

**WATER RESOURCES ADVISORY COMMITTEE  
Chapter 105 Adhoc Workgroup**

**November 13, 2008**  
Room 105, RCSOB  
Harrisburg, PA

**MEETING MINUTES**

**1. Call to Order and Attendance – Steve Rhoads**

- The start of the meeting was delayed to allow review of the September draft meeting minutes. Meeting started at 9:48am
- Members
  - Dr. Robert P Brooks, PSU
  - Sue Germanio, PA Coal Association
  - Grant Gulibon, PA Builders Association
  - Robin Mann, Sierra Club
  - Steve Rhoads, PA Oil & Gas Association
  - Matt Royer, CBF
  - Rick Shannon, McCormick Taylor
  - Thom Shervinskie, PFBC
  - Cindy Tibbott, USFWS
  - Pat Strong, ACOE, Baltimore District
  - Toni Zawisa, PADOT
- General Audience
  - Jack Kraeuter, DEP
  - Duke Adams, DEP
  - Ken Murin, DEP
  - Shelby Reisinger, DEP
  - Dave Goerman, DEP
  - Sid Freyermuth, DEP
  - Allison Miles, CBF
  - Bob Reeder, PennDOT

**2. Review and Approval of Minutes – Steve Rhoads**

- *Draft May meeting minutes emailed to the group for comments on Monday, November 03, 2008 with agenda by Shelby Reisinger.*
  - Dr Brooks motioned to accept the minutes, Rick Shannon 2<sup>nd</sup> the motion. The May meeting minutes were accepted by the group.
  - The finalized May meeting minutes were emailed to the group by Shelby Reisinger on Thursday, November 13, 2008.
- *Draft July meeting minutes emailed to the group for comments on Monday, November 03, 2008 with agenda by Shelby Reisinger.*
  - A change was suggested by Matt Royer and that change was incorporated into the minutes.

- Robin Mann motioned to accept the changed minutes, Dr Brooks 2<sup>nd</sup> the motion. The July meeting minutes were accepted by the group.
- The finalized July meeting minutes were emailed to the group by Shelby Reisinger on Thursday, November 13, 2008.
- *Draft Summary Comments on Wetland Classification Concepts document was revised based on comments made at the September meeting. Further revisions will be made after above meeting minutes are finalized.*
  - No further discussion at this time.
- *September meeting minutes emailed to the group for comments on Wednesday, November 12, 2008 by Shelby Reisinger.*
  - Dr Brooks motioned to accept the minutes, Rick Shannon 2<sup>nd</sup> the motion. The September meeting minutes were accepted by the group.
  - The finalized September meeting minutes were email to the group by Shelby Reisinger on Thursday, November 13, 2008.

### **3. Chapter 105 Aquatic Resource Compensation – DEP Staff**

- *Continued discussion on draft Chapter 105 Aquatic Resource Compensation document emailed on September 22, 2008 by Shelby Reisinger. The same draft version was emailed with agenda on Monday, November 03, 2008 by Shelby Reisinger.*
- *As of the distribution of the agenda on Monday, November 03, 2008, only one commenter (PBA) had submitted comments. No additional comments will be accepted on this draft after the meeting has adjourned.*
  - Comments received from PennDOT November 10, 2008
  - Comments received from PFBC November 13, 2008
  - Other members indicated they provided comments, but due to an incorrect email address, the Department had not received them at the time of the meeting. All comments, including those not received by the Department, were verbally expressed by the members at the meeting as follows.
  - PBA commented:
    1. The items in the draft document are a positive shift.
    2. Banking or In-Lieu-Fee (ILF) program will allow for flexibility and an expedited process, while retaining on-site mitigation as an option.
    3. PBA generally endorses the approach.
  - PFBC commented:
    1. There is general support for the initiative with a few small hurdles.
    2. Probably the biggest hurdle is that PFBC recommends on-site mitigation as first preference.
    3. Recommendation for formation of interagency review team for oversight of the development of the proposed program and compensation ratios for stream similar to PWRP. Steve Rhoads asked how PFBC foresees the review team would work. Tom Shervinskie replied that PFBC would like to see a review team used during development of the program. Steve asked how the compensation program would be implemented and if it would be publicly reviewed. Dave Goerman replied it would be implemented through policy and would receive public review. Steve sees no reason for the PFBC suggested review team. Dave mentioned that there is a workgroup established (EPA, ACOE, NRCS, USFWS, PFBC, DEP), but on hold until after this group is finished. The workgroup would do some of the things Tom is suggesting, and

