

TIDAL WETLANDS MITIGATION BANK WORKGROUP MEETING II

March 22, 2024 10:00 a.m.

Virginia Department of Environmental Quality
Piedmont Regional Office
4949-A Cox Road
Glen Allen, VA 23060

Workgroup Members In Attendance:

Shannon Varner	Troutman Pepper
Tom Tye	New Mill Creek Bank
Karen Johnson*	The Nature Conservancy
Randy Owen	Marine Resources Commission
Jeanne Richardson	Army Corp of Engineers
Sarah Woodford	Department of Environmental Quality
Lyle Varnell	Virginia Institute of Marine Science

Other Attendees:

Kati Booth	The Nature Conservancy
Carrilin Hirsch	Pender & Coward
Matt Hull	Pender & Coward

*Ms. Johnson stepped out of the meeting from 10:30-11:30.

Matt Hull called the meeting to order at 10:03 a.m. He explained that this meeting was open to the public and notice had been given. Members of the public were present. Printed copies of the documents under review were made available to all present.

Mr. Hull informed the group that it appeared there would be no extension to the budget or timeline to complete the documents review; therefore, this will be the last workgroup meeting. The recommendations have to be made to VMRC at their June Commission meeting in order to meet the July 1st deadline. Mr. Hull explained that the group members could communicate with one another outside of the meeting only in one-on-one capacity as the workgroup is classified as a public body, so all meetings of the group must be made public. Workgroup members can also share their thoughts with Mr. Hull or Ms. Hirsch directly as they are not members of the body, however, no "group" emails can be created to continue discussions.

Mr. Owen asked the members of the public in attendance to introduce themselves.

Each member of the workgroup introduced themselves and identified what agency or organization they are associated with.

Mr. Hull stated that the first document the group would review was the Guidelines for Establishment, Use and Operation of Tidal Wetland Mitigation Banks in Virginia (the “Guidelines”).

Mr. Hull reviewed the changes to the title page and appendices proposed changes. He asked the group if there were any questions or objections. There were none.

I. Introduction

The group discussed the introduction paragraph, including where the statutes regarding banking instruments and guidelines were headed. VMRC indicated they were looking into it. The revisions to the guidelines are not to conflict with statute. Discussion continued as to the need for the guidelines as a whole and that in-lieu-of fees were not addressed and questioned whether they should be in order to ensure consistency and regulate. Mr. Hull indicated that was unlikely to occur. While many of the group had concerns in general, there were no objections or suggested changes to the language in the Introduction section as presented.

II. Purpose and Scope

Mr. Hull asked the group if there were any questions or objections to the proposed changes. There were none.

III. Definitions

The group discussed the definitions section at length. The question was asked if they align with the DEQ definitions. Should the definitions attempt to capture efforts that are eligible for credits but aren’t captured, i.e. conversion? Should preservation be clarified? Mr. Hull pointed out that the document is vague about what is creditable and asked if the group thought it should be left that way. The group discussed increasing what is defined as creditable, most agreed perhaps needs to be clearer as there have been changes. There was agreement that it may be helpful to set forth more information but add flexibility language.

“Credit” definition was reviewed and the group agreed to change “bank” to “site” and accepted the remaining proposed changes.

“Restoration” definition was discussed as some felt it was somewhat conflicting with “establishment”. The group agreed to delete “or exist...degraded state”.

“Establishment” definition was discussed, specifically the terms “previously” and “upland site”. The group agreed to strike “at an upland site”.

“IRT” definition was discussed and the group agreed to adopt the federal definition.

“Compensatory Mitigation” and “Mitigation” were reviewed and Mr. Hull explained that they aligned with the Wetlands Mitigation Compensation Policy (the “Comp Policy”) definitions.

After much discussion, the group determined that the best solution would be to add language referring to federal law for all definitions included there, and only define here those that are not defined in that document or that were given different meanings.

IV. Tidal Wetland Mitigation Banking Guidance

Mr. Hull asked the group if there were any questions or objections to the proposed changes. There were none.

V. Implementation Procedures

A. Establishment of Tidal Wetland Mitigation Banks

Discussion ensued regarding this section, whether it is even necessary, and what the actual process is. The group agreed that a new #1 should be inserted indicating that a pre-proposal application can be placed/found on RIBITS. Once that proposal form is submitted, IRT will review in accordance with the federal process. Then #1 and #2 as written can be eliminated entirely. Mr. Hull asked if that would also eliminate the need for Item #3. The group felt that if VMRC had different requirements than federal, then it would need to be left in. The group discussed Item # 4, public comments were also received. It was agreed that this information would all be outlined in the Mitigation Bank Instrument (the “MBI”), therefore Item # 4 can be removed in its entirety.

