

Wetlands Advisory Committee Meeting

Meeting Notes-Final

December 11, 2013

(Approved February 11, 2014)

Agenda Items (Action Items are bulleted under the Agenda Items):

1. Review and Acceptance of the Meeting Notes
 - *Meeting notes were accepted with amendments to add the voting procedures under the motion to adopt voting procedures.*
 - *Discrepancies between the September meeting notes that were approved by the committee and the version that was posted online are to be corrected.*
2. Presentation on Prior Wetland Legislative Efforts by Andy Manus
 - *Matrix of past legislative efforts relating to freshwater wetland protection will be given to a DNREC staff member to complete, compile into a handout, and present to the committee next meeting.*
3. Presentation on Wetlands Regulatory Perspective by Marty Ross of the Delaware Farm Bureau
4. Presentation on Wetlands Regulatory Perspective by Brian Michalski of the Delaware Forestry Association
5. Presentation on Federal Wetlands Regulations including Nationwide Permits and General Permits used in DE and the Permitting Process in other states by Ed Bonner of the US Army Corps of Engineers
 - *Formation of a "Carrot" incentive subcommittee*
6. Public Comments and Discussion
 - *Virgil Holmes (DNREC) put on the agenda next meeting to discuss how Delaware interacts with the Army Corps of Engineers in the permitting process.*

Materials Distributed:

1. Agenda
2. Virgil's ppt slides- will be made available to committee before the 1/8/14 presentation

Review and Acceptance of the Meeting Notes and Discussion of Voting Procedures

- Mike Parkowski (Co-Chairman) called the meeting to order at 9:12 AM. He explained to the committee that the goal of these meetings is to get everyone exposed to the current programs in place relating to freshwater wetlands. He remarked that it's important to understand the current system and why it is the way it is now
- Mike Parkowski then thanked Marty Ross (Farm Bureau) for being astute in his review of the notes. He noted that Marty Ross noticed a difference in the meeting minutes regarding the voting procedures vs. what has been adopted. The difference is between 2/3^{rds} of the committee members and 2/3^{rds} of the voting members of the committee. Mike reminded the committee that at the last meeting the ability of committee members

from state and federal agencies to vote was discussed. Ed Bonner (US Army Corps of Engineers) had recused himself from voting, and members of the committee from the NRCS and Farm Services Agency were going to determine if they could vote.

- Bob Walls (Farm Services Agency) and Jayme Arthurs (NRCS - Alternate for Sally Kepfer, NRCS) confirmed that they would not act as voting members.
- Mike Parkowski confirmed that the committee will now have 3 nonvoting members. He then asked if the committee would like to change the protocol so it's 2/3rd of the voting members of the committee rather than the entire committee.
- Marty Ross stated that the meeting notes from the November meeting did not accurately reflect what happened at that meeting. He noted that the original meeting minutes were out of sequence and didn't accurately reflect what the committee did.
- Marty Ross noted that at the last meeting, Frank Piorko (DNREC – Div. of Watershed Stewardship) gave an overview of the voting procedures that had been distributed to the committee prior, and advocated that those procedures be adopted. Marty Ross stated that it was after this introduction of the voting procedure that he introduced the issue of voting eligibility, and noted that the committee took two affirmative actions:
 - The first action the committee took was to allow all committee members to vote. Marty Ross noted that had members been found not to be eligible to vote, but were still committee members, then he would advance the concept of changing the voting procedures to recognize that, and still stay within the intent of the DNREC recommendation. However, when the committee voted to adopt a position to allow all committee members to vote, it made it moot, because any change would be either out of the intent of the distributed recommendations or would be meaningless. For example, if it were changed it to 2/3rd of the eligible voting members, that would be in keeping with the distributed material, because it would recognize that some members wouldn't vote, and would have been appropriate.
 - The second affirmative action the committee took was the vote to adopt the procedure that had been distributed to the committee, which was 2/3rd of the total members. Marty Ross noted that as a point of order under Robert's Rules, that can be revisited, but only with a motion to reconsider that act or with a motion to rescind with a substitute position.
- Marty Ross remarked that he didn't enjoy bringing this to the committee's attention, but didn't create the dilemma, and in fact tried to circumvent it by bringing up the issue of voting eligibility of state and federal committee members at the last meeting. He implored the committee to not "shoot the messenger". He remarked that he spent a long time going over a tape recording of the meeting to ensure that he had the details right.
- Marty Ross stated that he didn't think this voting situation was created unconsciously, and he didn't think it was necessarily a bad thing. He noted that when the committee adopted a procedure that everyone can vote, that means that basically a certain number of members have to be there to enact an action, which acts as a voting quorum. In this case, the committee enacted a voting quorum of 19. He stressed that we shouldn't change the established policies over worries about voting outcomes.
- Marty Ross noted that when he went online and read the September notes the committee approved, they were different from the version that the committee approved. He remarked that they weren't substantive differences in his opinion, but stressed he has

