

Meeting Minutes
Thursday, July 7, 2022

Workgroup to Study Issues Related to Mitigation and Nutrient Credit Programs
DEQ Central Office, Third Floor Conference Room
1111 East Main Street, Richmond, Virginia

Members Present: Phil Abraham, Steven Barrs, Chris Boies, Andrew Clark, , Robert Condrey, Jeff Corbin, John Foote, Brent Fults, Kathy Hoverman, Casey Jensen, Dave Jordan, Mark Killgore, Terry Lasher, Patrick Link (T.J. Mascia and Jennifer Van Houten’s alternate), Justin Mackay-Smith, Amy Martin, Serena McClain, Martha Moore, Kelby Morgan, Lisa Ochsenhirt (Justin Curtis’s alternate), Tim Owen, Bobby Proutt, Jeanne Richardson, Nikki Rovner, Peggy Sanner, Kyle Shreve, Bill Street, Chris Swanson, Shannon Varner, Brian Wagner, Alan Weaver

Members Absent: Sara Aman, George Bryant, Howard Epstein, Greg Garman, Kirk Havens, Rene Hypes, Adrienne Kotula, Samuel Markwith, Chris Miller, Evan Ocheltree, Randy Owen, Jennifer Perkins, Fritz Schneider, Jeff Waldon

Other Attendees: Zach Jacobs, Karen Johnson, Zach LeMaste, Jon Roller

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

The meeting convened at 9:00 AM. The meeting adjourned at 4:45 PM.

- 1) Welcome from DEQ Director [Mike Rolband, DEQ]: Mr. Rolband welcomed the workgroup members and thanked them for their participation. He provided an overview of the General Assembly’s workgroup directives.
- 2) Introductions [Angela Jenkins, DEQ]: Ms. Jenkins had the Workgroup members and attending DEQ staff introduce themselves with their respective affiliations. She also reviewed building facilities information and emergency exit procedures.

Workgroup Directive #1 – Supply and Demand for Mitigation Credits

- 3) Presentation – “Supply and Demand for Mitigation Credits” [Sarah Woodford, DEQ]: Ms. Woodford presented on the current supply and demand for mitigation credits in Virginia based on data from DEQ’s CEDS database, the U.S. Army Corps of Engineers’ (Corps) Regulatory Banking and In-Lieu Fee Tracking System (RIBITS) database, and in-lieu fee mitigation provider annual reports. Several requests and comments were received during Ms. Woodford’s presentation:
 - a. Request for graphs depicting the non-tidal wetland demand trend over the last 10 years by river basin

- b. The supply presented for “Future Mitigation Credits” are skewed by future mitigation bank phases from approved mitigation banks that will never be built. Also skewed by potential mitigation credits in RIBITS not being updated to reflect as-built mitigation credits after construction.
 - c. Many older mitigation banks have no requirement to report mitigation credit sales in RIBITS, which skews demand data
 - d. Large-scale transportation projects skew demand data, making it hard to gauge an annual average demand
 - e. 3rd Party Mitigation Providers (Sponsors) have no way to indicate or track reserved credits per basin. There is too large a legal liability to regulatory agencies to track reserved credits (in RIBITS, particularly).
 - f. Wetland and stream mitigation credit demand are likely higher because the numbers presented may not account for all Permittee Responsible Mitigation that occurred.
- 4) Around the Table Questions [Angela Jenkins, DEQ]: Ms. Jenkins solicited thoughts and questions based upon the following questions:

What is the current and projected demand for wetland and stream mitigation credits by public and private entities?

What are your recommendations for legislative and regulatory changes to increase the supply of wetland and stream mitigation credits and reduce volatility in the price of mitigation credits?

