MINUTES

WRAC CHAPTER 105 AD HOC

Rachel Carson State Office Building
Room 105, First Floor Conference Room
Harrisburg, PA

January 9, 2008

Attendance – Members
Dr. Robert P. Brooks, Penn State University, Cooperative Wetlands Center
Grant Gulibon, Pennsylvania Builders Association
Nathan Havens, PA Game Commission
Jeff Lapp, EPA Region III
Robin Mann, Sierra Club
Gregory Quatchak, P.E., Civil & Environmental Consultants, Inc.
Stephen Rhoads, Pennsylvania Oil & Gas Association
Matt Royer, Chesapeake Bay Foundation
Rick Shannon, McCormick Taylor
Thomas Shervinskie, PA Fish and Boat Commission
Patricia Strong, U.S. Army Corps of Engineers- Baltimore District
Cynthia Tibbott, U.S. Fish and Wildlife Service
Craig Todd, Monroe County Conservation District
Toni Zawisa, PA Department of Transportation

Agencies, Advisors, and Guests
Tim Johnston, Skelly & Loy
David Anderson, Moody & Associates
Bob Wendelgass, Clean Water Action
Duke Adams, Denise Caudill, Troy Conrad, Dave Goerman, Kelly Heffner, Ken Murin, Ken Reisinger, Shelby Reisinger, PA Department of Environmental Protection

Call to Order and Attendance

Steve Rhoads called the meeting to order. Everyone in the room introduced themselves. Steve informed the group that they are being asked to provide the Water Resources Advisory Committee (WRAC) with feedback, input, and suggestions for possible revisions to the Chapter 105 Regulations. The group will not need to reach consensus on the feedback, but provide a list of items. The group will meet regularly and at each meeting will be given the opportunity to discuss and comment on specific conceptual revisions proposed for the Chapter 105 regulation package.

Review and Discussion of Chapter 105 wetland classification concepts

Overview

Troy Conrad gave an overview of the two topics of discussion for the meeting: wetland classifications concepts and compensation for impacts concepts. Wetland classifications concepts were covered first and compensation concepts would follow. Mr. Conrad explained the current water resource classifications in Chapters 93 and the current wetland classifications in Chapter 105. Mr. Conrad further explained that in some permitting situations, incongruities between the two regulations may sometimes cause certain wetlands to be

held to a higher level of protection than the watercourses adjacent to them. For example, under the current Chapter 93 and Chapter 105 regulations, a wetland next to a Class C Wild Trout stream would be classified as an EV wetland, however the Trout Stream itself would not qualify for special protection. In the same example, under Chapter 102 NPDES regulations, a landowner would not be able to discharge stormwater to that EV wetland, but would be able to discharge to the stream. The Chapter 105 Program is considering making changes to better align the chapters by creating a 3-tier wetland classification system in Chapter 105 that would more closely mirror Chapter 93 regulations with Wetlands, High Quality (HQ) wetlands, and Exceptional Value (EV) wetlands. These three proposed classifications concepts would affect the permitting process in the following ways:

- proposed unavoidable impacts to Wetlands would be held to a general water dependency test and be allowed no significant adverse impact.
- proposed unavoidable impacts to HQ Wetlands would be held to a general water dependency test and be allowed no adverse impact.
- proposed unavoidable impacts to EV Wetlands would be held to a stringent water dependence test and be allowed no adverse impact.

Wild Trout Streams and Data

One of the primary conceptual changes in the criteria to meet the 3-tiered wetland classification involves wild trout streams. While it appears that under the proposed changes that wetlands connected to wild trout streams may be removed from the EV wetland criteria, the proposal is for those wetlands to be reclassified using different criteria. The Program is proposing to classify wetlands adjacent to HQ waters as HQ wetlands, this would include wetlands next to Class A wild trout streams. The Program is also proposing to classify wetlands adjacent to EV waters as EV wetlands, which would include wetlands next to wilderness trout streams. Wetlands adjacent to wild trout streams that do not otherwise qualify as HQ or EV (such as via the assessment protocol or vegetative communities) would be reclassified as other wetlands.The Pennsylvania Fish and Boat Commission and a few other workgroup members expressed their concern over the concept.

Some workgroup members asked if the concepts DEP is proposing protects resources to the current requirements? They also inquired what the regulatory impact will be by changing to the proposed conceptual 3-tier system. They were unsure if the proposed concepts are appropriate.

Mr. Conrad stated that the Program is not trying to change the permitting vehicle. The Program is still proposing to keep the EV classification and its current permitting requirement as having no adverse impact and meeting the stringent water dependent test. The Program is evaluating concepts to possibly change what wetlands meet the EV classification and therefore get the additional protection. The members of the workgroup asked to see numbers or graphs depicting what is currently regulated and what would change under the proposed conceptual system. Mr. Conrad stated that the information could be provided for the next meeting.

Dave Goerman provided the group with approximated numbers of Wild Trout Waters calculated using basic GIS coverages available and summarized statistics. Mr. Goerman will follow up at the next workgroup meeting with more data.

Greg Quatchak asked to see a quantification of those permits issued for EV wetlands over the last 3-5 years. Then suggested looking at those permits issued to see what number dealt with wetlands adjacent to wild trout waters. Mr Quatchak also suggested looking at those same permits and see what wetland classification they would be in under the proposed conceptual wetland classification (i.e., which of those would fall under the new conceptual classification as HQ or other).

Ken Murin mentioned the possibility of including higher levels of protection to wetlands near other special aquatic resources, not just limited to wild trout. The Program is looking to further strengthen the relationship between wetlands and the watershed.

