

Meeting Minutes
Monday, August 8, 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: Chris Boies, Andrew Clark, Mike Collins (Jeff Waldon's alternate), Robert Condrey, Jeff Corbin, Justin Curtis, John Foote, Kathy Hoverman, James Hutzler, Rene Hypes, Casey Jensen, Dave Jordan, Adrienne Kotula, Terry Lasher, Patrick Link (T.J. Mascia & Jennifer Van Houten's alternate), Justin Mackay-Smith, Amy Martin, Martha Moore, Kelby Morgan, John Olenik (Chris Swanson's alternate), Erin Reilly (Bill Street's alternate), Jeanne Richardson, Nikki Rovner, Peggy Sanner, Kyle Shreve, Sarah Thomas (Phil Abraham's alternate), Shannon Varner, Alan Weaver, Charles Wilson

Members Absent: Sara Aman, Steven Barrs, George Bryant, Howard Epstein, Brent Fultz, Greg Garman, Kirk Havens, Mark Killgore, Samuel Markwith, Serena McClain, Chris Miller, Evan Ocheltree, Tim Owen, Randy Owen, Jennifer Perkins, Bobby Proutt, Fritz Schneider

Other Attendees: Cecilia Boyd, Jim Eisenhardt, Karen Johnson

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 4:15 PM.

- 1) Welcome from the Director of Water Permitting Division [Melanie Davenport, DEQ]: Ms. Davenport welcomed the workgroup members and thanked them for their participation in the second workgroup meeting.
- 2) Introductions [Melanie Davenport, DEQ]: Ms. Davenport had the workgroup members and attending DEQ staff introduce themselves with their respective affiliations. She also reviewed the building facilities information and emergency exit procedures.

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

- 3) Introduction [Sara Felker, DEQ] – Ms. Felker gave an overview of the content discussed at the previous workgroup meeting on July 7, 2022, as well as a reminder of the three workgroup directives the group was tasked with.
- 4) Around the Table Questions [Sara Felker, DEQ]:

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

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) Some members expressed concern that there is not yet enough data readily available to answer this question.
 - i) HB 894 was mentioned, which should result in the creation of a map or repository of prime farmland in the Commonwealth led by the Virginia Department of Agricultural and Consumer Services (VDACS), with an initial report expected by December 1, 2022. Recommendations were also made regarding the importance of ground-truthing the data if limiting the inclusion of prime agricultural land in the nutrient trading program is being considered, while others were concerned with using this dataset as the basis for decisions without reviewing it first.
 - ii) It was also recommended that a definition for prime agricultural lands be standardized across programs throughout the Commonwealth. HB 206 was referenced as a good basis, where “Prime Agricultural Soils” are defined as “Soils recognized as prime farmland by the US Department of Agriculture...” This was further defined as Class I and II soils. Others noted additional complications for how to categorize crop to hay land conversion activities, since the land would still remain in agricultural production. The group also noted that the designations for “Unique” and “Important” agricultural lands were too broad in definition and scale to be included for limiting land conversion activities.
- b) Comments were made to make it clear that this workgroup should focus on land conversion activities. Incidental land conversion, including the 35-foot riparian buffer requirements for stream restoration practices, should not be considered as part of these discussions. HB 1283 was noted to focus on land conversion activities, but that this further clarification could be made.
- c) Concerns were raised about what the potential effects of limiting prime agricultural land conversion activities could be on credit supply and credit prices.
- d) In Maryland’s program the state designates prime farmland based on site-specific evaluations. If determined that part of the property contains prime agricultural land then land conversion would be limited.
- e) Various workgroup members expressed the following concerns: land conversion affects communities and the impacted localities should have additional authority to restrict enrollment in the program; property owners should be able to decide what they do on their own property; and there shouldn’t be a government program incentivizing land conversion.

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

- a) A suggestion from the previous workgroup meeting to separate the Shenandoah and Potomac watersheds into separate tributaries was discussed. It was mentioned that the two are combined now to match the Virginia Pollutant Discharge Elimination System (VPDES) permit requirements and would require a change to § 62.1-44.15:35.
- b) Concerns were raised for how the program would handle potential trade restrictions by HUC for banks that are already approved. It was recommended that banks be grandfathered to their current service areas.

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) Representatives from VDOT and the home builders association expressed concern that any change in market requirements would increase costs, which would be passed on to the public.

