Chesapeake Bay Program
A Watershed Partnership

Habitat Goal Implementation Team

January 4, 2013

Nicholas DiPasquale, Director
Environmental Protection Agency
Chesapeake Bay Program Office
410 Severn Avenue, Suite 112
Annapolis, MD 21403

Dear Mr. DiPasquale,

The Chesapeake Bay Program's Habitat Goal Implementation Team (GIT) met in November 2012 to convene a meaningful dialogue between regulators and practitioners about the permitting process for habitat restoration projects within the Chesapeake Bay watershed. Many habitat restoration projects have been delayed by a permitting process that was primarily intended to provide environmental protection during development projects. Nearly 40 people traveled to Cacapon State Park in West Virginia, and more joined by phone, to participate in this meeting, underscoring the timeliness and importance of this subject to the many dedicated professionals working to restore the Bay and its watershed. With this letter, we are pleased to deliver on one intended outcome of the meeting – that of providing a set of suggestions for ways to reduce the amount of time needed to get permits approved for habitat restoration projects.

The positive tone you helped set at the beginning of the meeting was carried throughout the day, with everyone speaking from a common platform of achieving swimmable, fishable waters in the Bay and its tributaries. The need for accelerated project implementation was also evident during our day of discussion. If the community as a whole is to meet habitat and water quality restoration goals articulated in Watershed Implementation Plans (WIP) required by EPA, we as a community of both practitioners and regulators will have to work together to move projects more quickly through the permitting process. From the viewpoint of the practitioners, faster implementation means less expense and quicker water quality and/or habitat benefit. From the viewpoint of many regulators, WIP goals will lead to increased numbers of proposed restoration projects, and therefore increased permit applications in need of review as the States work to meet load reduction requirements under the TMDL. It is therefore in both groups' best interests to discuss this issue.

Several themes emerged from those who participated in the meeting, though with only a few hours to discuss, full consensus by all present on every point could not be attempted at this forum. Following the meeting, a letter was drafted and sent to all Habitat GIT members and meeting participants for comments. Many comments were consistent with the current suggestions; however others could not be

easily accommodated within this letter. This final letter was approved by our Habitat GIT Steering Committee members. The Habitat GIT represents views from numerous agencies and partners from the six states and the District of Columbia. We recognize that some of the following suggestions are already implemented within certain agencies and jurisdictions. The Habitat GIT would like to advance the following suggestions to the Management Board for further dialogue:

A. Consult Proactively: Regulatory representatives emphasized the need for restoration project managers to engage the regulatory agencies early in the application process by taking advantage of the pre-application consultation process. By engaging the regulatory agencies early, practitioners are able to interact with the regulators as partner agencies to develop the best project possible in the appropriate location to maximize benefits and minimize risks to the ecosystem while achieving the desired nutrient, sediment, and/or habitat outcomes. It was also suggested grant makers on restoration projects should communicate with regulatory agencies before awarding funds to determine which proposals have the highest chance of obtaining permits. Restoration practitioners emphasized the need for a permit pre-application tool that standardizes the level and type of information and data being sought by the regulatory community. It was also suggested that it would be useful to have a public database of projects that have been permitted or denied permits and the reasons for these decisions. Tools like EPA and Maryland SHA's collaborative "Water Resources Registry" may meet this need.

B. Create Clear Application and Review Processes: Develop clear guidance and processes to assist potential applicants in preparing effective applications that are responsive to the regulatory requirements. This would include increased clarity provided upfront on application requirements and guidelines (for example, if certain types of studies or monitoring data are required in certain circumstances).

We suggest permit agencies:

1. Develop written site, design, and construction selection criteria so applicants are not preparing proposals for projects that permit writers will not likely permit.
2. Develop a written process flowchart that clearly delineates primary, secondary, and even tertiary steps in the permitting process.
3. Develop permit application checklists specifically for certain types of restoration projects to ensure applicants submit complete applications.
4. Identify problematic terminology that may trigger unintended and unnecessary requirements.
5. Define criteria that would allow and encourage innovative projects to get permitted, specifically function-based assessment and monitoring requirements, responsibility in the event of a failure, etc.
6. Compile an inventory of technical resources and specialists available to assist applicants in preparing complete and meaningful applications.
7. Identify a principal Point of Contact (POC) for the regulatory agencies (and if possible lead agency) to ensure smooth flow of accurate information and communication with the applicant.
8. Provide training opportunities for permit applicants on these issues.

We suggest restoration practitioners:

1. Utilize pre-application consultations to increase understanding of project outcomes.
2. Follow checklist and guidance from permitting agencies to ensure submittal of complete permit applications.
3. Develop projects with a goal of achieving ecological uplift through restoration while limiting conflicts with other resource requirements.
4. Identify a principal Point of Contact (POC) for the applicant to ensure smooth flow of accurate information and communication with the permitting agencies.
5. Consider function-based science and enhanced monitoring to validate innovative restoration techniques.

