TIDAL WETLANDS MITIGATIAON BANK WORKGROUP MEETING I

February 23, 2024 11:00 a.m.

Virginia Institute of Marine Sciences
Watermen's Hall
1375 Greate Rd
Gloucester Point, VA 23062

Workgroup Members In Attendance:

Shannon Varner	Troutman Pepper
Tom Tye	New Mill Creek Bank
Jay Ford*	Chesapeake Bay Foundation
Karen Johnson	The Nature Conservancy
Randy Owen	Marine Resources Commission
Jeanne Richardson	Army Corp of Engineers
Sarah Woodford	Department of Environmental Quality
Lyle Varnell	Virginia Institute of Marine Science

Other Attendees:

Kati Booth	The Nature Conservancy
David Davis	Department of Environmental Quality
Carrilin Hirsch	Pender & Coward
Matt Hull	Pender & Coward

*Arrived late

Matt Hull called the meeting to order at 11:03 a.m. He explained that this meeting was open to the public and notice had been given. Members of the public were present. He requested the workgroup members to limit all discussions to the meeting itself, no outside discussions. A full transcript of the meeting will not be made, but a summary will be prepared and made available.

Mr. Hull advised that the purpose of the meeting is that Virginia Marine Sciences Commission ("VMRC") is required under HB1950 to update the Wetlands Mitigation Compensation Policy (the "Comp Policy") and the Guidelines for Establishment, Use and Operation of Tidal Wetland Mitigation Banks in Virgini (the "TWG"). Mr. Hull read the code section which outlines what VMRC must do.

Each member of the workgroup introduced themselves and identified what agency or organization they are associated with.

Mr. Hull stated that first the group will review the redlined version of the Comp Policy which had been circulated to all workgroup members. Printed copies were also made available.

4VAC20-390-10. Definitions

Mr. Hull explained that "Compensation" was amended to align with the federal definition and that "Tidal Wetlands Guidelines" was defined in order to incorporate the latest version of that document.

The group talked about what "not take" means, does that include avoidance and whether or not the language here is clear enough considering the different types. DEQ indicated that they defer to VMRC for what the types are. Compensatory mitigation is actual action, prior to that would be avoidance, and mitigation would be "not take".

Discussion was had regarding replacing "compensation" with "compensatory mitigation". The group agreed to that change.

4VAC20-390-20. Policy.

Mr. Hull indicated that little substantive changes have been made, outdated data was eliminated and commitment added. The statement was made that this should make reference to the coastal resilience master plan.

The question was raised as to whether the use of the word "encourages" is strong enough. Perhaps it should read requires, that stronger language would also help clear up disagreements between agencies. "Require" would be better as we say "no net loss" and the statutes should drive the policy statement. Mr. Hull advised that this is not an operative document and requirements will come later.

Mr. Hull asked if there would be a need to eliminate "where appropriate"? Discussion ensued. Some members felt not necessary because then there would be no compensation.

Question raised about "all permitted" language. Is it always "all"? Some members say yes, even one square foot. However, others say that the federal government can say compensation not required and the state may still require. Mr. Hull indicated that if it's possible that something may be too small to require compensation then encourage may suffice and perhaps leave "where appropriate".

No consensus was reached.

4VAC20-390-30. General Criteria

Mr. Hull reviewed suggested changes and indicated that much of the text removed was surplusage.

It was observed that just because an area is wetlands does not mean it is protected and that preservation alone is not compensable. The ACOE requires that 80% be action and 20% can be preservation. Is stronger language than "preserve" needed here? Mr. Hull stated that if there is a preservation option, this is where to set that forth. The ACOE offers blended credits, but no separate preservation credits. The point was made that preservation inclusion may encourage more participation. A 10 to 1 ratio protects resources around the work being done.

No consensus was reached.

4VAC20-390-40. Specific criteria.

Mr. Hull indicated that the changes made here were to simplify the provision. The second sentence was clarified for the group.

No comments.

4VAC20-390-50. Supplemental guidelines.

Mr. Hull reviewed the proposed changes.

Section A

It was stated that this is not consistent with federal regulations. Mr. Hull indicated that (4) is different, that's why County can set up fund, etc. It was suggested that "in-lieu-fee" be clarified. Mr. Hull suggested adding a (5) for the different in-lieu-of fees. It was suggested that a definition of "instrument" be added. That the State has a program that, if it aligns with the federal regulations, can be accepted. It was requested that "should" be changed to "shall" and that the sequency be fleshed out further.

