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## MEMORANDUM

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**To:** Chesapeake Bay Program Water Quality Goal Implementation Team Members

**From:** Christine Conn and Bill Jenkins, *Habitat Goal Implementation Team Chairs*  
and

Dinorah Dalmasy and James Martin, *Water Quality Goal Implementation Team Chairs*

**Date:** January 9, 2020

**Re:** Chesapeake Bay Program Water Quality GIT and Habitat GIT Response to PA DEP Hold on Wetland BMP Expert Panel Report

### Executive Summary

At the September 10, 2019 Wetland Workgroup meeting, the Pennsylvania Department of Environmental Protection (PA DEP) Wetland Workgroup members using the consensus continuum recommended a HOLD on finalizing the current Draft Wetland Best Management Practice (BMP) Expert Panel Report. PA DEP continued its HOLD on the report during the December 9, 2019 Water Quality Goal Implementation Team (WQGIT) meeting, during which the Expert Panel Coordinator sought approval of the report from WQGIT members.

The HOLD recommendation was made due to PA DEP's dissatisfaction with the "continued propagation of deficiencies" from past expert panels and the lack of a process to resolve these issues. The three concerns registered by PA DEP relate to the following topics: wetland land use classification; compensatory mitigation wetlands; and general BMP panel report review and approval process. Below is a summary of each issue and the most recent response from the WQGIT chairs, Habitat GIT (HGIT) chairs, Expert Panel Coordinator, and other Chesapeake Bay Program leadership.

### Issue: Wetland land use classification

PA DEP's largest concern with wetland classification lies in the use of the categories of "Floodplain Wetlands" and "Other Wetlands" for establishing upland acres treated and wetland retention efficiencies, as well as Total Maximum Daily Load (TMDL) crediting in the Watershed Model. Research within the jurisdiction shows that headwater systems are high value landscapes and play an important role in reducing pollutant loads. Because headwater systems are included in this category of "Other Wetlands", rather than as "Floodplain Wetlands" or its own classification, PA argues that the important role of these complexes, and any restoration that is completed within them, is discounted and not sufficiently credited in the Watershed Model.

The Department would like to re-visit the two classifications for wetland restoration and the subsequent effect in terms of BMP crediting. They request an action plan and time frame outlined for the jurisdictions for resolving this issue. They suggest that since this classification issue arose during



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the 2016 BMP report and has not been resolved, the action plan and timeline should be included as an addendum to the 2016 BMP report as a formal Chesapeake Bay Program commitment to resolve this concern.

#### **Response:**

The Chesapeake Bay Program agrees with the significant role that headwater systems play with respect to water quality. The land use loading rates for other wetlands is equal to floodplain wetlands in the Watershed Model. They agree that more clarification is needed on the appropriate place for headwater wetland complexes in the wetland classification scheme to better reflect their importance. The Bay Program proposes to provide a mappable redefinition of wetlands as part of new land use/land cover data. By working with PA DEP, the Wetland Workgroup, and the Land Use Workgroup, the mapping team can develop GIS layers that PA deems more relevant and applicable, given recent research and new data.

Broadening the definition of floodplain wetlands and reflecting this change with mapping visualizations must be substantiated by the partnership, starting with the Wetland Workgroup. Peter Claggett has offered to hold a “kick-off” presentation for this process at the next Wetland Workgroup meeting. The mapping team estimates that they can create a better floodplain methodology over the course of a year. This process will include a literature review, prototyping of visuals, simultaneous mapping of the updated 2017-2018 land use/ land cover classification, and a vetting process.