never been on a board of any significance in which it was tolerated for the staff to change approved meeting minutes or notes. He remarked that it wasn't tolerable because that's the reason for the committee to give the notes consideration, and that the staff should bring edits to the notes to the committee and ask for approval.

- Mike Parkowski thanked Marty Ross for his accurate description of voting procedure and for raising an important issue. He remarked that he didn't want to be in a dilemma of the outcome of a vote being up to interpretation. He restated that what the committee has adopted is that 2/3rd of the entire committee is required to vote on something irrespective of whether or not certain members of the committee are entitled to vote. He stressed that from the standpoint of being totally transparent, it's something that everyone should understand going forward, so that when the committee has a vote, it is known what a valid vote is and isn't and thanked Marty Ross for raising the issue.
- Mike Parkowski also complimented Marty Ross's attention to the details in the meeting notes because the minutes that come out of the committee's meetings are ultimately supposed to be used by the Department to prepare a report which is going to come back to the committee to vote on and consider. He asked that every time an error is found in the notes, the committee be notified. He firmly believes that if there are discrepancies, they should be raised, so the committee can resolve them.
- Mike Parkowski noted that if a committee member is inclined to want to change what's been adopted, they are entitled to do so by making a motion. He summarized that currently, the committee need 19 votes, which is 2/3rd of the majority of the 28 member committee. He remarked that if no committee member would move to amend the procedure that the committee could move to the next agenda item.
- Marty Ross inquired as a point of order about accepting the meeting notes from November, as was listed on the agenda. Mike Parkowski asked if Marty Ross would like to make a motion to accept the minutes as revised. To which, Marty Ross responded that he would like to make a motion to ask without objection that the voting procedures be included in the meeting notes directly under the motion to adopt the voting procedures. Sarah Cooksey seconded this motion. Mike Parkowski inquired if there were any comments or discussions on the motion. When no committee members responded, Mike Parkowski asked that all members in favor of the motion raise their hands. All members voted in favor, and the motion to accept the meeting notes with the amendment of adding the voting procedures under the motion to adopt the voting procedures passed.

Presentation on Prior Wetland Legislative Efforts by Andy Manus

- Andy Manus (The Nature Conservancy/DU) gave a presentation on prior wetland legislative efforts in DE:
 - There have been a total of four prior efforts to pass legislation providing protection to freshwater wetlands in DE
 - Two Senate efforts to pass a Freshwater Wetlands Act during the 136th and 137th General Assembly in 1992 and 1993 (referenced as Sokola SB 248 - 1993)
 - One House effort to pass a bill to amend Chapter 66, Title 7 of the Delaware Code Relating to the Protection of Wetlands by the 141th General Assesmbly in 2002 (referenced as Cathcart HB 340 – 2002)

