

**Nutrient Trading Expansion
Regulatory Advisory Panel, Meeting #2
Richmond, Virginia**

**December 13, 2012
10:00 a.m. – 3:00 p.m.**

Nutrient Trading Expansion RAP Members Present

Philip Abraham, Virginia Association of Commercial Real Estate
Doug Beisch, Williamsburg Environmental Group
Jack Frye, Chesapeake Bay Commission
Brent Fults, Chesapeake Bay Nutrient Land Trust, LLC
Taylor Goodman, Balzer and Associates
Normand Goulet, Northern Virginia Regional Commission
Steve Herzog, Hanover County
Ann Jennings, Chesapeake Bay Foundation
Whitney Katchmark, Hampton Roads Planning District Commission
Larry Land, Virginia Association of Counties
Mindy Leblond, Water Resources Institute
Joe Lerch, Virginia Municipal League
Joe Maroon, Maroon Consulting
Adam M. Meurer, ECS Mid-Atlantic, LLC
Nikki Rovner, The Nature Conservancy
Tom Simpson, Water Stewardship, Inc.
Wilmer Stoneman, Virginia Farm Bureau Federation
Jack Storton, Babcock & Wilcox Company/Virginia Manufacturers Association
Shannon R. Varner, Troutman Sanders
Brian Wagner, Ecosystem Services, LLC/VASWCD

Facilitator

Kristina Weaver, Institute for Environmental Negotiation

Agency Staff Present

Russell W. Baxter, DEQ
Allen Brockenbrough, DEQ
Michael Fletcher, DCR
Deb Harris, DEQ
Darrell Marshall, VDACS
Stephanie Martin, DCR
Virginia Snead, DCR
Bettina Sullivan, DEQ
Michelle Vucci, DCR
Matthew Gooch, Office of the Attorney General

Others Present

Erik Allen, Watershed Consulting
John Fowler, Chesapeake Bay Foundation
Eldon James, RRBC
Scott Blossom, Williamsburg Environmental Group
Peggy Sanner, Chesapeake Bay Foundation
Cabell Vest, Aqualaw

Welcome and Introductions

Ms. Snead welcomed members and staff to the second meeting of the Nutrient Trading Expansion RAP.

Regulatory Action Overview, Committee Charge, and Regulatory Timeline

Ms. Snead reviewed the regulatory action and committee charge. She said that there would be opportunity later in the meeting to discuss the revised work plan.

Ms. Weaver welcomed members to the meeting. She said that her role as moderator was to make sure that all voices were heard. She reviewed the agenda for the meeting.

Ms. Jennings asked if the list of mitigation banks being reviewed at the next meeting could be placed on the DCR website.

Ms. Snead said that DCR would provide that list.

Information regarding this meeting is posted at the following link:

http://www.dcr.virginia.gov/laws_and_regulations/lr6.shtml

Mitigation Bank Procedures

Bettina Sullivan with DEQ gave the following presentation.

Wetland Stream and Mitigation Banks Process and Lessons

Mitigation Banks and ILFs

- Provide compensation for stream or wetland impacts permitted under the Virginia Water Protection Permit Program (VWPP)
- Credits derived from stream or wetland restoration, enhancement, preservation; upland buffer restoration and preservation
- Credits sold on open market

Site Approval Process

- Sponsor prepares Prospectus
- Monthly IRT meeting
- Site visit to review conditions
- Prospectus is public noticed
- Initial Evaluation Letter
- MBI development and signature
- Site protection, Financial assurances
- Initial credit releases
- Construction and Monitoring
- Credit releases
- Closure and Long Term Management

Role of IRT

- DEQ and Corps are “Co-Chairs”
- Other members of IRT: EPA, FWS, NOAA, DGIF, DCR, DOF, VMRC, localities
- IRT develops template documents and guidance used for banks and ILFs
- IRT meets monthly
- Provides expertise for resources (wildlife, forestry, T&E, E&S)
- Provides consistency

Role of Chair(s)

- IRT strives to seek consensus but Chairs have ultimate decision power
- Dispute resolution processes established
- Chairs issue public notice of bank prospectus
- Chairs compile and address public and IRT comments
- Chairs (and Sponsor) sign MBI
- Chairs release credits based on success
- Chairs release financial assurances

