

**CHESAPEAKE BAY PROGRAM**  
**TRADING AND OFFSETS WORKGROUP MEETING**  
**June 20<sup>th</sup>, 2012**

**ACTION ITEMS**

**ACTION:** Evan Branosky will send the WG the TOWG-EPA Workplan Review meeting agenda and additional information about the EPA Workplan.

**MINUTES**

**Updates on TOWG and EPA Workplans – Evan Branosky**

- TOWG subcommittee is meeting with EPA staff to discuss the EPA Trading & Offsets Workplan for the coming years and the TOWG Workplan.
  - The meeting is scheduled for 6/25
  - Intended to establish a relationship between the two groups both developing Trading and Offsets Workplans.
    - Increase communication and feedback. Work to resolve remaining issues with proposed trading programs and improve both workplan.

**ACTION:** Evan Branosky will send the WG the TOWG-EPA Workplan Review meeting agenda and additional information about the EPA Workplan.

- Gleason: Will the results from this meeting be discussed on an upcoming WQGIT call?
  - Branosky: Currently scheduled to provide an update on the TOWG Workplan on the July WQGIT call. If TOWG Workplan changes as a result of the 6/25 meeting, will also describe the relationship to the EPA Workplan.
    - Will also update the TOWG after the TOWG-EPA Workplan Review meeting.

**Ensuring Permanence in CWA Section 404 Compensatory Mitigation – Steve Martin**

- See presentation: [Permanence of Compensatory Mitigation](#)
- Branosky: Issue of ensuring practices implemented to offset loads are maintained in perpetuity.
  - Examine CWA 404 Compensatory Mitigation regulatory requirements and tools to meet requirements as an informative example to help with the refinement of stormwater offset policies.
- Martin professional information: Army Corps of Engineers (USACE) Institute for Water Resources (IWR). Experience with oversight of mitigation banking in the Norfolk district.
  - IWR provides technical assistance to USACE HQs and districts.
  - Martin worked with USACE and EPA on the development of mitigation rule in 2006-2008 timeframe. Recently, working with USACE and EPA on the implementation of the rule.
- Will provide a regulatory overview of site protection and long-term management issues relating to compensatory mitigation to give a background on permanence considerations.
- Slide 1: Joint Corps-EPA mitigation regulations (issued in 2008) aimed at improving the quality of compensatory mitigation.

- The “Mitigation Rule” incorporated recommendations by NRC
- Rule aims to address NRC review and regional reviews that found compensatory mitigation was falling short of overall objective of replacing lost aquatic resource function.
  - Ensures projects’ sustainability through proper siting, design, and management.
    - Creates equivalent, stringent standards for all types of mitigation through a watershed approach with strategic implementation.
    - Focuses on compensatory mitigation, not required mitigation, which is addressed through permits.
- Slide 3: All plans must address these twelve elements.
- Slide 4: Site protection applies to overall mitigation project, whether within jurisdiction or not.
  - Degree of long-term protection afforded by real estate instruments varies state by state, as real estate protection is regulated at state level.
    - Therefore, real estate instruments’ effectiveness depends on location.
- Slide 5: Conservation easements with third party grantee assuming oversight responsibility preferred mechanism of site protection for most districts.
- Slide 7: Prior to Rule, after performance standards were met, project considered complete.
  - Approach not viable for changing aquatic resources. Ongoing management needed to address issues like: structural maintenance, invasive species encroachment, maintenance of ecological communities through prescribed burning, periodic grazing, etc.
  - Post Rule, Long-term management usually required after performance standards have been met to ensure the continuation of aquatic resource function.
- Slide 8: With long-term management activities, cost can be a significant issue
  - Need for funding mechanism. Endowments (non-wasting account) usually established as the funding mechanism with permanent basis.
  - Property analysis record can help determine long-term management costs.
  - Planning for long-term management costs influences site selection.
- Branosky: Regarding plan elements described on slide 4, who develops this plan?
  - Martin: These plan elements are required for the project proponent to address.
    - However, if applicant is proposing an offset on permitted impacts through a mitigation bank, all that would need to be addressed is baseline information on the impact site and credit determination. Bank sponsor would have already addressed the 12 elements required.
- McGee: Who receives reports on maintenance/long-term monitoring?
  - Martin: The easement holder sometimes receives reports, though occasionally the easement holder also acts as the long-term steward.
    - Land owner and inter-agency review teams receive the reports.
    - These are usually concise documents for long-term management, unless other issues involved (e.g. endangered species habitat).
- McGee: How does the public access the record of inspection reports?
  - Martin: For USACE and the Fish and Wildlife Service (FWS) approved mitigation bank or in-lieu fee projects, encourage use of a web-based application Regulatory In-Lieu Fee and Bank Information Tracking System (RIBITS), which is available to the public.
    - Developed by inter-agency coordination between USACE, EPA, and FWS.
    - Increasing use of RIBITS by agencies.