- the rest would be up to the Department to determine. As the regulatory agencies, it is ultimately up to DEP and ACOE to establish ratios.
- After some discussion, Tom thinks most of the PFBC comments would be addressed. He again emphasized keeping avoidance first. Dave reminded the group that any in-lieu-fee program (ILF) and banking program would go through and Interagency Review Team (IRT) per the final Federal Mitigation Rule (Rule), so a process similar to the current Environmental Review Committee (ERC) review would continue. Ken Murin reminded the group that the Rule sets a mitigation order (after first avoiding and minimizing the impact) of banking, ILF, then on-site. Dave added that the IRT members comment on the mitigation plan back to the Chairs. Tom asked if that would be for each permit. Dave replied saying that is the benefit of this approach, each ILF or banking site goes to the IRT and on-site mitigation does not, therefore on-site would not get that level of review.
  - Dave asked regarding last PFBC comment – What is the basis for their disagreement with order preference? What does PFBC recommend to meet the Rule with the opposite preference, how do they see resolving it? Tom replied frequently state law is more restrictive than federal law, PFBC does not want to send the message that the resource is able to be bought out or made less important. They fear a buying out of the resource, especially for large projects. Dave replied that what we're seeing in the mitigation grant review is that the resource is better compensated for through ILF or banking, not on-site. Ken reminded the group that via the Rule avoidance is first and the Program has the same focus. On-site mitigation can be done on a case-by-case basis as DEP deems necessary. PFBC sees potential in the compensation program, but would like on-site mitigation to stay the preference, especially for stream mitigation. Cindy Tibbott asked if an ideal on-site situation is present for streams or wetlands, is it still an option? Ken replied yes. Tom asked how that determination will be made, currently it's made in the field. Dave mentioned the development of a set of criteria to meet in order to consider on-site mitigation for wetland and streams. Someone asked if permit fees would be increased. Dave replied that the permit fees are a separate fee structure from the compensation fees that are used for mitigation.
  - Dave reminded the group to look at the proposal, the Program is not proposing to do what other states have done (i.e. linear feet for linear feet), the proposal is to look at the actual effects of the project on the functional areas of the resource and ensure compensation of those functions.
  - Steve asked if there will be as much detail for the mitigation of all authorizations (i.e. GPs, road crossings). Dave said that GPs are a very limited and strict set of activities, a standardized compensation package can be developed for each of them. In the case where the applicant does not agree with the mitigation package, they can propose something else. Steve thinks this is a huge workload undertaking, Dave replied that there are models out there to get us started. Sue Germanio echoed that models are out there for mining and have been for awhile, the concepts can be borrowed. Tom also echoed that models have been done for small projects and highway projects. Sue said that the mining industry fears a lot of time and money spent on compensation that may not ever be successful. Dave replied that the models will give predictability, allowing the applicant to make more informed decisions furthering avoidance and minimization.
  - Toni Zawisa asked about the time frames to get this compensation proposal implemented. Dave replied the Program will take some existing models and

tweak them to fit Pennsylvania. The rapid tools will be developed based on sound science. Ken reminded the group that they are the 1<sup>st</sup> group the Program is talking to, models and tools are not yet developed. Rob Brooks suggested putting together a list of types of projects (GPs, mining, transportation, small projects, etc) and then figure out how to move forward for those types of impacts. What is in hand? What can be borrowed? Dave asked the group if there is a preference to develop it incrementally or comprehensively as both approaches require a lot of work. Sue stated that incrementally is generally how it ends up working. Steve said that since we have at least 2 years to comply with the Rule the Program should follow Rob's suggestion and proceed as comprehensively as possible within the 2 year time constraint.

- PennDOT commented:
  1. Many of their comments were addressed.
  2. Recommend flexible, various types of mitigation within the scope of the Rule. They would like to see preservation included as an option, realizing it may not necessarily be within the context of the impact, and will probably be at a much greater ratio.
  3. PennDOT is currently working with DEP on wetland banking. PennDOT has concern over stream mitigation with regard to time frame, they may need something sooner due to the current bridge initiative. Dave asked if it's PennDOT's desire for DEP to develop an interim process. Toni suggested a set-aside to start the ILF program or stream banking program.
    - Sue asked if temporary impacts would require compensation under the proposal. Dave responded that it depends on the activity, for example, utility lines are generally considered temporary, most of the earth moving is restored, but the vegetation is managed differently. Sue asked for clarification that compensation is not just for the body of water, but the areas around it. Steve clarified that we are talking about "the ecotone". Dave agreed.
    - PennDOT and DEP may be able to work together on a pilot program. Someone asked if the pilot program or interim process would come back to this group. Steve clarified that the group was established to comment on revised regulations only. Dave clarified for the group that this concept is allowable under the current regulations and would be done mostly through policy and guidance. The concept is not necessarily part of the regulation revision, but fits in similarly so the Program thought it appropriate for this group to discuss. Rick Shannon cautioned the Program and group regarding implementation of this concept (regulation vs policy) nothing that, if too much detail is written into regulation it can back everyone into a corner, where policies can be more readily changed to allow for technology and science changes.
- PCA commented:
  1. They have general support for the proposal and have been trying to work towards stream mitigation for awhile.
- USFWS commented:
  1. Mitigation Process section – Pleased to see avoidance and minimization will be kept but the Program should clarify to the applicant that this is not a buy-out and emphasize existing processes and procedures in the document.
  2. Wetland Compensation Consideration section – Suggests the list should also include those in the Rule at 230.93(f).
  3. Wetland Compensation Consideration section – Ecological condition factor (PA RAP) – Concerned that the assessment does not reflect aquatic life and habitat value, it really only looks at stressors and not the positives of a