Prospectus

- Provides...
 - Sponsor identification
 - General information on project
 - Maps of location, topos, aerials, draft site design
 - Land ownership information
 - Service Area
 - Site selection factors

- Feasibility issues (threats to site, locality zoning/plans, known encumbrances)

IRT Monthly Meetings

- Used to review projects and receive comments from resource agencies
- Provides consistency
- Allows IRT to ask questions of Sponsor or their consultant
- First review of project by IRT
- Used to address policy issues and template changes

Sponsor

- Sponsor is responsible party for bank
- If Sponsor is LLC, Company, or other, IRT must insure that representative has ability to sign for LLC
- Review of Operating Agreements
- Sponsor must be registered with SCC, if a company

MBI Development

- Mitigation Banking Instrument (MBI) is a “contract” between Sponsor, DEQ, and Corps
- Outlines credit creation, monitoring requirements, success criteria, reporting requirements, Long Term Management, financial assurances, credit release schedule, closure procedures

Service Area

- Area in which a bank can sell credits
- Limited by SWCL
- Same or adjacent sub basin (8 digit HUC) within same river watershed
- IRT may also be limited based on physiographic province or other factors to ensure similar resources and consistency

Land Ownership

- Sponsor does not need to own land but must have sufficient interest in property
- Fee simple ownership is preferred
- Sponsor must have easement if not owned
 - Allow access for Sponsor, IR, and Long Term Steward in perpetuity
 - Allow construction and repair activities

- Transfers all rights for sale of credits derived from eased land to Sponsor
- If Land owner is LLC, Company, or other, IRT must ensure that representative had ability to sign for LLC
- Review of Operating Agreements
- Title search and title insurance determine encumbrances and other interests (utility easements, separated resource rights)

Site Protection

- Regulated by State Law and federal regulation
- Sites must be protected in perpetuity
- Deed Restriction
 - Uses template language
 - Restricts activities
 - Must be recorded with locality
 - Runs with the land
- Conservation Easement
 - Restricts activities
 - Must be recorded with locality
 - Runs with the land

Deed Restrictions

- Not as protective as Conservation Easements
- Uses template language
- If conservation easement is placed on entire property, a deed restriction is placed on bank lands

Conservation Easements

- Additional credit given if conservation easement is held by third-party non-profit in accordance with Virginia Conservation Easement Act (State agencies including Virginia Outdoor Foundation)
- Provides additional protection

Financial Assurances

- Four financial assurances for each site
 - Initial Credit Release
 - Monitoring and Maintenance
 - Catastrophic Events
 - Long Term Management
- Accepted Types: Escrow Accounts, Bonds, Letters of Credit, Casualty Insurance (not currently approved)

- Managed by escrow agent per MBI and escrow agreement

Financial Assurances

1. Initial Credit Release (credits following site protection but prior to construction)
 - Bond,
 - Letter of Credit
 - Fully Funded Escrow Account
 - Or Insurance Policy (has not been approved by VA IRT)

This one is only needed if initial credits are released. Some sponsors may forgo these credits.

2. Monitoring and Maintenance Fund
 - Assures that money is available to monitor and repair site during active monitoring period
 - Currently: 8% of credit sales is placed in escrow, 10% of fund value is released each monitoring year
 - Problem: Price of credits can vary and doesn't guarantee adequate funding
 - Proposed: Payment plan based on monitoring costs
3. Catastrophic Event Fund
 - Assures that money is available in the event of a catastrophic event.
 - Catastrophic events defined in MBI
 - Percentage of credit sales based on mitigation activities is placed into escrow account
 - Benefits Sponsor during active monitoring period
 - Benefits Long Term Steward at bank closure
4. Long-Term Management Plan
 - Assures money will be available to address long-term management of site
 - Requirements detailed in Long-Term Management Plan
 - Funding requirements based on Property Analysis Record (PAR)
 - Intent for non-wasting fund and for all yearly costs to be funded by interest from the account

Success Criteria

- Based on goals of the project
- Clear, quantitative criteria
- Wetland criteria based on hydrology, vegetative success, hydric soil development

- Stream criteria based on stability of stream
- Buffer criteria based on stem density, herbaceous cover, vigor

Tree Success Criteria

- 400 native stems per acre until 30% canopy cover (includes planted and voluntary)
- 60+% native herbaceous cover
- No more than 5% invasive species cover
- Goal to develop a diverse native forest