- b) There were multiple questions about the ability of localities to implement their own permitting requirements for nutrient banks. Concern was expressed that localities cannot regulate nutrient trading without express direction from the legislature. Some were concerned that a statewide program could be changed by local ordinances while others expressed a desire for local regulation.
 - c) A recommendation was made to divide the workgroup members into the categories of agricultural conservationists, land developers, and the nutrient banking community in order to develop a set of recommendations from each group. This was recommended due to the varying viewpoints held by each group regarding the limiting of land conversion activities, and how those unique perspectives will limit the ability to reach consensus for the workgroup as a whole. The recommendations from each category can then be shared with the General Assembly.
- 5) The following items were tested for consensus:
- a) There should be a consistent definition of prime agricultural soils across programs for the purposes of mapping. Specifically “prime agricultural soils” should be defined as it is in HB206: “soils recognized as prime farmland by the U.D. Department of Agriculture...” (which refers to Class I and II soils).
 - (1) Fully Support - 16
 - (2) Do Not Fully Support But Do Not Oppose - 9
 - (3) Opposed - 0
 - b) Any legislation addressing land conversion for nutrient credit generation should be limited to agricultural to forest land conversion. Forest land conversion does not include stream restoration projects and associated buffers.
 - (1) Fully Support - 14
 - (2) Do Not Fully Support But Do Not Oppose - 6
 - (3) Opposed - 0
 - c) Restricting the conversion of prime agricultural soil lands to forest for the purpose of generating nutrient credits could: reduce supply and increase the price of nutrient credits, allow for the preservation of land with prime soils for non-silviculture agricultural use, and the impacts cannot be quantified until a prime agricultural soils map is created per HB 894.
 - (1) Fully Support - 19
 - (2) Do Not Fully Support But Do Not Oppose - 2
 - (3) Opposed – 0

Workgroup Directive #1 – Supply and Demand for Mitigation Credits

- 6) Introduction [Sarah Woodford, DEQ] – Ms. Woodford gave an overview of the content discussed at the previous workgroup meeting on July 7, 2022, as well as a reminder of the workgroup directives the group was tasked with.
- 7) Ms. Woodford asked workgroup members whether they wanted DEQ to discuss the agenda attachments (graphs depicting historic mitigation credit demand and credit sales in Virginia). No workgroup members wanted to review the attachments.

8) Around the Table Questions [Sarah Woodford, DEQ]:

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) The potential for a mitigation credit commodity market was discussed. DEQ staff stated that they met with Director Rolband, who is very interested in creating the commodity market. A stakeholders meeting may be established in the future, likely a year away.
- b) Legislation was previously approved to expand service areas (2021) to increase competition and the number of banks, as well as expediting bank approvals. This legislation has led to a number of requests and approvals for service area expansions.
- c) The previously proposed legislation (2022) would have removed the requirement to look for available mitigation credits within a Primary Service Area to serve impacts before going to available mitigation credits within a Secondary Service Area to serve impacts. One workgroup member mentioned that this does no good if there are no approved mitigation banks with credits available. DEQ questioned whether it was appropriate to remove this requirement, given that the change would be at odds with other permitting requirements for in-kind mitigation and guidance for “ecologically and environmentally preferable” mitigation options, which must take into account proximity of a given mitigation site to project impacts.
- d) The Wetland and Stream Replacement Fund established under Code of Virginia was discussed. DEQ and U.S. Army Corps of Engineers (Corps) staff identified issues with the language of the Code that established the Fund, which directly conflicts with the Corps’ and EPA’s 2008 Final Mitigation Rule. Therefore, the Fund cannot be implemented without a change in the Code. Other concerns raised by DEQ staff included questions regarding who would implement the projects, avoiding conflict of interest, providing adequate funding or budget for program operation, and need for additional staff. One workgroup member stated that this seemed like a more long-term solution. Another workgroup member stated that DEQ may not want to prioritize this potential solution over other potential work and solutions to increase mitigation credit supply.
- e) Regarding Mitigation Banking Instruments, workgroup members stated they support accelerated credit releases. They suggested decreasing buffer width requirements or increasing credit yields to make banks more feasible financially. Buffer width requirements were discussed at the June 2022 3rd Party Compensation Providers Meeting. This issue may also come up at the September 2022 3rd Party Mitigation Providers Meeting, where a new Mitigation Monitoring Report Template will also be presented to increase monitoring report review efficiency.
- f) Workgroup members discussed increasing advance mitigation credits for the Virginia Aquatic Resources Trust Fund (an in-lieu fee mitigation program operated by The Nature Conservancy). DEQ discussed that this has been done several times over the last couple years, in river watersheds with high credit demand, and may be done again.