wetland. USFWS would like to see aquatic life and habitat value incorporated, Dave thinks it's already included in the assessment. Rob clarified that if the resource is classified appropriately it assumes a certain suite of functions and then the stressors indicate its deviation from those suite of functions. RAP will show the functions of the resource and what it should and should not have. USFWS is missing the link Rob is mentioning, asking what does a great score mean. Cindy thinks Rob is saying the data exists, but maybe it's not in a reviewable format. Rob clarified that there are a set of reference standards and they have certain functions and values associated with them, the stressors cause them to deviate from reference and then the condition gradient can be seen. The evaluator can make a determination if the wetland can be restored back to original condition or not, the score may mean that the best thing to do for that resource is to protect it at its current level. Dave replied saying that aquatic life and habitat are considered in the RAP and in the mitigation ratio considerations. Dave continued that 3 of the 5 items under consideration for wetland compensation are indicators of aquatic life and habitat. Rob says that Level 3 data which includes habitat evaluation profiles is continuing to be collected and will further calibrate the RAP.

- o Tom asked if compensation is to meet reference condition or existing condition? Rob proposed context (landscape and watershed) would determine that, he thinks it a case specific answer.
- 4. Wetland Compensation Consideration section – Physiographic Resource Priorities factor – The term “Critical habitat” should be changed to "important" habitat or something else as "critical habitat" is defined under the Endangered Species Act.
- 5. Wetland Compensation Considerations section – “Wetlands disturbed by long term vegetation management. . . .” paragraph – USFWS is not sure of the intent of that section. Dave explained using a utility line as an example. If trees are cut down in a forested wetland for the utility line right of way and the wetland will be maintained as an emergent wetland, then compensation would be required under the proposal. If the utility line right of way is over an emergent wetland and therefore no vegetation will be disturbed, then compensation would not be required under the proposal. This requirement is because the action results in a deviation from reference.
- 6. Waterways Compensation Considerations section – It is not obvious in considerations that aquatic life values are factored in, recommend benthic surveys, etc. should be factored into the decision making process. This may be what was meant by the categories "Resource Condition" and "Resource Value," but they're not defined in the document. Dave said program development would allow for requirement of intensive surveys but also proposing to use rapid assessments based on proposed impact. For example, if a project proposes to use boring, the applicant would not need to do stream assessment, but would need to do a riparian assessment. The proposal attempts to make our currently narrative Environmental Assessment (EA) into a set of rapid assessment tools, most of which already exist. The required level of detail in the rapid assessments would vary based on the level of impact. Sue asked who will be doing the assessments. Dave replied the applicant or their consultant. The EPA Rapid Bioassessment Protocol (<http://www.epa.gov/owow/monitoring/rbp/>) contains assessment tools with forms in the appendices. These assessments are probably cheaper to run than the existing narrative discussions. They are more predictable and more easily repeatable. These types of rapid assessments allow the applicant to do more pre-planning.