Wetland Monitoring Assessment Protocol and Wetland Vegetated Communities

A member asked if the conceptual incorporation of the wetland monitoring assessment protocol would help capture more wetlands as HQ or EV in the proposed conceptual system. The Program concurred that the monitoring assessment protocol has the potential to qualify more wetlands as HQ or EV. Mr. Conrad briefly explained the development of an ambient monitoring assessment protocol. The concept classification would require the completion of a rapid stressor checklist, performed during the project development. The score from that rapid assessment could determine the wetland to be classified as HQ or EV. Mr. Conrad also mentioned the wetland vegetated communities developed by the Pennsylvania Natural Heritage Program (Pennsylvania Department of Conservation of Natural Resources, The Western Pennsylvania Conservancy and The Nature Conservancy). The concept includes the Heritage Program developing a key to be used to determine the vegetated community of the wetland, most likely during the deliniation. Once the wetland vegetated community is determined, the community's State Rank could determine the wetland to be classified as HQ or EV. Mr. Goerman and Dr. Robert Brooks, provided the group with a brief background on the monitoring assessment protocol that DEP and PSU have developed and the assessment work being done. A concern was raised that it will create a burden performing the proposed rapid assessments and questioning how they are conceptually going to be applied. The members asked that the ambient monitoring protocol be explained to the group at the next meeting.

Review and Discussion of Chapter 105 wetland compensation concepts

Mr. Conrad addressed the group regarding the draft conceptual language for wetland compensation and asked the group for their thoughts on:

- making the types of compensation sequential or not and
- how to work in the out-of-kind compensation
    - when might out-of-kind compensation be the first option?

EPA/ACOE Mitigation Rule

EPA currently has a Mitigation Rule for wetlands pending final approval and release. A member asked how the pending rule would affect the Program's conceptual wetland compensation language. Mr. Conrad replied that the two things that could be affected are the in-lieu-fee program and out-of-kind mitigation.

Current Wetland Replacement Success

A member asked what has been the success of the current replacement program. The Program will provide information on past accomplishments at future meetings when compensation is the topic of the meeting. Mr. Conrad added that the Program has obtained a grant to look at current mitigation sites in greater detail than has been available prior. The grant will allow Program staff to collect data over a 3-year period to determine how successful the current applicant has been at meeting their wetland replacement obligation in both an ecological and a regulatory context. The Program is expecting to have data from the first round of site visits by this spring showing the functional replacement of what was lost. The initial function of the wetland would be captured in the initial application for a permit

Replacement Ratios

Current Pennsylvania regulations require a minimum 1:1 replacement ratio of function and area for wetlands. The group raised the ratios for discussion. Many of the members felt that the ratios should be increased. Mr. Conrad asked the group to think about what the replacement ratios should be and if there should be more categories (i.e. created wetland versus restored wetland). The Program would like the group to provide input on appropriate replacement ratios, and if acreage is the correct proxy to determine success in making the functional replacement.

Effectiveness of Compensatory Wetland Mitigation

Pennsylvania's current wetland program is successful at avoiding and minimizing impacts to wetlands, permitting only unavoidable impacts. Over the past 10-15 years the Department has averaged 50-100 acres of wetland impact per year, that number averaging closer to 40-60 over the most recent five (5) years. Approximately 40% of permits issued are deminimus (<0.05ac) with approximately another 40% impacting less than 0.5ac. Members voiced concern regarding the effectiveness of the wetland mitigation part of the program. The group expressed concerns regarding the current regulations preference to on-site replacement because it can lead to a wetland attempting to be placed where conditions are not optimal. Some of the members want the revised Chapter 105 Regulations to allow for more opportunities to use out-of-kind compensation for unavoidable wetland impacts. By allowing out-of-kind compensation more readily the members can work with watershed groups to see what environmental activities and needs are more vital to the watershed. This approach would then allow compensation dollars to address those projects instead of an in-kind on-site mitigation project with less potential for success.

The Program's idea is to compensate for the impacted wetland as close to the project site as possible, but when it is impracticable, the Program is asking the workgroup for what the limits on out-of-kind mitigation should be (i.e. by mileage, by watershed). The members recommended that compensation should stay in the same watershed and then presented several additional questions to consider:

- If it cannot be done within the local watershed, should that prevent DEP from issuing a permit?
- How do you determine the affect of trading a wetland for another type of aquatic resource?
- What the process would be when evaluating permit applications and how the unavoidable impact would affect the ecosystem?
- How to score if a riparian buffer was added—how will it affect the surrounding different types of waters?

Next meeting

Members asked for the next meeting to include details/presentations on:

- How permit applications would be treated in those three tiers of conceptual classifications proposed;
- Information on procedures and standards that will be used to evaluate projects proposed in the different conceptual classifications;
- Summary of the permitting decisions made and how they may change under the conceptual wetland classification;
- Presentation on the Ambient Assessment Monitoring Protocol;
    - What it is
    - How it is proposed to affect the wetland program
- Presentation on the Wetland Vegetated Communities.
    - What it is
    - How it proposes to affect the wetland program

It was stated that the next meeting should focus on classifications and compensation not be discussed. The group's objective is to finalize discussion on classification, try to identify the areas they agree with and what points need further discussion.

As the meeting minutes were developed the Program made note of items needing additional clarification. Those items and the suggestions from the workgroup members set the foundation for the agenda of the next meeting. The Program will address as many of the above mentioned requests as possible in the time allowed.

The next meeting will be an all-day meeting held on February 20 at 9:30; February 27 as a backup date.

Adjourn