- Bill drafted by Dr. Jerry Kaufman/ENGO entitled Freshwater Wetlands Act based on NJ's wetland law (referenced as Kaufman/ENGO FWW act - 2005)
 - One bill drafted in 2011 amending Delaware Code to establish a Program for the Regulation and Protection of Freshwater (Non-tidal) Wetlands.
 - At the November meeting, Andy Manus was tasked with creating a comparison of the different efforts. To accomplish this goal, he obtained a template of a comparative matrix from Alison Rogerson (DNREC, Div. of Watershed Stewardship), and compared the first three efforts across many different parameters:
 - Purpose
 - How freshwater wetland is defined
 - Treatment of pre-existing use
 - Protected freshwater wetland types
 - Permit application process
 - Mapping requirements
 - Mitigation requirements
 - Conservation planning
 - Public hearings
 - Landowner incentives
 - Through adding the first three efforts into the matrix, Andy Manus had several preliminary observations:
 - Legislative efforts that seek to amend the DE code to address freshwater wetland issues are sometimes difficult to follow. In the legislation it refers to code, and you have to go back and forth to put the two together to get a good understanding of it.
 - Standalone legislative efforts that address freshwater wetland issues are understandable and transparent, because you have the bill in front of you, and you can see what it says and what it means.
 - Legislative efforts that do not involved effected stakeholders usually fail.
 - Prior legislative efforts are excellent resource documents that should be consulted by this committee.
 - Lastly, Andy Manus recommended that a designated DNREC staff member assume responsibility of maintaining the matrix and completing it by adding the 2011 effort. He also suggested that the matrix could be updated according to the committee's input of parameters they would like to see. He also suggested linking e-copies of the efforts to the matrix document.
 - A copy of this presentation can be found at:
 - http://www.dnrec.delaware.gov/swc/wa/Documents/Wetland%20Advisory%20Committee/Meeting%202012.11.13/Manus_PriorWetlandLegislativeEfforts.pdf
- Mike Parkowski thanked Andy Manus for his presentation. Mike Parkowski reminded everyone that currently we were talking about state legislation of wetlands, which can be completely independent of the federal wetlands system. He reminded the committee when they look at the state initiatives to remember that if the Supreme Court decides that the federal law that should be interpreted differently it doesn't mean the state law has to

follow suite. He mentioned that when state laws are modeled to be similar to federal laws, after Supreme Court rulings, you can have dilemma of a state law being interpreted in one way, and the federal law being interpreted in another way. This can create complexities in looking at past efforts, but Mr. Parkowski asserted that looking at the past can still be a helpful thing to do, recognizing that when looking at legislation that never passed, there will be positive and negative aspects of the bills and reasons why it didn't pass.

- Mike Parkowski also mentioned he felt Andy Manus's suggestion to have a DNREC staff person complete the matrix would be an effective way to view the past legislative efforts. He asked Frank Piorko if that was something DNREC would be willing to do and Mr. Piorko responded that DNREC would be willing to assist. Mr. Parkowski then stated that he would like the matrix distributed to the committee in the form of a handout, and asked that a member of the DNREC staff present the handout at the next meeting. Mr. Parkowski asked Mr. Manus to provide DNREC with the files, to which Mr. Manus agreed.
- Brenna Goggin (DNS) interjected that the committee had several questions pertaining to Mr. Manus's presentation.
- Sarah Cooksey (DNREC – Coastal Programs) asked Mr. Manus about the listing of the parameters in the matrix on his PowerPoint presentation. She commented that the speed of the presentation didn't give her time to fully consider the parameters. She asked if they could be viewed again.
- Mike Parkowski reminded everyone that the materials would be distributed to the committee members for consideration after the meeting. Sarah Cooksey responded that reviewing the materials again after the meeting would be okay.
- Brenna Goggin noted that in the meeting minutes from last meeting, it was agreed upon that presenters would send out their slides to the committee in advance through Frank Piorko, so that committee members would have time to go through the slides and formulate questions. She noted that this was a prime example of moving way too quickly and not being able to formulate proper questions. She recognized the importance of complying with the agenda time limits, but stressed that the committee needs an opportunity to review slides and also ask the questions that they want to ask.
- Mike Parkowski reminded the committee that they did agree to send out slides in advance of meetings. He asked Frank Piorko to make note of this, and to send out emails reminding presenters to send their slides. Mr. Piorko agreed to this. Mr. Parkowski then further addressed Ms. Cooksey's prior concern relating to the speed of the presentation and the opportunity to review their content, reflecting that the committee would take the time needed to go through this process the right way. He mentioned that it is important to get through the agendas as they are planned, but noted that if any committee member wants to revisit topics, this is certainly something that can be accommodated in the 18 month time span to get a report by the committee to the legislature.