Monitoring Requirements

- Based on the activity conducted
- Correlate with Success Criteria
- 10 year monitoring period (Years 1,2,3,5,7 and 10)
- Additional years added if success is not met by 10th year

Reporting Requirements

- Reports required each monitoring year
- Requirements correlate with Success Criteria and monitoring requirements
- Reports include maintenance activities for the year and a description of success
- Due date in MBI
- Credit releases based on results of monitoring report and outcome of site visits

Credit Release Schedule

- 15% initial credit release (“seed” money)
 - Must be built within 1 full growing season of first credit sale
- Wetland credits released upon success
- Stream credits released yearly based on success and bankfull events
- 10% of each type of credit is withheld until Year 5

Credit Releases

- Credit release requests coordinated with IRT and require site visit
- Releases by formal letter
- Credit releases and sales recorded on ledger
- Ledgers available to public on Corps-sponsored website

RIBITS

- Regulatory In-lieu fee and Bank Information Tracking System
- Map of all approved, proposed, terminated, and closed banks in VA
- POC information
- Ledger
- Service Area

- Cyber Repository
 - MBI
 - Monitoring Reports
 - Credit release letters

Long Term Management

- Sponsor is default Long Term Steward
- Money for Long Term Management provided by LTM Fund
- LTM Plan outlines requirements, typically including:
 - General monitoring
 - Site protect from trash and trespass
 - Defense of easement
 - Fence, gate, road repair
 - Yearly report preparation

Templates

- Ensures consistency
- Addresses common situations
- Allows project-specific modifications
- Eliminates the need for legal review on some projects
- Proponents submit redlined documents highlighting changes from template
- Speeds up document review
- Mitigation Banking Instrument
- Deed Restriction
- Escrow Agreement
- Long Term Management Plan
- Other documents could use templates:
 - Letters of Credit/Bonds
 - Monitoring Reports
 - Conservation easements

Guidance Documents

- Provide public with clear expectations
- Provide consistency
- Provide IRT with support for decisions
- Examples:
 - Mitigation Dos and Don'ts
 - Site Selection Criteria
 - Wetland Mitigation Design Recommendations
 - Unified Stream Methodology (crediting)

Ecological Success

- Site selection guidelines
- Mitigation Dos and Don'ts
- Monitoring and Success Criteria
- Monitoring and Reporting (10 years)

Administrative Success

- Banking Instrument Template
- Standard Operating Procedures
- RIBITS
- Financial Assurances
- Escrows
- Long-Term Stewardship

2008 Federal Mitigation Rule

- Sets out timelines for review
- Details requirements for complete prospectus and instruments
- Considers ecological suitability and sustainability in site selection
- Require ecologically based success criteria

Summary

- Interagency Review Team provide diverse agency review and participation
- DEQ Co-Chair of IRT
- Site protection important
- Goals of project drive success criteria
- Financial assurances
- Long Term Management
- Templates and Guidance Docs provide consistency

Mr. Maroon asked who typically holds easements on mitigation banks.

Ms. Sullivan said that most have a land restriction and are recorded by the locality. If there is an easement it is most often held by the Virginia Outdoors Foundation. Easements are sometimes held by Soil and Water Conservation Districts or the Department of Forestry.

Ms. Sullivan said that regardless of the easement, every site will have a long-term steward.

Mr. Maroon asked Ms. Sullivan to explain what was meant by the extra credit.

Ms. Sullivan said that extra credit is given if there is a non-profit third party easement holder on the property.

Mr. Lerch said that a Soil and Water Conservation District would be a qualified third party.

Ms. Sullivan noted that the Thomas Jefferson Soil and Water Conservation District is an easement holder and a long-term steward of one mitigation bank.

Mr. Wagner asked if there could be a situation where seven credits could be sold if ten were held or if all credits were required to be sold together.

Mr. Brockenbrough said that in reality that would just be one credit for a particular area. He said that the actual goal is the nutrient reduction value. He said that it would be possible to approve a portion of the reduction value but that it would still be recorded as one credit.

Ms. Jennings asked about the public notice process. She asked when notice was given and how comments would be received.