Section B

Mr. Hull advised that the sequency will be reordered to match Section A and explained the proposed changes as follows:

1. Language has been strengthened.
2. Grammatical correction.
3. No change.
4. Non substantive – simply defines" established".
5. Discussion was had about 1:1 ratio. Mr. Hull asked if there were instances where it may not be 1:1? One member stated the statute says 1:1 so should state that clearly, others felt it should not as it can be determined on a case-by-case basis at time. Generally, is 1:1 for Tidal and 2:1 for nontidal. The question was raised as to whether this refers to actual area or functional value. Mr. Hull indicated that 1:1 refers to actual measure and ideally also functional value. It was noted that it is not clear and suggested that if it's land to land it should say so. It was noted that in some places it says "marsh", should consistently say wetlands.

6. There were no suggested changes. The question was raised as to whether it should read "own" as a Permittee may not necessarily own the site, for example they may have an easement. Mr. Hull indicated that it means they owns an interest does not mean they own the site, but perhaps could change to control. The group agreed. It was also suggested that "mitigation site" be changed to align with definitions.
7. No changes or discussion.
8. The group discussed the language, particularly "sacrifice", and ultimately all agreed to strike Item # 8 in its entirety.
9. Discussion was had as to what is "demonstrated history" and does it need to be more clearly defined. Just because something has a demonstrated history in one place doesn't mean it is appropriate. It needs to align with the proposal.
10. The group discussed the language here and indicated that it may not be appropriate as there are circumstances where conversion may be appropriate, though unlikely. After much discussion the group decided that this should be fleshed out in Item # 1 and then Items # 9 and 10 can both be eliminated. Ms. Woodford indicated the state regulations for non-tidal wetlands have language to refer to in order to do so.

12:40 p.m. Break for Lunch.

1:11 p.m. Reconvene.

11. Lengthy discussion was had as to whether the language here is clear enough. Mr. Hull indicated it means that cannot require a lesser ratio because it is vegetated v. non-vegetated. Some members didn't' think the language made sense at all or that it was already stated elsewhere or that the purpose is to compensate equally in case all that is available is the opposite. Mr. Hull asked if perhaps it could be changed to "will be treated equally". No consensus was reached.
12. The question was asked as to whether or not the applicant is responsible for all monitoring. The group agreed to strike "for unproven types of compensation" and to change "applicant" to "permittee".
13. Proposed changes eliminated Item 13 entirely. Discussion was had as to adding the first sentence back in for permittee responsible mitigation and to change "easement" to "site protective instrument"? The second sentence can remain deleted. Mr. Hull indicated that he would re-work 13 and put back in, tracking the state language.

Section C

It was indicated that the language "Unless the applicant can demonstrate compliance with specific criteria contained in § 28.2-1308 for use of a compensatory mitigation bank outside the watershed where a permitted project is located, the use of a mitigation bank for permitted activities requiring compensation must be in the same USGS cataloging unit or adjacent USGS cataloging unit in the same watershed" is broad enough to capture new exceptions in the Code.

Section D

Mr. Hull stated that this is different than federal. The group talked about in-lieu-of fees; how many people use them. There is limited data as it is not tracked. The fees need to be clearly defined. The availability of credits was discussed. Generally, credits are available with a minimum of 450 square feet. The group discussed how to make available to people who cannot afford to buy credits. Twenty localities have in lieu-of-fees. What do people do in those that do not? Who monitors cost of in lieu of fees?

Discussion was held about where there are alternatives to go elsewhere, reduce costs so as not to limit people's options. The best choice is the closest, in HUC, mimicking what has been disturbed. VMRC language says go to next HUC.

It was suggested, in the 2nd to last sentence, to change "could be" to stronger language, possibly "shall be". Mr. Hull indicated that he is not certain we can restrict a locality that way. VMRC has no power to control it. Perhaps say "should" or "encouraged". The question was asked as to what the purpose of tracking is if cannot control it? Does Code say have to is it required or just allowed? Can VMRC remove that entirely. The position was taken that if the funds aren't used, then there is a net loss.

Mr. Hull stated that he will incorporate the comments/changes into the Comp Policy and to the Guidelines, as applicable. We will need to schedule another meeting. Mr. Owen indicated that we need to be done with all review before VMRC meeting in June.

The meeting was adjourned at approximately 2:00 p.m.