

**WATER RESOURCES ADVISORY COMMITTEE
Chapter 105 Ad-hoc Workgroup**

May 9, 2008
Room 105, RCSOB
Harrisburg, PA

MEETING MINUTES

1. Call to Order and Attendance – Steve Rhoads

- *Members*
 - Steve Rhoads, POGAM
 - Cindy Tibbott, USFWS
 - Matt Royer, CBF
 - Nathan Havens, PGC
 - Grant Gulibon, PA Builders Assn
 - Robin Mann, Sierra Club
 - Pat Strong, USACOE, Balt.
 - Sue Germanio, PA Coal Assn
 - Jeff Lapp, EPA
 - Rick Shannon, McCormick Taylor Inc.
 - Toni Zawisa, PennDOT

- *General Audience*
 - Ken Murin, PA DEP Watershed Management
 - Meg Murphy, PA DEP Legal
 - Dave Goerman, PA DEP Watershed Management
 - Frank Payer, PA DEP Watershed Management
 - Shelby Reisinger, PA DEP Watershed Management
 - Aaron Ward, PA DEP Watershed Management
 - Duke Adams, PA DEP Office of Policy
 - Dave Spotts, PFBC
 - Greg Podniesinski, PA Heritage Program
 - Tom Johnston, Skelly and Loy, Inc.

2. Review and Approval of January 2008 Minutes – Steve Rhoads

- *February Minutes will be emailed in draft form, then approved at the July meeting.*
 - January Minutes accepted by member with recommended changes.
 - Changes include “Jurisdictional Determination (JD) on 5th/6th line) should read “wetlands delineation” and third title should read “EPA/ACOE Mitigation Rule.”

3. EPA/ACOE Mitigation Rule – Jeffrey Lapp

- *Summary of Mitigation Rule*
 - Links to the Rule and supporting documents are on EPA and ACOE websites (www.epa.gov/wetlandsmitigation or http://www.usace.army.mil/cw/cecwo/reg/news/final_mitig_rule.pdf)
 - In general the Rule takes existing agency (EPA and ACOE) recommendations, guidance, and policies and puts them into regulation

- The Rule points out preference in mitigation. 1st - banking 2nd – In Lieu Fee (ILF) 3rd - permittee provided mitigation/compensation
- The Rule highlights the use of watershed plans where they are in place. If no watershed plan in place, then the Rule suggests the development of a watershed plan or to at least include some sort of watershed level thought process in the permit application. A watershed plan is not a specific document, it could take many forms.
- The Rule also discusses functional analysis, such as those like the PA assessment.
- Concern was expressed regarding the lack of watershed plans, the point was made that absent a watershed plan an analysis could be performed by a permittee, sponsor, or other responsible party to show a watershed level thought process.
- It was further pointed out that a watershed plan is not the responsibility of a permittee and the Rule does not provide specific guidance as to what must be provided to the reviewing agency.
- Watershed level thought process will fit the scope of the project, greater detail may be required for large or long projects whereas less detail may be necessary for localized, small or routine projects.
- The ultimate decision maker is the District Engineer (DE).
- Existing Mitigation Banks and ILF programs will be grandfathered under the Rule, but will need to meet Rule requirements within 2 years.
- The Rule imposes significantly higher standards on all 3 types of mitigation (banks, ILFs, permittee provided)
- Rule formalizes sequencing (avoid and minimize), sets 5 years as the minimum monitoring period with option to increase monitoring period.
- Rule emphasizes site protection (long term instrument eg: deed restrictions) and self maintaining design (getting away from mechanical pumps), looking at hydrologic budget and ecological performance standards.
- Rule formalizes Interagency Review Teams for banks and ILF programs
- For ILFs the Rule requires geographic service areas (watershed based), description of threats to the aquatic resources, historic aquatic resource losses, current conditions, watershed goals, watershed priorities, etc, etc... Generally the goal is to develop an understanding of where the threats to wetlands and other aquatic resources are and where the compensation will take place.
- Rule makes ILFs more like banks and specifically a not-for-profit entity
- Reporting – The Rule requires yearly accounting and reporting to ACOE and Inter-Agency Review Team (IRT), including contributions, permitting, expenditures.
- The Rule requires fees to be commensurate with the cost of mitigation in that service area.
- Preservation – has to be an aquatic resource that agencies decide is worthy of preservation and why it is at risk. (Wetlands in Chester Co for example may be at greater risk of degradation or loss than those in Potter County, preserving 5 acres in Potter Co. may not be as great an accomplishment for the watershed that 5 acres in Chester may be).
- Buffers – riparian areas and buffers are important to aquatic resource so they are able to be included in some mitigation.
- Nathan Havens – would this Rule allow for a large area of riparian area to be preserved as mitigation for wetlands impacts? Jeff said probably not, while out-of-kind mitigation is acceptable, there is a rigorous review process. This situation should be avoided, it's not realistic to say "never". Preservation must be in perpetuity.
- With regard to a discussion regarding historic loss, it was pointed out that historic loss typically looks at past impacts, not necessarily the permit load in that watershed.
- Matt Royer – does the risk assessment for preservation look at local ordinances (etc)? Jeff said he would think so.
- Robin Mann – does the Rule allow for mitigation buy-downs? Jeff reemphasized that there is still focus on avoidance and minimization. Dave Goerman reminded the group that Pennsylvania has been requiring mitigation plans to be submitted with permit

application. Dave and Jeff agree that many of the things in the Rule are not new concepts and many have been routine practice under existing PA regs.