C. Clarify Definitions and Manage Trade-offs: Significant uncertainty centers around definitions of habitat types and trade-offs among types, particularly regarding stream restoration projects (i.e. stream vs. ditch vs. swale and ephemeral vs. intermittent vs. perennial). A different set of guidelines may be used for a permit application depending on which agency takes jurisdiction of the potential restoration site. The Habitat GIT recognizes that there are two issues to be addressed. The first attends to concerns related to ditches that are in areas that were originally wetlands and restoration proposals to restore previously existing hydrology. The second issue relates to converting existing perennial streams to wetlands (e.g., RSC designs). Understanding how to evaluate trade-offs is admittedly challenging. Regulatory agencies have developed processes, like Maryland's Joint Evaluation Committee, to bring those responsible for multiple resources together to address impacts and trade-offs. However, currently there is no guarantee that these forums will provide solutions to these issues. Therefore, additional processes need to be developed to assure timely integration of all necessary resource inputs.

D. Pursue Options to Expedite Review of Restoration Projects: Currently, restoration projects are subject to the same general requirements and multiple considerations as development projects. It was suggested that efficiency can be achieved, without detriment to our waters and wetlands, by expediting the review of restoration projects that utilize common practices, such as plugging drainage ditches and building small embankments to restore wetland hydrology, especially when these practices are implemented by resource agencies in working (e.g. cropland, pasture) and degraded (e.g. ditched pine plantation) landscapes. Relatively small functional changes (e.g. small conversions of emergent wetland to open water) may be accepted under certain circumstances in the context of restoration to achieve greater overall goals (i.e. recovery of wetland functions on a larger footprint). Projects with significant functional change should have some minimal level of assessment, design and monitoring requirements to assure project success. For instance, ditch plugging can cause flooding to adjacent properties and appropriate assessment must be provided. These efficiencies can be provided through a number of regulatory vehicles, such as general permits, regional letters of authorization, regional conditions for general permits, and memoranda of understanding. Efficiencies in restoration permitting will hasten Bay restoration while allowing regulators more time to review projects that inherently carry greater risk and uncertainty.

Practitioners urged consideration of general permits, such as Nationwide 27, for expediting review of restoration projects. Examples were given (NH, WI, PA) where a new approach or "restoration lens" is applied to applications for restoration projects submitted by resource agencies rather than grouping them with development projects under the same review process. We recommend that regulatory agencies and key practitioners coordinate to prepare additional guidance and cross training on regulatory requirements, innovative restoration approaches, and designs for all pertinent staff and other relevant stakeholders. Outreach and information should be made clearer and accessible. Opportunities for streamlining review and general permits under appropriate circumstances should also be investigated. Creating forums for this outreach will also be helpful. For NGO and local projects, we also may want to consider agency co-sponsorship of projects to help facilitate appropriate use of general permits and broaden the array of eligible projects.

E. Validate with Science: Regulatory representatives stated that providing data and accurate information in the pre-application consultation and formal application can be important to regulators in making a timely decision on a project. By using data to support the overall rationale for and design objectives of the project, applicants can expedite the review process. Both regulators and practitioners agreed that a permit pre-application tool that standardizes the level and type of data needed would be useful for all. Costs associated with monitoring should be taken into consideration, such that those costs alone do not serve as a barrier. Several meeting participants voiced the concern that permit application requirements should not be more rigorous for restoration projects than they are for development projects. In addition, we suggest the consideration of developing new processes or new forums to continuously apply advances in science and new tools to the regulatory and restoration process.

F. Increase Understanding through Training and Education: Representatives from the regulatory community indicated that in some cases, permit delays result from incomplete or incorrect application materials. Both the restoration practitioner and regulatory representatives agreed that training opportunities offered to permit applicants would improve the quality of permit applications. We suggest that regulatory agencies and key practitioners coordinate to prepare additional guidance and cross training on regulatory requirements, restoration approaches, and designs for all pertinent staff and other relevant stakeholders. We recognize that agency resources may be constrained and that agencies may need additional resources to develop recommended tools on a regional or state-by-state basis.

Overall, we wish to foster a cooperative atmosphere among the regulatory and practitioner communities to create common understanding to not only meet the goals set by the TMDL, but also comply with other regulatory requirements. Our Habitat GIT would like to remain engaged and await Management Board guidance for appropriate next steps. Thank you for your support of the Habitat GIT in facilitating this dialogue, and for your personal interest in finding a better way forward for the good of restoration practitioners, regulators, and the Bay.

Sincerely,

Jeff Horan

Chair, Habitat Goal Implementation Team

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