Presentation on Wetlands Regulatory Perspective by Marty Ross of the Delaware Farm Bureau

- Marty Ross (DE Farm Bureau) gave a presentation on Wetlands Regulatory Perspectives:

- Mr. Ross opened his presentation by asking how many committee members have read to the Clean Water Act. To which several committee members raised their hands. He then outlined how his prior 30 year career officiating basketball games has demonstrated that knowing the rules without knowing the intent of the rules can be a disastrous combination.
- The Rivers and Harbors Act was passed in 1899, and the Water Pollution Control Act (Clean Water Act) was passed in 1948. These two acts remained separate until 1972. The opening paragraph of § 404 has remained unchanged since 1899, and the secretary in that sentence is referring to the secretary of the US Army, and after 1972, it referred to the Army Corps of Engineers and the EPA. He also asked the audience to note that the mandate is to regulate “navigable waters”.
- Mr. Ross then showed the second paragraph of § 404, and remarked that this was the guidance provided by Congress to the regulating agencies pertaining to the intended extent of regulated waters within this section of the Clean Water Act. He noted that this guidance directs both the Corps and the EPA to develop guidelines based on criteria that had been used for almost 100 years: territorial seas, contiguous zones, and the ocean.
- Using current NOAA criteria, Mr. Ross then explained that territorial seas extend from mean low water to 12 miles seaward and state owned subaqueous lands (submerged lands) extend from mean low water out to 3 miles, which creates overlap, as referred to in the one mention of “adjacent lands” in § 404. In DE, private property governed extends from high water line to low water line which also creates overlapping state regulatory issues. He also drew the committee’s attention to the separating line between high water line and property, and submerged private lands.
- Mr. Ross noted that he disagreed with Mr. Bonner in his past assertion that the Clean Water Act in 1972, “changed everything”, because there is virtually no difference between the § 404 and the Rivers and Harbors Act. Mr. Ross noted that where, Mr. Bonner was correct was that the Clean Water Act made EPA an “Administrator” that had to work in conjunction with the Corps. Mr. Ross remarked that for 17 years the Corps fought expansion of regulation until the publication of the first wetland delineation manual in 1989.
- There was review of agricultural exemptions in § 404. Mr. Ross noted the use of the word “such as” when listing these requirements and noted this was a positive thing because it would be impossible to list every activity. The exemptions are listed as only necessary if the activity might be construed to negatively impact navigable waters. Mr. Ross commented that he would love to hear the EPA or the Corps try to argue that converting forest land to farmland is not a normal farming practice in DE, since there would not be a single acre of farmland without converting forests to farmland. He also pointed out that ditch maintenance is exempt in a general sense, and that farm or forest roads are permitted but with the caveat to protect navigable waters.
- There was a regulatory exemption for prior converted cropland established in 1993. The prior converted cropland was exempt as long as it was farmed within a five year period and wetland characteristics of soil hydrology and vegetation do

not return. So simply not farming the land does not automatically mean that it becomes a wetland.

- Mr. Ross then put up a slide of the Selbyville quadrant showing tax ditches as blue lines and then asked the audience to consider them while he made some final points:
 - Mr. Ross was asked to update the DE Farm Bureau on the committee's conversations. He asked the members present how many of them thought it would be good for DNREC to assume regulation of § 404, to which no one agreed. Mr. Ross made sure to ask the question before his presentation to not bias the results.
 - He noted that the members of the DE Farm Bureau feel that the EPA and Corps have exceeded their authority, and are confident through litigation this overreach will end. It is believed that any state laws mirroring the federal laws will stop that forthcoming regulatory relief.
 - Mr. Ross noted that the DE Farm Bureau would also like to point out the perversity of policies that decrease property values for preserving resources. He noted that they discourage public participation, and if the goal is resources protection, then policies that reward activities that work towards accomplishing this goal are necessary.
 - Mr. Ross emphasized that the members of the DE Farm Bureau are proud of their work, respect the land they own, and have a long history of working with the government and often spending their own money to accomplish that work. He implored that the committee work with landowners, and ask rather than demand. He suggested focusing on restoration cost share and conservation programs, and noted that with this approach the committee should not be surprised when results exceed expectations.
- Finally, Mr. Ross returned to the tax ditch map and asked if DNREC considers these ditches navigable water and wants to regulate the lands adjacent to them, the committee should ask itself how much land is left. He stated that ditches are not navigable and land is not water, and that confusion on this topic is perpetuated by those who want to steal private property from landowners. He remarked that regulating private property out from land owners comes with a big risk to all citizens, because their land could be next.
- A copy of this presentation can be found at:
http://www.dnrec.delaware.gov/swc/wa/Documents/Wetland%20Advisory%20Committee/Meeting%2012.11.13/Ross_12112013.de%20freshwater%20wetland.pdf
- Mike Parkowski asked Mr. Ross to give the committee some examples of dilemmas that farmers have run into while dealing the federal regulatory programs. Mr. Ross responded that the biggest difficulty they (as farmers) had was the 1989 delineation manual. He remarked that in the 91 years before that there were no issues between farming and navigable waterways, and the introduction of the delineation manual and subsequent legal decisions were what clouded the operating definitions of navigable waterways and adjacent wetlands.
- Mr. Parkowski followed up that he was more interested in activities and asked if there were certain things farmers do in farming where they run into a problem with the federal