- g) Workgroup members raised the idea of selling excess mitigation credits from projects. There are several ways that this does happen in the current mitigation program (i.e. permittee may utilize unused mitigation credits from another one of their permits, permittee may sell mitigation credits back to the mitigation bank or site). For the permittee to be able to sell them to another permittee specifically, there would need to be a commodity market established.
- h) Turning mitigation credits from permanent to term credits was discussed. Several DEQ staff pointed out that Code of Virginia and Virginia Administrative Code state there must be permanent no net loss, and term credits would not be compatible with this statutory requirement.

Workgroup Directive #2 – Incentivizing Dam Removal Projects in Virginia

9) Introduction [Sarah Woodford, DEQ] – Ms. Woodford gave an overview of the content discussed at the previous workgroup meeting on July 7, 2022, as well as a reminder of the workgroup directives the group was tasked with.

10) Around the Table Questions [Sarah Woodford, 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?

- a) One Workgroup member clarified that thermal impacts might be changed to “thermal changes” for dam removal projects, because the temperature changes are usually mostly beneficial. Additionally, workgroup members indicated that sedimentation may occur downstream with or without dams, and potential sedimentation issues during dam removal are usually short term.
- b) The workgroup discussed the potential to expand the mitigation service area for 4th order or higher streams for dam removal projects generating stream mitigation credits. Several members spoke about how dam removal provides benefits to the entire river system, not just the removal location.
- c) One workgroup member asked whether the Unified Stream Methodology (USM) calculation of compensation requirements currently takes into account the proximity to impacts, and requires more compensation if in an adjacent river watershed. DEQ answered that USM does not take into account adjacent river watersheds, however, there was a multiplier in the previously proposed legislation for dam removal projects that was intended to have that effect.

- d) One workgroup member asked if there were incentives for dam removal projects through mitigation crediting. DEQ answered that the USM includes the ability to grant Adjustment Factors on a site specific basis, such as cattle exclusion, watershed preservation, and rare, threatened and endangered species protection. Other adjustment factors may be created. For example, adjustment factors for proposed dam removal projects have been discussed, including for RTE species, anadromous fish passage, priority dam removals, water quality, etc.
- e) Regarding species credits (non-mitigation credits), DEQ staff raised the question as to who would require compensation for species impacts. Would a species banking program be under DEQ or the Department of Wildlife Resources (DWR)? Would DEQ have to change permitting based on Threatened and Endangered Species impacts, including Time of Year Restrictions? There is potential for new legislation for a species banking program. DWR would still adhere to a Time of Year Restriction for anadromous fish, to avoid impacts, so the potential demand for anadromous fish species credits may be low.
- f) Existing examples of innovative dam removal partnerships were discussed, including:
 - a. Example: The Bloede Dam Removal had partnerships with the Maryland Department of Transportation, National Oceanic and Atmospheric Administration (NOAA), American Rivers, Maryland Department of Natural Resources, etc.
 - b. Federal government grant funds partnered with matching private funds, these projects have pro-rating of mitigation credits
 - c. Agencies that have involved or implemented public/private partnerships for dam removal: the Federal Emergency Management Agency (FEMA), NOAA, and the Federal Energy Regulatory Commission (FERC)
 - d. Natural Resources Damage Assessment (NRDA) process
 - e. Agreements for fish passage on hydropower dams
 - f. One workgroup member pointed out that these are not necessarily innovative, only current practice. Public/private partnerships are the current way to get dams removed.
- g) Need for incentivizing dam removal included dam owner education regarding their liability for dams on their property

11) The following item was tested for consensus:

- a) Dam removal provides ecological benefits within the river watershed where the dam is located and those benefits outweigh the potential ecological impacts.
 - 1) Fully Support - 19
 - 2) Do Not Fully Support But Do Not Oppose - 2
 - 3) Opposed – 0

Next Steps

- a) Next Workgroup meeting Tuesday, August 30, 2022
- b) Draft meeting minutes will be distributed