Beyond improvements to partnership data layers, GIT leadership and CBPO staff discussed how the land use classification methods of existing wetlands, which relies on FEMA floodplains and SSURGO data to separate into the two wetland land uses, does not constrain PA’s reporting of wetland restoration BMPs as “floodplain” to the same areal extent of those areas classified as “floodplain wetlands.” Whether a wetland restoration project is in a “floodplain” or not is determined by site conditions, such as hydrology and connectivity, and not based on FEMA floodplain layers. Indeed, some projects will reconnect areas to the floodplain. Jeremy Hanson offers to summarize this clarified definition in a section of an updated fact sheet regarding the findings from the BMP reports and provide a draft to the workgroup by March 2020. In the next cycle of progress reporting, PA can begin recording wetland restoration projects that occur in headwater systems as floodplain wetland restoration. Clarifying the application of the definition for reporting purposes, combined with improved mapping of wetlands is consistent with the recommendations of both wetland expert panels (2016 and 2019). It will also provide greater clarification both within the Bay Program partnership and broader stakeholders. We encourage PA DEP to stay active and engaged champions throughout this process.

#### **Issue: Compensatory mitigation wetlands**

As with the previous Wetland Expert Panel that concluded in 2016, this current panel and report are focused on voluntary wetland activities that can be tracked and reported toward TMDL progress. Compensatory wetland mitigation is outside the purview of the panel and is not creditable for Chesapeake Bay TMDL purposes. PA DEP disagrees with the ineligibility of compensatory wetland mitigation projects for use as Bay Program BMPs. They argue that when land is converted to urban uses developers can implement several BMPs, such as erosion control measures, various storm water controls, infiltration, etc., that are credited towards mimicking the natural processes that were



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lost due to development. Yet wetland compensatory mitigation projects that are developed to account for loss of wetlands to development are not eligible to be credited as a BMP. PA sees this ineligibility as a historical carry-over and not reflective of the current WIP strategy that includes both regulatory and voluntary strategies. PA DEP advocates for the inclusion of these projects as a BMP across all jurisdictions.

**Response:**

The Bay Program has a long-standing distinction between wetlands as a voluntary BMP and regulatory wetland mitigation under Section 404 of the Clean Water Act. The wetlands regulatory programs are intended to ensure no net loss of function and value, which includes the mitigation requirement. The goal of wetlands as a voluntary BMP, and as stated in the wetlands outcome, is net gain and functional uplift of wetland habitat, which is captured by restoration, rehabilitation, and creation of wetlands outside of the regulatory context. Therefore, as it stands, wetlands created through compensatory mitigation are not eligible as a BMP. If compensatory mitigation projects exceed the demand or need for off-site mitigation, perhaps that surplus should be applied towards TMDL progress.

PA raised the concern that other jurisdictions, namely Maryland, were reporting compensatory mitigation projects. The Bay Program has checked with Maryland Department of the Environment and they have clarified that they are *not* reporting compensatory mitigation projects. To confirm current tracking and reporting methods for compensatory mitigation projects, the Bay Program will address this at the next Watershed Technical Workgroup meeting in February 2020, and subsequent meetings as needed. If current reporting is not consistent across the jurisdictions, then steps will be taken to correct that. If current reporting is consistent, then the Bay Program will take no further action unless new issues arise. If PA wants to pursue this issue beyond this, then they must champion it through the partnership and gain support and approval for this change at a higher level of the Bay Program. The CBPO can provide additional guidance should PA decide to move forward with this initiative.

**Issue: Overarching concerns regarding the general BMP panel report review/approval process**

In the past, PA DEP has registered its comments during the BMP report review process. Though their concerns were not resolved, they allowed the report to be finalized so as not to interfere with the other jurisdictions' implementation. However, they feel that past comments regarding these issues have been carried forward into the latest report and have still not been satisfactorily addressed, causing dissatisfaction with the overall BMP panel report review and approval process. They suggest that within the adaptive management framework of the Chesapeake Bay Program, it is essential that there is a process to correct past mistakes or misinformation in these reports, move forward with amendments, and allow for the integration of new research.