- Meg Murphy – does preservation include restoration of riparian areas? Or just preservation? Jeff replied that restoration and preservation of riparian areas would be looked at separately, but could work together, such as restoring a riparian area before it is preserved.

- *Affect(s) on Pennsylvania*
 - Robin Mann – will the Pennsylvania Wetland Replacement Project be reviewed? Jeff replied that it would be grandfathered as-is for 2 years and then would need to comply with the Rule if PWRP were to compensate for impacts to waters of the United States.
 - For those projects that only require DEP mitigation, DEP can use its own mitigation separate from the Rule.
 - Toni Zawisa mentions that PennDOT is interested in and will be looking in to stream mitigation banking
 - Steve Rhoads – how will this affect PA State Programmatic General Permit (PASPGP-3)? Pat Strong responded that more projects may come to the Environmental Review Committee (ERC). However, the regulatory agencies already do most of what the Rule requires, the only difference may be whether or not projects can use PWRP.
 - Steve Rhoads – how does DEP foresee this affecting the program's process? Ken Murin replied that the program will need to work through the items in the Rule, but the program is already doing a lot of the things detailed in the Rule. As the program moves through the regulation revisions, there will be an emphasis to stay consistent with the Rule.
 - Dave Goerman noted there are many things currently being done and being developed that put the program in a good position to be consistent with the Rule. The current EPA Mitigation grant work will show the program a lot about what types of mitigation have and have not worked well in PA, then what actions to take next.
 - Steve Rhoads – will DEP be coming to workgroup with ideas and suggestions on how PA changes will reflect Rule? Dave Goerman replies positively and specifically mentioned the development of the waterways mitigation program.
 - Steve Rhoads – for clarity, this applies not just to wetlands but all water resource, does this apply to NPDES? Meg, Dave and Ken responded that the impacts of this Rule would impact projects through Chapter 105 and not NPDES Permitting, Jeff stated the Rule is specific to 404 permitting.
 - Toni Zawisa stated DOT was interested in preservation and banking.

- NEXT STEPS
 - DEP will discuss the details of the Rule with EPA and the ACOE to see what changes should be made in the Commonwealth's program.
 - A meeting among the agencies has been set up to start looking at waterway mitigation.

4. Wetland Vegetative Communities – DEP staff *see handout*

- *General*
 - The acreages of each state rarity rank on the handout are actual acres of wetlands of those types, they do not include buffers.
 - Toni Zawisa would like an update on the acreages of each state rarity rank after all county assessments are completed.
 - Nathan Havens commented that it is a good idea to move forward with including the vegetative wetland communities in the regulations.

- *Ranking process*

- Steve Rhoads – has there been a public review in the ranking process (mentioned trout streams and Chapter 93)? Greg Podniesinski indicated that there has been no public review for regulatory purposes because no agency has regulatory authority over the communities. The rankings are reviewed by the Pennsylvania Biological Survey (PABS). Greg mentioned that the committee can make recommendations to DEP and DEP can then get public comment. Dave Goerman and Meg Murphy agreed that the details are something the Department needs to look at further.
- *S-ranks to include in special protection*
 - Summary of previously provided information on hand out
 - DEP concept includes S1 and S2 in EV wetland classification and S3 in HQ wetland classification.
 - Rick Shannon - what is proposed about dual-ranked S2S3, and S3S4? Dave Goerman responded that if the concept is acceptable by the group, then we can move forward and decide how to handle those split rankings. Greg Podniesinski said additional work can be done to resolve dual rankings.
 - Toni Zawisa – has the entire state been assessed? Greg Podniesinski responded that a few counties remain to be surveyed. Toni asked if these numbers are final? Greg replied that it's not expected to find any more large fens in the state, some lower levels may be found.
 - Concern was expressed regarding oversight and public comment. It was stated that there isn't a formal review of the ranking process, it was further pointed out that this ranking is a service to the regulated community and was established as an alternative to a case by case review of each wetland. The classification system states up front the classification of a wetland, so as to avoid surprises. Again the concern was expressed that regulatory standards are being created through a non-regulatory process, Meg stated she does not necessarily agree with that point but agreed that this is something we should look in to further.
 - Toni – again expressed concern over possible change in the numbers found/classified.
 - Steve expressed concern over the ambiguity of S-class and suggested that “guidance” be avoided, rather the system should be clearly stated in the regs.
 - Toni – pointed out that S1 communities count as an “outstanding resource” for purpose of preservation, Matt followed up stating S1 communities are outstanding candidates for preservation but expressed concern that all S1's are not created equal and functions may vary. Matt further stated S1's should be a red flag for avoidance.
- *End product*
 - Fike listings will most likely be updated and be presented as an online document. The current plan is that each community will have a 2-3 page fact sheet and a 6-7 page abstract available. This information will be helpful in identifying the specific communities for advanced avoidance and minimization.
- **NEXT STEPS**
 - Does the workgroup agree with the concept of using the communities and rarity rankings as part of the wetland classification system? Yes, the group supports moving forward including the communities as part of the wetland classification system.