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

- a. How can the time it takes to release credits be tracked? Answer: DEQ’s forthcoming Permit Enhancement and Evaluation Platform (PEEP) may track this time period
- b. RIBITS does not accurately portray mitigation credit availability.
 - i. Mitigation credit reservation is not tracked.
 - ii. RIBITS operates off the best information available.
 - iii. Would the mitigation banking community be willing to deduct or show reserved mitigation credits for a more accurate picture?
 - 1) Sponsors not willing because reserved credit sales are not guaranteed yet
 - 2) Several other members indicated general hesitancy to share reserved mitigation credit information
 - 3) Corps indicated reserved mitigation credit information will not be tracked in RIBITS, too large of a legal liability for the regulatory agency.
 - 4) Future phases may never be built
- c. Economic factors of supply for Sponsors include funding the mitigation bank upfront and not seeing a return on investment until mitigation credits are released
- d. How can mitigation banks receive mitigation credit releases sooner?
 - i. Answer: The Corps’ Regulatory Guidance Letter (RGL) 19-01 allows for accelerated mitigation credit releases. These accelerated releases have been implemented in the Potomac River watershed so far. Pricing in the Potomac allows Sponsors to absorb the cost of required financial assurance mechanisms.

- e. Discussion of potential ways to increase supply.
 - i. Industrial sites such as Superfund sites to convert to wetlands
 - ii. Need different ways to generate mitigation credits because running out of land
 - iii. There is competition with nutrient banking
 - iv. Expand Geographic Service Areas so watersheds with higher demand can purchase mitigation credits from further away?
 - 1) Goal is to restore ecological functions and services near where the impacts occur as a basic regulatory concept
- f. Potential development of a commodity market
 - i. Improve system to be more efficient and transparent
 - ii. Need a system to provide mitigation credit availability information to permittees and sponsors
 - iii. Sponsors provide mitigation credit availability letters to permittees, but permittees are not bound and can buy mitigation credits from another bank or sponsor
 - 1) Could Sponsors make mitigation credit availability letters contractual?
 - 2) Some Sponsors have expiration dates on letters, some don't.
- g. Potential development of a public/private partnership mitigation credit information platform
 - i. High number of permittees
 - ii. Could it be required or be voluntary?
 - iii. Could show permittees real time mitigation credit information
 - iv. Could be created and driven by sponsors
- h. Land availability is a huge issue
 - i. No longer 100+ acre sites available, now smaller acre sites
 - ii. Need to find ways to lower costs to make smaller sites viable
 - iii. Demand is increasing
- i. Propose other ways to generate mitigation credits?
 - i. Rare, Threatened, and Endangered Species Adjustment Factors available according to the Unified Stream Methodology (USM) for stream mitigation credits.
 - ii. Also discussed by Interagency Review Team for wetland mitigation
- j. Can the long-term release of mitigation credits be shortened?
 - i. Sponsors would see return on investment sooner, more economically feasible
 - ii. Abbreviated release schedule?
 - iii. If all mitigation credits are released, regulatory agencies have no leverage if there are performance or non-compliance issues, except for financial assurance mechanisms
- k. Financial assurance (FA) mechanisms
 - i. Basing the FA on the cost of replacement mitigation credits is too high in high demand basins
 - ii. If a project is meeting performance, why are financial assurances needed?

- iii. How big of a problem is mitigation bank failure? Looking at historical data of closed mitigation banks, in how many years did the mitigation banks meet 100% performance?
- iv. FA money could be spent on ecological improvements instead
- v. Sponsors take on full liability
- vi. DEQ's obligation is to the statute of no net loss
- I. Reducing stream and wetland buffer width requirements, as a way to increase mitigation credit supply
 - i. Discussed at June 2022 3rd Party Mitigation Providers Meeting hosted by DEQ and the Corps
 - ii. Reduced buffer is an easier sell to land owners, could open up more site opportunities
 - iii. Nutrient banks only require 35 feet
 - iv. Buffers in valleys can be tight

Workgroup Directive #2 – Incentivizing Dam Removal Projects in Virginia

- 5) Presentation – “Incentivizing Dam Removal Projects” [Sarah Woodford, DEQ]: Ms. Woodford presented on Geographic Service Areas for wetland and stream mitigation according to the current Code of Virginia. She presented maps of wetland and stream mitigation river watersheds, the physiographic provinces of Virginia, and the Hydrologic Unit Code map of Virginia. Example Service Area maps in the James River and Potomac River watersheds were presented.
- 6) Around the Table Questions [Angela Jenkins, DEQ]:

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?