Ms. Sullivan said that both state and federal law require public notice. She said that DEQ currently relies on the public notice from the Corps. That is published on the Corps website and distributed to adjacent property owners. She said that DEQ issues a public notice after a prospectus is received. She said that most comments come from the bankers and the adjacent property owners.

Ms. Jennings asked why there was a lack of comments from the public.

Ms. Sullivan said that it could be awareness. The notice is not published in the newsletter.

Ms. Snead asked how many staff at DEQ currently work on the program.

Ms. Sullivan said that currently she was the only staff person assigned to coordinating the mitigation banks. She said that there should be at least three people. She said she does not have the ability to make yearly site visits. She said that she tries to visit every two years or when there is a credit release.

Mr. Simpson asked if only the state could do the monitoring.

Ms. Sullivan said that the sponsor is responsible for monitoring and that DEQ receives an annual monitoring report.

Mr. Lerch said that it was important to have the appropriate staff moving forward. He said that while it was a selling point that fees could cover some of the costs there needed to be a realization that general funds would have to be appropriated for the program.

Possible Elements for a Nutrient Credit Certification Process

Mr. Baxter reviewed a document regarding elements for a Nutrient Credit Certification Process.

Mr. Baxter said that this was a straw man proposal that attempted to build on the information presented by Ms. Sullivan.

- **AGENCY: Nutrient Credit Review Team (NCRT)**
 - Members and roles of NCRT
 - Agency initial point of contact for credit/bank sponsor
 - Issuance of agency requirements to sponsors
 - Receipt and distribution of documents from sponsor (as necessary)
 - Determination of completeness (minimum requirements) with notification
 - Collection of comments and recommendations of team
 - Approvals
 - Response to sponsor, including recommendation as to whether or not to proceed and/or further guidance (evaluation letter)
 - Issuance of a public notice
 - Upon approval, demonstration of financial assurance (e.g. monitoring and maintenance, long-term management, catastrophic) and escrow agreements
 - Dispute resolution process
 - Credit release schedule (initial, phased, etc.)
 - Time frames
- **APPLICANT: Multi-step submittal process:**
 - Initial contact and receipt of guidance
 - Applicant submits draft/informal proposal
 - Site review by agency staff
 - “Ready to Proceed” recommendation by agency
 - Applicant submit proposal pursuant to regulatory requirements for content and supporting materials including proof of financial assurance, verification of any necessary permits and conformance with local zoning.
- **APPLICATION REQUIREMENTS: (subject to evaluation and review)**
 - Description of number of credits to be provided, including definition of baseline and generation of nutrient credit beyond baseline requirements
 - Brief description of current site conditions (forested, row-cropped, pasture, existing BMPs, etc.) with photos. If new BMPs or BMP retrofits are proposed, include information on the receiving stream.
 - Specific location of proposed practices and watershed and 8 digit HUCs served.
 - Work plan: detailed written specification and work descriptions for the nutrient bank site
 - Description of land use before July 1, 2005, with supporting documentation (Land Use Conversion projects only)

- Maintenance plan: description and schedule of maintenance requirements
- Performance Standards: standards used to determine whether the project is achieving its objectives
- Monitoring requirements
- Management plan (for the life of the credits): description of site management after meeting all performance standards to ensure long-term sustainability of the site
- Financial assurances: a description of any financial assurances that will be provided to ensure that the project will be completed in accordance with the performance standards
- Any other information deemed necessary
- REGISTRY:
 - Bank & Agency contact information
 - Bank locations by service areas
 - Available credits
 - Ledgers for credit accounting accessible to sponsors and agencies
 - Information for prospective bank sponsors (guidance, templates, etc.)

Members expressed concern regarding the following:

- Concern was expressed regarding the term “bank” instead of describing the practices.
- How would the dispute resolution relate to the public?
- What is the timeframe for the release of credits, particularly with regard to the fallow phase?
 - Should there be separate applications for crop to fallow and fallow to forest? Or separate releases?
- When will the public notice be posted?
- Clarification is needed with regard to the 8 digit or 12 digit HUG under the application requirements
- When would an on-site visit be conducted? Would this occur at the time of release or prior to approval?
- The different processes between temporary and permanent credits need to be addressed. Would more regulation be required for a temporary vs. permanent credit?
- When should fees be submitted?
- How will the program be maintained as it grows?
- When is the ledger updated and how?
- There should be regular (perhaps monthly) meetings of the review team. These meetings should be public noticed.
- BMP standards need to be described.
- The life cycle of the credit needs to be described with regard to the three phases in the Registry.
 - Verification/monitoring
 - Trade

- Retirement
- Assurance may vary by practice. Assurances need to be further clarified.