B. Criteria for the Siting and Design of Mitigation Banks

The group agreed that this information would all be outlined in the MBI, therefore should be following that.

C. Criteria for the Use and Operation of Tidal Mitigation Banks

The group agreed that this information would all be outlined in the MBI, therefore should be following that.

D. Dispute Resolution.

The group discussed and agreed to remove entirely.

11:20 Break

11:30 Reconvene.

Mr. Hull advised the group that he had accepted all the changes in the Comp Policy document as discussed at the last meeting, then included additional changes in the red-lined version being reviewed today.

4VAC20-390-10. Definitions

The group first discussed the “Approved in-lieu fee program” definition and discussed that it doesn’t say anything about the sale of credits and whether that should be added. An agreement was reached to change the first sentence to “...a program involving compensation mitigation through funds paid to a governmental or non-profit natural resources management entity for the purchase of credits” and to accept the rest of the proposed changes to that definition. The group agreed that preservation of aquatic resources needs to be added to the “approved in lieu” definition as well as the “compensation mitigation” definition.

4VAC20-390-20. Policy.

The group reviewed, discussed, and agreed to the proposed changes with the additional change to the last sentence to read “...to avoid or minimize any impact.”

4VAC20-390-30. General Criteria

The group reviewed, discussed and agreed to the proposed changes along with the following changes:

Paragraph one, change first sentence to read “policy of Commonwealth to avoid, minimize and compensate the loss of wetlands...”

Paragraph three, strike “Since use and development.....Zoning Ordinance”. Remainder of sentence to read: “A permittee’s commitment to preserve other existing tidal wetlands could, under certain circumstances, be a form of compensatory mitigation”.

4VAC20-390-40. Specific criteria.

The group discussed this section and whether it is necessary at all since it is all related to permitting. They agreed to strike entirely. However, after further discussion, it was decided to strike as is written, but include a sentence that states something to the effect of: “When a permit is issued for impacts to wetlands, the permit shall be conditioned on appropriate compensatory mitigation.”

4VAC20-390-50. Supplemental guidelines.

Mr. Hull indicated that the lettered paragraphs were re-ordered to align with the order of preference as set forth in Paragraph A. There was discussion again about the in-lieu fee programs

and whether “ad-hoc” be listed here at all or completely broken out as leaving it here makes it appear that it is an option for any size impact which is concerning to the group as a whole.

12:00 p.m. Break for Lunch.

12:37 p.m. Reconvene.

The group continued the discussion regarding breaking out the “ad hoc in-lieu fees” to a stand-alone section as there are such limited times it is even an option. Generally, the ACOE, DEQ, IRT do not accept as an option, it is an antiquated idea. The entire group felt that when this option is utilized, it is not managed properly, the funds are not spent, etc.

It is only for extraordinary circumstances when there are no other options. Mr. Hull indicated that while localities need to be encouraged to buy credits, we do not have the authority to impose such a requirement on them.

Discussion was had as to how wetland boards established the in-lieu rates. As written, the policy reads, “In no case should an ad hoc in-lieu fee amount be accepted that is less than the cost of necessary compensatory mitigation area or the purchase of necessary credits...” Should it be more than the current cost to account for inflation and the loss of ecosystem services. The group agreed wholeheartedly that some sort of multiplier would be appropriate.

The ad hoc is only an option when the feds are not imposing any requirements and there are no other options available. Discussed making part of permit conditions, the permittee must demonstrate no other options. Additional language such as: “In the circumstance where federal regulators do not require compensatory mitigation and the applicant demonstrates that no form of compensatory mitigation is available, compensatory mitigation requirements may be met by payment of an ad hoc in-lieu fee.”

Section B

Discussion ensued as to the reference to “ecologically preferable”. Mr. Hull suggested moving that language to Section A wherein VMRC or a Wetlands Board will choose the ecologically preferred method in the order set forth there.

Section D

Discussion was had about the term “undesirable plant species” in Item #1. The group agreed to change it to make reference to the DCR list of invasive species.

Mr. Hull stated that he will incorporate the revisions as discussed into the Comp Policy and the Guidelines and circulate for the group to review and provide any further comment or feedback. He reminded them to not discuss among themselves as a group. Then the proposed changes will be provided to VMRC for posting for public comment and review at the June Commission meeting.

The meeting was adjourned at 1:43 p.m.