system. Mr. Ross responded that prior to the exemption in 1993 of prior converted crop land, this was a big issue, because you were actually restricted from even dipping your ditch out for ditch maintenance because they were considered navigable waterways. Mr. Ross remarked that the biggest issue is that simply there's a purported confusion over what waters of the US are, and what navigable waters are, he stated that there's no need for that except for the fact that people want confusion to reign so they can regulate it.

- Mr. Parkowski commented that in his experience, farmers attempting to reclaim forested areas for cultivation can face issues using mechanized land clearing, and he ask Mr. Ross if he had ever encountered that issue. Mr. Ross responded that those issues are one of the reasons the DE Farm Bureau does not support a state law. Mr. Ross noted that mechanized land clearing or clearing with a mule or ox are standard farming processes that are currently restricted under federal law. The Delaware Farm Bureau feels that relief from this restriction will be achieved through legislation, but a state law that mirrors the federal law would impede any relief at the federal level.
- Mr. Parkowski thanked Mr. Ross for his presentation and no further questions were asked by the committee. Mr. Parkowski also offered his own perspective of the evolution of federal wetland regulation. He commented that everything has arisen from a provision in the Federal Pollution Control Act of 1972 that read “no person shall discharge a pollutant into the waters of the United States”, and the system that is in place today has come to be from a series of court interpretations. “Person” refers to everybody – individuals, corporations, and legal entities, and “discharge” means “fill”, not “excavate” which is where the concept of filling wetlands comes from. “Waters of the United States” refers to ground waters as well as surface waters, and when referring to “of the United States” that's been interpreted as waters with some navigational tide, which has brought the need to distinguish between isolated wetlands and wetlands that are adjacent to waters. Mr. Parkowski noted that these complicated and sometimes bizarre interpretations that don't always make ecological sense have led to the body of regulations that the Army Corps of Engineers has to maneuver through because Congress has not and most likely will not make any changes to the law since it's such a controversial issue.
- Mr. Parkowski then commented on how regulatory programs can have very significant impact on landowners who are trying to utilize lands. The committee has already heard prospective from the land development and agricultural communities, so Mr. Parkowski then welcomed Brian Michalski from the Delaware Forestry Association to speak to the experiences of the silviculture community with wetlands regulation.

Presentation on Wetlands Regulatory Perspective by Brian Michalski of the Delaware Forestry Association

- Brian Michalski (DE Forestry Association) began by correcting the agenda, which incorrectly listed him as representing the DE Forest Service.
- Mr. Michalski then gave the committee a presentation on Wetland Regulatory Perspectives:
 - The DE Forestry Association is an educational non-profit organization of DE. Its function is to support and protect private landowners and the forestry industry's right to practice forestry through public policy and education effort. The DE Forestry Association has 165 members and distributes a newsletters to members of their organization, legislators, and the Governor's Association on Forestry and

the Council on Farm Organizations. They partner with the American Tree Farm Association as a sister organization, and in DE they have certified 275 tree farms, which encompasses 19,554 acres.