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?

What are the potential impacts for local and Chesapeake Bay water quality, ecological services, and fisheries as a result of the removal of such obsolete dams and significant river obstructions?

What innovative dam removal partnerships and incentives are used in other states?

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

- a. Original proposed legislation from Sponsor of the proposed South Anna River at Ashland Mill Dam Mitigation Bank (AMD) seeking different service area for large-scale dam removal projects generating stream mitigation credits.

- i. AMD is a high priority dam removal within the Chesapeake Bay watershed, according to several major ranking systems for dam removal projects.
 - ii. AMD is located in a high supply, low demand watershed (York River)
 - iii. Proposed bill would allow dam removal projects on a 4th order or higher stream to have the Service Area as currently allowable by the Code (York River) as well as the adjacent river watersheds (James River and Rappahannock River) upstream from the Chesapeake Bay to the first significant impediment to fish passage. Permittees in the adjacent river watersheds could use up to 75% stream mitigation credits from the AMD mitigation bank to cover mitigation requirements. The remaining 25% would need to be obtained from a mitigation bank in the river watershed of the impact. Permittees would be have to buy 1.5 times the number of mitigation credits otherwise required by their permits.
- b. Department of Wildlife Resources (DWR) supports dam removal for ecological benefits to anadromous fish, including American eel and shad
- c. Does dam removal in the York River watershed enhance all stream functions in the Rappahannock or James Rivers?
 - i. Does not satisfy no net loss
 - ii. Adding adjacent watershed has overall benefit to Chesapeake Bay (ecological benefits, not physical)
 - iii. Research shows that most fish return to their stream of origin, but about 6% may stray into adjacent river watersheds.
- d. Allowing expanded Service Areas for dam removal alone is unfair to other wetland and stream mitigation Sponsors. Dam removal should follow the rules all Sponsors follow.
- e. All trading programs need to protect local watersheds as well as the Chesapeake Bay. If the Service Area is expanded in one program, would that lead to expansion in other areas?
- f. Science supports dam removal as providing more ecological uplift than a local, traditional stream restoration project. Lentic ecosystem to lotic ecosystem.
- g. To attract private funds for dam removal, could consider public/private partnership to use available federal infrastructure money
- h. Landowner permission is a large hurdle for dam removal. Need cooperation/permission and incentives for removal. Dam owner education across agencies could be beneficial
- i. DCR Dam Safety Program options for obsolete dam owners include lowering the dam, removing it, or bringing it to code
- j. Is there research showing dam removal has been successful for anadromous fish?
 - i. DWR cited research on shad from the Virginia Institute for Marine Science indicating removal provides a small population recovery
 - ii. Dam removal means no restriction to potential habitat
- k. Dam removal results in thermal impacts, sedimentation downstream, buffer stabilization
- l. Incentives for dam removal?
 - i. Use public money for removal, private money to monitor, and a partnership for long term management
 - ii. Need financial incentives for dam owners

- iii. One current incentive is through mitigation crediting
- iv. Regulatory agencies have less flexibility to incentivize within trading programs
- m. What is the proposed monitoring duration for dam removal?
 - i. Answer: Ten years is proposed for the AMD bank with renegotiation after 5 years
- n. Species banking was discussed
 - i. For mitigation banking, tie back to no net loss of stream functions for permanent stream impacts. Rare, Threatened, and Endangered Species mitigation credits are available within USM.
 - ii. Other species credits were discussed.
 - iii. Potential for anadromous fish passage impacts in other programs to use AMD mitigation credits as compensation for these projects?
- o. Site protection impossible on a large river
 - i. Too many landowners
 - ii. Huge land area
 - iii. Potential for another dam to be put in upstream in the future? Agencies provide checks to keep from happening

Workgroup Directive #3 – Nonpoint Source Nutrient Trading Service Areas and the Conversion of Agricultural Lands

- 7) Presentation – “Introduction to Nonpoint Source Nutrient Trading Service Areas and the Conversion of Agricultural Lands” [Sara Felker, DEQ]: Ms. Felker presented data on the nonpoint source nutrient trading program, including bank locations, acreage by county, and information on the use of credits by 8-Digit HUC.
- 8) Around the Table Questions [Angela Jenkins, DEQ]:

To what extent are nutrients being generated through the conversion of important, prime, or unique farmland?