5. Wetland Assessment – DEP Staff

- *Open discussion on how to implement the use of the wetland assessment tool*
 - February Meeting Minutes should help to clarify the many uses for the wetland assessment.

- The wetland assessment tool was initially developed to assess the condition of the wetlands in PA. The assessment is similar to the stream assessment program, but differs due to wetlands being a different type of aquatic resource.
 - As the wetland assessment protocol has been developed, it has evolved, and additional uses for the assessment have become apparent. DEP would like to use the assessment tool to evaluate proposed wetland impacts during the review process.
 - The wetland assessment could also be performed on mitigation sites in order to compare the condition of the mitigated wetland to the wetland impacted via that same permit.
 - The program is also applying the assessment to volunteer wetland restoration and creation sites.
 - The program foresees use of the same method across many parts of the program.
 - The assessment protocol and associated Index of Biologic Integrity (IBI) has been peer reviewed and published
 - The program firmly believes the assessment tool would be very difficult to skew in either direction.
 - DEP asks – since we have supporting data, should we use it in the regulatory context for wetland classification?
 - The current thought process includes the applicant doing the Level 1 and Level 2 assessment as part of a modified Environmental Assessment (EA) submitted with the permit application. The score of the assessment would determine if the wetland is other, HQ or EV.
 - An EA is currently part of the permit process and this suggestion would not only be a more concise approach, but also a cheaper option.
 - The group would like a day in the field to learn the wetland assessment protocol.
 - Cindy Tibbott – can we use this tool to help inform permit decisions? Or does it need to be incorporated into regulations? Dave Goerman replied that it will help inform permit decisions, but looking at taking it further to provide wetland regulatory classification based upon the wetland condition.
- NEXT STEPS
 - 2 day meeting next time, 1 day in field, 1 day meeting

6. Potential Affects (Data) – David Goerman & PA Fish and Boat Commission (PFBC)

- *Data presentation on the effect proposed concepts could potentially have on the level of resource protection, wild trout streams will be the focus.*
 - DEP and PFBC have had 2 meetings to start looking at data.
 - PFBC looking at GIS data layers for National Wetland Inventory (NWI) wetlands, Hydric soils, trout waters, HQ waters, EV waters, 100 foot buffers, 200 foot buffers, 300 foot buffers and various combinations of the data layers
 - As of the date of the meeting, only about 1/3 of the data is complete, so PFBC and DEP decided to hold off until all of the data is ready before presenting to the workgroup. Data presentation will be given at the next meeting.

7. Other Business – Dave Goerman and Shelby Reisinger

- *Member Comments on Classification Concepts*
 - Open discussion on method to begin collecting member comments on proposed classification system
 - a. Concept of 3-tier wetland classification system
 - i. The workgroup is uncertain, but would like the program to continue to move forward looking at it.

- b. Concept of using vegetative wetland communities in classification system
 - i. The workgroup generally supports moving forward
 - c. Concept of using wetland assessment protocol in classification system
 - i. The workgroup generally would like to see more information
 - d. Concept of changing special protection wetlands linkage to wild trout waters and Chapter 93
 - i. DEP and PFBC are evaluating the data which will be presented at next meeting.
- Why is the Department proposing changes to Chapter 105?
 - a. The regulations have not been updated since 1991.
 - b. The science has changed since the last regulations were developed.
 - c. Chapter 105 is linked with other Chapters and would be beneficial to provide consistency between them (i.e. Chapter 93).
 - d. The program would like to establish a "middle ground" found in many other types of waters in the HQ classification.

8. Next Meeting

- 2 day meeting
 - 1st day in the field so workgroup can better understand the wetland assessment protocol – July 7th
 - 2nd day normal meeting – July 8th
 - a. DEP/PFBC data
 - b. Assessment protocol
 - c. 3-tiered system acceptance
- Start to look at Mitigation Rule and return to mitigation concepts from January meeting at meeting following the July meeting.

9. Adjourn

- Meeting adjourned at 2:06pm.