distributed.