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

- a. An ask was made to compare acreages of unique, prime, and important farmland to acreages of converted acres under the NPS trading program by overlaying the conversion bank areas with the mapped areas of unique, prime, and important agricultural lands. Further analysis will require better maps of bank conversion areas that bank sponsors may be able to provide.
- b. One workgroup member noted a current mapping effort to identify converted agricultural land, prime farmland, and important farmland throughout the state that could be of use to the workgroup.
- c. One workgroup member noted that 36% of the parcels converted for nutrient credits in Clarke County were considered prime, important, or unique farmland, compared with 24% of the county itself considered prime, important, or unique farmland.

- d. Several members expressed their anecdotal experience is that less valuable farmland is typically converted.
- e. Others in the group felt that the analysis of this historical data is not helpful for the future direction of the program due to revised land conversion rates and general shift away from land conversion activities under the program.
- f. Several members, including representatives from Clarke County, voiced concerns that a disproportionate amount of prime, important, or unique acres of agricultural land are being converted under the nutrient trading program. They expressed a desire to remain an agricultural community and believe that land use decisions in northern Virginia are negatively impacting the retention of farmland in adjacent communities. Members were also concerned that a future supply shortage of nutrient credits could once again make land conversion activities viable in the county again even with the revised nutrient crediting rates.

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

- a. The group expressed general concern with attempting to have localities dictate whether they are allowed to convert agricultural land for generating nutrient credits under the program.
- b. Questions were raised on whether this is an important discussion to have if it is not as economically advantageous to convert agricultural land under the programs revised land conversion nutrient crediting rates.
- c. Several people requested finer-scale data on farmland classification.
- d. The group questioned whether the language in the proposed amendment would also restrict the development of other stream restoration projects in rural counties.
- e. Rather than a complete restriction, members proposed that there be a maximum percentage of an agricultural parcel for conversion.
- f. Members referenced ranking data used by other governmental agencies to assess the relative importance of farmland for funding programs and suggested this data may be used for analyzing land conversion applications.

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

- a. The group asked if nutrient service areas could be expanded to allow areas of high development to purchase nutrient credits from a greater area.
- b. A request was made that the program look into separating the Shenandoah and Potomac watersheds to be two separate tributaries as opposed to them being combined as they are now.
- c. Members expressed concern on how this would impact existing nutrient banks that were established under the previous requirements.
- d. There were questions about the usefulness of such restrictions given the impacts of recently enacted local water quality restrictions.

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?

- a. Incentivize other practices, such as wetlands restorations or targeting the conversion of pastureland/sub-prime agricultural land, to shift the focus away from prime, important, or unique farmland? Shoreline restorations were also mentioned as a viable alternative. Members suggested a “multiplier” be included to increase or reduce the number of nutrient credits to generate, similar to the Unified Stream Methodology mitigation credit methodology discussed in an earlier discussion. Others voiced their opinion that this shift was already occurring and did not need to be further incentivized.
- b. Is it possible to place limitations on agricultural property purchases when the intent is to enroll the property as a nutrient bank? Would this just shift the business model to “easement” agreements where the existing farmer maintains ownership to avoid the requirement?
- c. Would increasing financial incentives to farmers to keep land in active agriculture prevent land use conversions?
- d. Allow localities to make a finding that this program is hurting their economy and restrict the nutrient trading program. If a finding is made that a locality was disproportionately losing farmland, allow nutrient credit purchasers to use nutrient credits from an expanded service area and/or restrict nutrient credits from the impacted locality.
- e. Some members of the group expressed a possibility of giving localities more authority on property uses. Some of the ideas included conditional use permits for all land activities or laws that allow localities to restrict nutrient bank creation. It was suggested that a Commonwealth attorney review the existing laws to determine whether localities could restrict nutrient bank creation under current law.

9) Next Steps

- a. Next Workgroup meeting Monday, August 8, 2022
- b. Draft meeting minutes will be distributed