- Mr. Michalski commented that he is a landowner, and he lives, works, and derives part of his income by being in wetlands, based on DNREC's figures that 85% of woods in Delaware are wetlands. He also noted that he's an industrial forester for Hardwood Mills, a sawmill in Millington, MD. In his career, he has seen the permit system change from needing no permits to the situation that is in place now.
- Mr. Michalski also showed the committee a copy of the DE Forestry Association's Best Management Practice Manual that was first drafted in 1989, which presents a set of guidelines which forest operators and landowners can look to and derive how they want to do silviculture activities on the property. He reflected on Mr. Parkowski's comments that we should be diligent not to duplicate what has already been done, and expressed that the forestry industry already has a good system, which is overseen by the Department of Agriculture. He commented that many organizations represented by people in the room had worked on the DE Forestry Association's Best Management Practice Manual, including the DE Forestry Association, Society of American Foresters, Delaware Farm Bureau, DE Nature Society, Audubon Society, Sierra Club, Association of Conservation Districts, DNREC - Div. of Water Resources, Wetlands, and Div. of Soil and Water Conservation, Drainage and Coastal Management, USDA Forest Service, and EPA.
- The purpose of the manual was to streamline the process of regulations for responding to potential or existing water quality problems, and to establish an enforcement scheme for dealing operators who do not follow proper permits for commencing a timber harvest. The rules from the manual apply to silviculture operations that are conducted on private, state, and federal lands in Delaware, to ensure that silviculture activities do not cause erosion and sediment in Delaware's waters.
- Mr. Michalski then held up many papers of different colors to show the committee the permits that are required for timber harvest, thinnings, replantings, or any forestry or silviculture activities. There is a section on the permits that deals with wetlands and stream crossings. These permits are then submitted to the Department of Agriculture where they're documented. The Forestry Department then looks at the permit and approves it. He also commented that landowners get maps with wetlands located on them, which are used by foresters to plan landings and design timber harvests.
- Mr. Michalski also noted that if there is a change in land use, there is a portion for that on the permit. The Department of Agriculture will assess the permit, and send a notification to the Army Corps of Engineers, the Conservation Districts, and DNREC, so the notification of land use change addresses wetlands issues and are either approved or denied. He also stressed that it's impossible to know if the maps are correct about the location of a wetland unless you are in the field and assess the land, and oftentimes the maps do not accurately reflect what's on the ground.

- Lastly, Mr. Michalski reflected on how it's been a particularly hard year for forestry operators due to the extraordinary amount of precipitation this year. He commented that operators are often faced with real, difficult economic issues when navigating wetlands regulations. He also noted that a law banning incineration in DE hurts the industry from purpose wood to energy markets in the state. He closed by reflecting his love of being outside and in the woods, and reiterated that you have to be on the ground to accurately assess the location of wetlands.
- Mr. Parkowski thanked Mr. Michalski for his presentation and commented that the committee was lucky to have Mr. Michalski's hands on experience. He also commented that the regulatory system the forestry operates under through the Department of Agriculture is the most rational system he was aware of, due to the Dept. of Agriculture acting as an intermediary and the customized BMP manual to guide foresters. Mr. Parkowski asked what differences between what foresters can do in a jurisdictional vs. a non-jurisdictional area from a practical standpoint. Mr. Michalski responded that from his perspective the regulations were fairly liberal because they don't operate much in tidal areas.
- Mr. Parkowski further questioned what kind of control a landowner would have to exercise in a jurisdictional area. Mechanized land clearing was an example of something that would not be permitted, and reforestation is part of the management plan. Mr. Parkowski asked what the practical side of things was in terms of impacting the land. Mr. Michalski responded that a lot of what foresters do is take a common sense approach. They'll identify trees they want to keep, determine where wetlands are and then plan a timber harvest to go around the wetlands. He stressed again that the maps could be good tools for planning a timber harvest, but being on site was necessary.
- Mr. Parkowski asked if anyone else from the committee had questions and Ms. Goggin commented that she was in grade school when the first manual was drafted, and asked if it had been updated. Mr. Michalski responded that it was updated in 2006.
- Ms. Goggin then asked for Mr. Michalski to confirm her understanding that there were two permitting processes: a land use change and everyday forestry activities permit. Mr. Michalski confirmed this. Ms. Goggin then asked where the permits went after being reviewed by the Department of Agriculture. She commented that for land use, she knew it went to DNREC and the Army Corps of Engineers, she asked where the permits for everyday activities went. Mr. Michalski responded that the everyday activities permits are given to the Department of Agriculture, who administrate the permit and inspect the site. He clarified that this process was different than Maryland. Maryland doesn't have an inspection system, and their permitting system is much longer. Professional foresters prefer DE's system of dealing with the Department of Agriculture. Ms. Goggin then asked who provided the maps that foresters use, and Mr. Michalski responded that the Department of Agriculture provided the maps, and noted that Maryland's process is much more difficult because each county there has different paperwork and processes; whereas, in Delaware it is a single streamlined process.
- Paul Morrill (Committee of 100) asked if in the process of converting forest lands to agricultural lands if there was a nationwide permit that would govern that or certain one-off permits. He asked under what conditions that could happen. Mr. Michalski responded that he was unsure of the answer to that question. Mr. Ross responded that it was the