At this time the committee recessed for lunch.

Regulation Outline Presentation/Discussion

Ms. Vucci referenced two handouts. One was an outline of the regulations, the other a list of recommended definitions. Copies of both are available on the DCR website.

Ms. Vucci expressed appreciation to Deb Harris of DEQ for helping to develop these drafts.

Ms. Vucci said that the purpose of the outline was to try to get a general framework in place. She said that the documents provided were for discussion. She asked that members bring specific comments and suggestions to the February 22 meeting.

Ms. Vucci said that the internal working group looked at the existing law and existing stormwater regulations as well as the DEQ regulations to develop the drafts. She said that what the working group attempted to do was to take the specifics of the law and organize those into general categories of the outline.

Ms. Vucci reviewed the draft outline and draft definitions.

Members offered the following comments:

- Is “Exemptions” on page 2 related to Fees?
- Where would “Verification” fall? It should be included up front as well as later in the process
- Include “Certainty” in draft 4VAC 50-80-70
- Is “Financial Assurance” in the right place? At what point will the trigger occur?
- Suggestion to move Local Water Quality to Part III as criteria for service area, or move it up into a couple of different areas in the outline
- Articulate/define “Service Area” (It was pointed out that this is in the Law)
- Include “Wetland Mitigation Banks”
- Comment that we should only be considering Local Water Quality as it relates to the specific Charge of the RAP
- Include a separate area on Transfer and Sale of Credits
- Wetland and Stream Mitigation conversion to Nutrient should be separate
- Include a section for Public Notice
- Include a section differentiating Term and Permanent Credits
- Include “Re-Sale of Credits” in Part III

Regarding definitions:

- What is the difference between “Bundler” and “Aggregate”? Select one to use
- Clarify digit vs. order for “HUC”
- “Delivered Load” – may in effect prohibit practices like shellfish aquaculture because of the language related to “from an upstream point.”
- “Baseline” needs to more clearly articulate what’s needed to meet allocation
- When there is more than one definition, are we choosing among them or creating a new definition? Should the default be what’s in the Law?
- Related to the above, a member spoke to the importance of consistency with other programs to avoid duplication over time
- “Additionality” some felt that this term would not be relevant; one member argued that definition is also not useful; another member spoke of the value of including the concept for now as a way to hold this RAP to a high standard
- “Nutrient Bank” in a wetland area the bank is the physical location, not the entity
- “BMP” suggestion from a few RAP members to use the definition from the Act
 - Suggestion to add definitions of “structural practices, “nonstructural practice,” and “other management practices” to clarify the definition of BMP
 - There should be consistency in Virginia Code – why four definitions?
 - Suggestion that it may be presented as in a dictionary entry with multiple valid definitions included as part of the overall definition
 - Aim for consistency
 - Is a maintenance procedure a management practice? Need to “add meat to the bone” but not change the definition
- “Bank Sponsor” – the clause “and in most circumstances” creates too much uncertainty and needs to include more defined language
- Add the term “Local Water Quality”, which the RAP needs to define
- Add “Contravention”
- At the end of the process, terms that are not used in the regulation will be taken out.

Discussion of Future RAP Meetings and Work Plan

Ms. Snead said that the next meeting of the RAP would be Friday, February 22.

Ms. Jennings requested that any materials for review be sent out as far in advance as possible.

Ms. Snead said that any comments be submitted by the end of January and that staff would work to have a draft of the regulations to members two weeks prior to the meeting.

Ms. Snead said that two items for the February meeting would be Cranston Mill Bank and a discussion of procedures. She said that comments regarding methodologies such as Virginia Assessment Scenario Tool (VAST) or Chesapeake Assessment Scenario Tool (CAST) would be welcome.

Public Comment

Eldon James

Mr. Eldon James said that he appreciated the concerns and questions that had been raised with regard to term credits. He said that he hoped the process would be balanced and would provide creative ways to meet water quality goals.

There was no additional public comment.

Adjourned

There was no further discussion and the meeting was adjourned.