- Baxter: Other mechanisms used to provide assurance of permanence beyond real estate instruments? For example, financial assurance, insurance, etc.
  - Martin: Don't see financial assurance mechanisms as providing site protection, but provides a source of resources that can be drawn upon in the event that the responsible party is unwilling/unable to fulfill obligations.
    - Mechanisms like causality insurance are a relatively new product in the field of mitigation, but only valid for 10-yr period.
    - Source of funds for long-term management is important in permanence issue.
  - Baxter: Used in concert with land protection mechanisms to ensure management is funded.
- Raub: Are there spot-checks used to verify the long-term management reports?
  - Martin: There is an obligation for compliance and the USACE districts conduct compliance inspections on a percentage of approved mitigation banks each year.
    - In VA, DEQ has a regulatory stake in mitigation banking; therefore, is also active in compliance inspections.
    - Compliance inspections generally occur prior to the release of additional credits.
- Raub: If there is non-performance, what remedies, penalties exist? And who enforces the compliance?
  - Martin: Range of consequences if non-compliance is identified and not addressed.
    - 1) Suspended credits at non-compliance areas.
    - 2) Suspended credit operations throughout the bank.
    - 3) Notice of violation.
    - 4) Suspension of associated permits.
    - 5) Claiming financial assurances.
    - 6) Termination of the agreement.
      - Last two measures are used reticently after all other options exhausted because need guarantees that compensatory mitigation will be corrected or alternative compensation will be provided.
    - Types of acceptable financial assurance mechanisms: performance bonds, surety bonds.
      - Used to guarantee construction of mitigation site, usually do not cover the performance monitoring phase of project.
      - Letters of credit
      - Causality insurance
      - Cash, cash in escrow
    - Federal agencies must be cautious with assurances because of miscellaneous receipt statute, which indicates that unless Congress provides statutory authority to receive funds in the event of a financial assurance claim is made and no other party is to receive, the funds will go to the Treasury.
      - Therefore, at outset, key determination of beneficiaries who are willing to take on responsibility in the event of a financial assurance claim.
- Branosky: Potential sources of offsets in the Bay jurisdictions could include privately-owned agricultural land to reduce nutrient and sediment load below baseline. With compensatory mitigation, is the wetland acreage owned by a wetland bank? Are private owners involved?

- Martin: Regarding mitigation banks, ~ 80% compensatory mitigation provided through banks nationally is commercial, and, of that, ~80% of those banks are private sector banks.
  - Bank sponsors can be land owners, or LLCs including the land owner.
- Branosky: Helpful in that demonstrates great applicability to offsets in the Bay region.
- George Kelly: How is crediting separate from land encumbrance (e.g. how credit release relates to permanent easement)?
  - Martin: Credits are released based on achieving performance milestones. Also, there is typically an initial release (% of credits) once the project is approved and funding mechanisms are in place.
  - Kelly: Credit release schedule is then a certain number of years, but easement continues regardless of credits.
    - Martin: Correct. Not a term easement, but permanent.
  - Branosky: How does that affect developers to offset loads and short-term constructs?
    - Kelly: That would be different because constructs are not permanent.
- Levellev: Are there eligibility requirements for buyers?
  - Martin: Transactions acknowledged are generally associated with a permit or compensatory mitigation obligation, but buyer could be any entity.
- Baldwin: Anyone with permit obligation or in-lieu fee can be buyer?
  - Martin: Ability to acquire credits is geographically restricted by specific service areas.
    - Primary focus in East is to ensure compensation occurs within the watershed impacted by actions.

### **Using Restrictive Covenants for Stormwater Nutrient Offsets in Virginia – Allan Brockenbrough**

- In VA, offsets approved under program used for new stormwater loads
  - Post-construction P runoff load that must be met. Trades under certain circumstances can be made to achieve P reductions.
- Offset must be permanent; therefore, involves land use conversions, not BMP implementation.
  - Fairly analogous process to mitigation banking.
- Referring to slide 4 of [Permanence of Compensatory Mitigation](#): Nutrient Reductions Implementation Plans rather than mitigation plans, but includes many of the same elements as mitigation plan.
  - VA's Nutrient Reduction Implementation Plans similar to a more streamlined mitigation plan because they are generally simpler to create and maintain (e.g. fallow field vs. functioning wetland).
- Site protection instrument required.
- Credit release relies on restrictive covenants.
- In future, likely to see more conservation easements, possibly paired with restrictive covenants.
- Allowance of mitigation banks to sell mitigation credits at nutrient value if the bank was created to be consistent with the VA nutrient banking program.
  - Additional stacking of credits not allowed.
  - Potential source of income for mitigation banks that are not generating income at this time.

