Restoration and Regulation – Update
Habitat GIT meeting
February 26, 2014
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Summary of the Issue

The process by which permits are obtained for restoration projects of various types (stream restoration, stormwater, nontidal wetlands, living shorelines, and more) has been an increasingly hot topic over the past several years as a result of the changing landscape of federal oversight of nutrient loads to the Chesapeake Bay. Both the Watershed Implementation Plan (WIP) process and new requirements through the Municipal Sanitary Sewer System (MS4) programs were developed in response to the federal total maximum daily load (TMDL) process, the call for the number of such restoration projects, and therefore restoration project permits, approximately doubled. Federal and State requirements through the Municipal Sanitary Sewer System (MS4) programs also are driving the need for increased restoration projects that require permits.

Restoration practitioners have called for a discussion about perceived hurdles in the permitting process, namely a) the time (and therefore cost) required to obtain permits for appropriate restoration projects in appropriate sites using appropriate techniques, and b) the types of data (often costly to collect) required in both the application process and as conditions of permits. In turn, the regulatory community has called for better communication and better information submitted, and has initiated a discussion of types of techniques defined as appropriate.

Progress has been made on the discussion at both the federal and state levels. An example is provided from Maryland. We welcome a discussion at the meeting of progress at the state level elsewhere.

Federal Update

Progress is being made at the federal level through a series of meetings (e.g., July 2013's meeting that brought local government and nonprofit organization permit seekers together with EPA and Army Corps regulatory leads), workshops (e.g., November 2012's Habitat GIT meeting that focused on this issue and brought federal and state regulatory staff to the table), site visits, and less formal conversations with Federal partners. The lead on this effort is the EPA Bay Program.

The efforts and discussion to date have resulted in the following highlights.
- o Acknowledgment that both groups have mandates, e.g., Clean Water Act, driving actions
- o Acknowledgment that both groups share the goal of environmental protection
- o The Corps has committed to streamlining the communications protocol and methods for sending appropriate guidance back to the potential permit applicants after pre-application meetings.
- o The Corps has improved the Nationwide 27 permit application instructions by developing a "NWP 27 checklist", which is available on their website (www.nab.usace.army.mil/missions/regulatory/permittypesandprocess.aspx), to facilitate determinations of eligibility under NWP 27.
- o The Corps developed a simple flow chart on the permit application process (available through above listed website).
- o The Corps is increasing outreach to stream/wetland restoration community (e.g., stormwater partner's retreat and Chesapeake Watershed Forum) about permit process and encouraging pre-application meetings.

Topics for additional discussion/clarification:
- o Idea of packaging permits for an entire subwatershed (most appropriate for local government applicants)
- o Permit application information needs, such as framing a project's scope and purpose, demonstrating functional uplift, demonstrating degradation of existing conditions,
- o There is concern about the change in stream function as a result of restoration projects.
- o The requirements for alternatives analysis needs
- o Trainings for regulatory staff, and transferring new scientific information
- o A separate track for review of restoration permits needs to be considered.
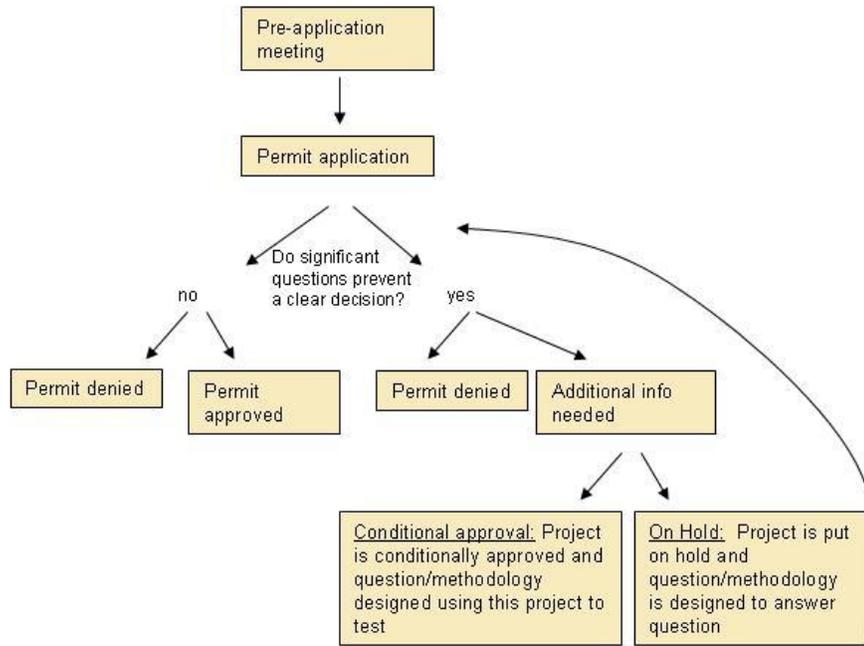
State Update – Maryland

The state level work in Maryland was focused in March 2012 with a relatively large stakeholder discussion that covered key topics of interest to both the restoration and regulatory communities. Several recommendations were made, and some progress has occurred on those:

1) <u>Pre-application meetings</u>. While pre-app meetings will not solve all issues, they will help solve some. MDE has changed its website to make it easier to request and organize a pre-app meeting with all relevant regulatory agencies, and has agreed to provide additional clarification on what applicants should bring to pre-app meetings. In addition, "scoping" pre-app meetings in which suites of project sites can be presented is now an option.
2) <u>Clarification of permit requirements.</u> MDE as of last summer was working on a specific checklist for the H&H section of the permit application, and MDE has agreed to provide more guidance on the alternatives analysis section.
3) <u>Projects in a WIP:</u> Some recognition that projects in a WIP already have some level of sign-off by both MDE and DNR seems to be occurring, and this *may* fulfill some requirements of the alternatives analysis. MDE has expressed willingness to discuss WIP relevance with local jurisdictions.
4) <u>Science sharing:</u> We need to set up at least one session, and consider a system, to bring to renew science information to regulators packaged in a way they can use it. Discussion has begun with MDE on this front, and the next step is for MDE to survey its permitters to determine what questions they have in order to organize a first session with researchers.
5) <u>Pooled monitoring:</u> Most appear to agree that the way monitoring data are currently collected is not ideal: Costly data are collected in different ways on different projects resulting in reduced usefulness and a non-hypothesis based approach. MDE has been working with DNR and several nonprofits on a model that would reduce requirements for performance-based monitoring on every project (compliance monitoring would still occur), and establish a method to articulate and answer questions that plague permitters (Figure 1). This method would allow for innovative practices to be proposed and tested. Next steps are to discuss this model with federal regulatory agencies.

What we'd like to focus the discussion on at the Habitat GIT Meeting:
1) Do you, as restoration practitioners, see any changes yet in interacting with regulatory staff? In the increased emphasis on pre-app meetings helping? Do the new checklists help?
2) What is the best way to get new science information to be useful to regulators as they make decisions on individual projects?
3) What do you think about the pooled monitoring proposal?

Proposed (DRAFT)

Permit Review Process

Pre-application meeting

Permit application

Do significant questions prevent a clear decision?

no — yes

Permit denied

Permit approved

Permit denied

Additional info needed

Conditional approval: Project is conditionally approved and question/methodology designed using this project to test

On Hold: Project is put on hold and question/methodology is designed to answer question

Research/Monitoring Process

MS4s

practitioners

Review Board: Development of prioritized questions list

regulators

MDE 319

MS4s

DNR

Other funders

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RFP

Review Board: Proposal review

Research conducted; answers obtained

Answers interpreted; communicated back to regulators, practitioners, MS4s