- Steve asked when the Program expects to have the permit application revised to reflect these changes. Ken reminded the group again that the Program is discussing these items, a timeline for implementation has not been developed yet. Program staff may be able to develop the suggested pilot process with PennDOT right after the wetland banking agreement is finalized. The discussions with this workgroup must be completed before moving forward with any sort of implementation.
- Matt asked if any elements in the current EA would remain a narrative if there is no existing protocol available? Dave said there is always a place for narratives for things where there are no protocols available.
- Matt would like this group or a group like it be developed when the pilot gets established.
- CBF commented:
  1. Agree with PFBC and USFWS that avoidance is clearly the emphasis and needs to be clarified in the language. When considering an expanded ILF program, there is concern that applicants will think they can “buy-off” the resource. Perhaps DEP can be given more authority to change the project purpose where adequate compensation is not available (example – scale back size of shopping center).
  2. Also agrees with USFWS on local impacts and PFBC on more stringent state regulations than the federal regulations, and would like to maintain the current preference for on-site mitigation.
  3. Recommends keeping the mitigation site functions specific to the local priorities and/or keeping mitigation on-site. If that’s not possible, then bump up the replacement ratio if going to bank or ILF.
  4. Secondary effects should include a land use risk assessment for nutrient and sediment impacts.
  5. Recommends any sort of choice for aquatic compensation should be based upon very detailed watershed plans.
  6. Recommend limits on geographic scope, suggesting 12-digit HUC. Steve asked how big that is and Rob replied maybe 100 square miles, Dave echoed that it is very small. Matt replied that it was just a suggestion. Toni added that 8-digit HUC equals 56 service areas in the Commonwealth. Matt says maybe start at the 12-digit HUC, keeping compensation as close to the impact as possible. Dave says we may end up doing something similar to PWRP in that we tract impacts to the smaller unit (i.e. Watershed 07A), but replace on a larger scale (i.e. Sub-basin 07) because there are not enough impacts to replace at that scale, indicating a strong preference for avoidance and minimization.
  7. Struggling to figure out what appropriate off-site mitigation project for stream mitigation may be. Perhaps day-lighting a stream or restoring a floodplain from legacy sediments could be viable mitigation.
  8. Caution on using mitigation money to fund restoration, the Program needs to be careful in how program is crafted so that the end result is not more impacts to create more money. Dave replied that there are many checks and balances in place to ensure that this would not happen. The concept is to receive monies for impacts that are currently happening without compensation. Currently the public is footing the bill for Growing Greener, with this concept those making the impacts would be footing the bill. Robin Mann understands the intent is not to generate funds, but the discussion is over past impacts, instead of looking at past work, the focus should be on reducing future impacts. Dave responded that most of the stream impacts are

necessary impacts, things we cannot further reduce or avoid. For example, we cannot change PennDOT designs on highways/bridges.

- Sierra Club comments:
  1. Cautions using past impacts as a revenue source because impacts are getting smaller. Dave replied that is what we are hoping for, less impacts. Ken says the history of the PWRP has shown further reduced impacts.
  2. Supports CBF comments and wants to underscore the ratios and raise them.
  3. Also says after-the-fact permits should have much higher ratios and have individual reviews. Dave says we are not proposing to change the current higher ratio for after-the-fact. Robin strongly recommends at least 2:1 minimum ratio, due to past failures of mitigation projects. Ken replied that is why the Rule has a preference for banking and ILF because the compensation site is already known to be successful. Robin says we have not shown PWRP to give functionally successful sites. Dave replied that most of our impacts are too small to use a functional assessment on, the science is not available at that small scale, therefore we cannot know if a replacement site is replacing lost functions. Rob mentioned that in the next 15 months we'll have numbers showing the condition of PWRP, banking and on-site mitigation wetlands. Dave added that the reserve for ILFs and banking allows for losses, but if there are no losses, the result is "extra" resources.
- McCormick Taylor comments:
  1. Support for the concept as anything that makes the expectation known is helpful on both sides.
  2. Recognizes concerns about on-site no longer being the preferred method, but acknowledges that the Rule has in a way forced DEP's hand. He hopes this approach will maintain flexibility so the right thing can be done in each situation.
  3. Asked if deminimus would remain or be eliminated. Dave replied that PWRP is now made up of a lot of deminimus. Discussions have included the idea of a nominal contribution to the PWRP for deminimus impacts. Ken mentioned something similar for waterways, which is where Rick was going with the question. Are we proposing to require compensation for impacts that had been previously done if replacing the same structure? The answer to this question will depend on the project circumstances.
- Wrap up conversation:
  - Sid thanked the group for the discussion and comments, he noted that the Program is aware to proceed cautiously.
  - Steve would like to see summary of comments for classification and compensation two weeks before the next meeting. Anything left for next meeting? The group agreed two key concepts were classification and compensation.
  - Steve motioned that the group would like to be reconvened when the Program has draft permitting language developed. Rick 2<sup>nd</sup> the motion. Motion passed. Motion should be taken to WRAC for approval.
  - Several hard-copy comments were submitted at the time of the meeting. Considering the email problems, the deadline for submitting comments was extended to COB Monday, November 17, 2008. Several more comments were submitted via email prior to that deadline.

#### 4. Other Business – Sid Freyermuth

- *If needed*

- None.

#### **5. Next Meeting**

- *The next meeting will be the last regularly scheduled meeting and will wrap-up comments on wetland classification and aquatic resources compensation concepts.*
  - The next meeting will be in Room 105 of the RCSOB on Friday, January 23, 2009 at 9:30am.

#### **6. Adjourn**

- The meeting was adjourned at 12:34pm.