- Process is not formalized in regulation at this point, but new bill in General Assembly this year directs DCR to develop regulations on nutrient offsets. Regulatory process should be established over next few years.
- Baxter: Examined wetlands mitigation banking, which served as an important component of developing VA's program/statute.
- Levellev: How were N credits addressed?
  - Brockenbrough: VA stormwater programs address P, as P is the limiting factor. Therefore, when P allocations are met, N reductions will also have been achieved.
    - Corresponding N credits retired when P credits purchased.
    - Baxter: Seller of P credit couldn't sell N credit for the same land use conversion.
- Rountree: Does the process described also meet the offsets for new growth requirement under the TMDL?
  - Brockenbrough: Yes.
- G. Kelly: Clarify: this is a mitigation credit for a nutrient value; therefore, separate nutrient banks are not established. However, nutrient value is sellable under state program. Then, conversions are determined for setting credits relating to P-reduction ratio.
  - Brockenbrough: Correction. Different ratios will be determined depending on location in the mitigation bank.
  - G. Kelly: Are you also using the VA "look-up table" for determining the loading reductions or are you creating a separate conversion table for wetlands?
    - Brockenbrough: No nutrient removal credit given for the wetland function itself at this point; just land use conversions. Therefore, same tables used.
      - Credits at an appropriately-sited bank, converted at the right time frame, may have multiple values or at least be able to provide offsets for more than one program.
      - G. Kelly: But, RIBITS is used to track and identify.

### **Jurisdictional Updates**

- Round robin question: How will those that could require offsets (e.g., developers, transportation projects) report them to state permitting authorities? If applicable, how will jurisdictions report offsets to EPA?
- PA Updates: Andy Zemba
  - Continued work on and develop stormwater offsets program.
    - Anticipates reporting requirements through NPDES permitting process.
    - Still developing reporting process to EPA.
  - McGee: Considering permanent offsets at this time?
    - Zemba: Cannot say definitively at this point as still developing the program guidance internally, but strongly considering permanence.
  - Zemba: Auction held 6/13 and plans to hold another auction in the fall. Results are on PennVest website.
- DE Updates: n/a
- MD Updates – Marya Levellev
  - Considering general permit that developer would submit to state for offset certification and identification.

- Presented to at Agriculture Nutrient Subcommittee meeting.
    - Details still being developed.
  - Rhoderick: In the early stages of developing this process. Holding a series stakeholder meetings to gather more feedback and conclude in the late fall.
  - McGee: As VA is focusing policy on P and MD on N, would be great to see a demonstration of relationship between nutrients and that focus on reducing one nutrient would have a similar effect on the other nutrient.
  - Rhoderick: As previously stated, recently conducted Agriculture Nutrient Advisory Committee meeting to discuss and review guidelines for the MD agriculture program.
- Koon: Recently, WV has not made much progress on the development of urban stormwater offsets program.
  - Strategy involves reporting through NDPES permitting process.
  - Will consider other states' approaches while developing WV program.
    - However, new development includes few MS4 permits.
- DC: No updates at this time.
- Brockenbrough: VA DCR is unavailable today.
  - Tracking for stormwater offsets is work in progress.
    - Registration statement for stormwater permit has a blank space to indicate if a developer is considering the purchase of credits, but does not indicate definite intent to purchase credits or where those credits are coming from.
    - When sale of credits is completed, receipt of affidavit of sale and ledger from banker indicating that credits have been sold for a specific stormwater project.
    - Method of reporting to EPA is still being determined.
  - Other updates: completed first year of compliance for Watershed General Permit.
    - Statewide: Significant point sources ~20% below N load cap and ~40% below P load cap.
    - 34 facilities acquired credits to meet compliance obligations. Trades involved less than 2% of statewide N allocation and less than 5% statewide P allocation. Trades totaled ~\$1.9 M of credits.
  - New legislation: Senate Bill 77.
    - Outlined study of expansion of trading program conducted last year. Provides path forward.
      - DCR will be developing regulations on certification of non-point source offsets, but currently DEQ will certify.
      - New law allows new or expanded facilities to acquire compliance credits.

### **Updates on CIG Common Platform Project – Mindy Leblond**

- Work on the registry piece should be completed in the next few weeks.
  - Based on the feedback from states.
- Currently, focusing on state input and guidelines, even if policies are in flux regarding baselines, ratios, scale.
- Core calculations through NTT.

## Other Updates

- Foster: Good progress has been made on wastewater and agriculture issues through the TMDL.
  - Stormwater is still very problematic due to high costs for local governments.
    - Stormwater controls are too expensive to be feasible.
    - Concern that this will be the undoing of WIPs.
  - Trades will be necessary to maintain WIPs.
  - Rountree: Agree with sentiments.
    - Hopeful that a trading program can be develop in order to meet stormwater goals by alleviating cost issues.
  - Kelly: However, additional trading requirements will limit level of trading activity.
    - Need a scientific basis for requirements in order to achieve the most effective, cost-effective trading programs.

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