PA DEP would also like to address the challenges that several jurisdictions have with conflicting priorities across workgroups. Perceptions of unequal crediting in the Watershed Model (i.e., between wetland restoration and riparian forest buffers) lead to greater prioritization and emphasis on projects that get the highest credit, despite their actual ecological effects on the environment. PA DEP would



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like the see the role of the CBP Cross-GIT Coordinator and other leadership fully utilized in resolving these conflicts across workgroups and encouraging greater communication and transparency.

**Response:**

The Bay Program wants to reiterate that per the partnership's BMP Expert Panel Protocols, there is a process in place to revisit past panel reports to integrate new science or information and correct what may be perceived as errors:

*C. Existing estimates or treatment processes*

*The WQGIT will periodically re-evaluate existing loading and effectiveness estimates if new science or information becomes available, to determine if a review is warranted. Such reviews can be prompted by the availability of new information, such as a new treatment process or new information on efficiencies. Reviews can also be initiated if current estimates produce illogical model outputs or if there is reason to believe that they were developed using inaccurate information. Requests for reviews are typically submitted by a source sector Workgroup or GIT but are not restricted to these groups. (WQGIT BMP Review Protocol, 2015, p.3)*

Throughout the entire expert panel process, there are several opportunities to raise concerns and/or provide feedback. However, the Bay Program recognizes that improvements can be made to provide more clarity on points in the process where partners can interact with the reports. The Bay Program is exploring the concept of a “dashboard” or improved webpage for BMP panels, similar to Chesapeake Decisions, that clearly outlines the current status of each panel and holds an archive of completed reports. However, the creation of a web platform will depend largely on usefulness to the jurisdictions and other partners, the number of panels expected in the future, and resources needed to create and maintain this website. Staff at CBPO will continue to engage with PA DEP as possible updates to the website are considered.

As for potential workgroup conflicts, again there are ample points of engagement throughout the panel process. Every CBP partnership workgroup, GIT, and Advisory Committee has an opportunity to review the panel charge, proposed membership, panel scope and the draft report; participate in the panel's kick-off webinar and review and comment period; and engage in the workgroup and GIT decisional meetings. The Bay Program feels that the Scientific, Technical, Assessment, and Reporting (STAR) is an appropriate place to identify and begin addressing cross-GIT issues or scientific needs that arise in the panel or review process.

With regards to “unequal crediting,” it is important to reiterate that these expert panels are charged with assigning nutrient and sediment reduction efficiencies for BMPs based on the available science. It is entirely up to each state and local jurisdiction to select which BMPs to prioritize, emphasize, and ultimately implement based on unique programs, priorities, political realities, funding opportunities and constraints, etc. Per the BMP Panel Protocol (p.7):

*It is important to note that the purpose of the Panels is not to incentivize or promote the use of any BMP; it is to increase the understanding of the nutrient and sediment reductions associated with these practices. In addition, any appendix on ancillary*



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*benefits or unintended consequences does not change the definitions and loading or effectiveness estimates for nutrient and sediment reducing technologies and practices in the final Panel report. State and local governments may then consider both the definitions and effectiveness estimates from the main panel report, as well as ancillary benefits or unintended consequences from the appendix, when deciding upon which technologies and practices they intend to select, fund, and implement within their respective jurisdictions.*

The Bay Program is aware of the issues caused by perceptions and perverse incentives in BMP crediting and the importance of co-benefits, and is actively trying to discuss this in workgroup, GIT, and higher-level conversations. Additionally, the Wetland Workgroup is developing a Scientific and Technical Advisory Committee (STAC) Workshop proposal regarding this issue and if approved, would be an excellent forum to discuss this at a larger scale within the Bay Program.

### **Conclusion**

Once consensus has been reached on these outstanding issues and PA releases its HOLD on the report, the Chesapeake Bay Program agrees to add a finalized version of this memo, with resolutions to each issue clearly stated, as an appendix to the approved 2019 Wetland Best Management Practice (BMP) Expert Panel Report.