delineation process. Mr. Morrill asked for further clarification if jurisdictional lands cannot be converted. Mr. Ross responded that before the Department of Agriculture can accept a permit, a wetland determination needs to be performed first, and then a wetland delineation if there are wetlands on site. Mr. Ross also commented on the futility of the 1/10th acre policy for wetland filling, remarking that he has equipment that occupies more space than 1/10th an acre. He remarked that when wetlands are identified, farmers will just stay out of the area, due to financial and legal consequences.

- Ms. Goggin asked Mr. Ross who makes the determination of wetlands. Mr. Ross responded that farmers will defer to the NRCS and ask them to send delineators out, or private consultants can be hired. He commented that Mr. Bonner was right in his prior presentation where he noted that the Army Corps of Engineers, NRCS, or a private consultant could come out to a property to do a delineation and get the same results. He reiterated that due to harsh penalties, land owners won't take the risk of developing until they do a wetland delineation.
- Mr. Parkowski added that cultivating land with wetland characteristics doesn't happen because it'd require mechanized land clearing, so even though all the trees could be cut at the stumps under the current regulations, but you can't plow over stumps, and the stumps can't be removed without mechanized clearing, which is prohibited. He added that he hasn't seen anyone be successful in taking an area delineated as wetlands, bulldozing it, and cultivating it. He asked if anyone had seen that before. Mr. Ross responded that he hasn't observed that since 1989. He mentioned that you might see land developers attempt to clear wetlands if they want to build a golf course. They'll apply for a permit, and have to mitigate it 2 to 1. Mr. Parkowski added that they'd have to apply for a case by case permit if it's over 1/10th of an acre, and that there's not many farmers who can farm on 1/10th of an acre so it's not something that farmers really utilize.
- Mr. Ross commented that many lands have been converted to lands that have been farmed and are now forested and vice versa. He stressed the ability of land to recover from prior uses, and that he as a farmer and Mr. Michalski as a farmer are able to see areas that might be identified as wetlands by a delineation because they are on the ground. He expressed doubt in aerial imagery's ability to determine wetlands and mentioned that there are other reasons land might look like a wetland from an aerial photo. Mr. Parkowski agreed that the question of aerial photography's ability to determine wetlands was a good conversation to have. He commented that DE's unique flat topology in southern New Castle County and Kent and Sussex Counties would lead to a lot more area in the state being wetlands if it weren't for tax ditches, because of this he stressed that the committee needed to be aware of the impacts of regulation on agriculture and forestry industries in the state.
- Sen. Robert Venables had a statement about land clearing. He mentioned that in the past he has cleared land with a special blade that runs a foot under the ground.
- Mr. Parkowski mentioned that in his experience, dealing with the Army Corps of Engineers has been very idiosyncratic, which is in part to the legal interpretations. He asked if Mr. Edward Bonner (US Army Corps of Engineers) would like to comment. Mr. Bonner commented that that there is no general permit for conversion from forest to agriculture. He also mentioned that the presence of tax ditches drained much of the state so areas that would have been wetlands 200 years are no longer wetlands, so many areas today that are converted from forest to agriculture would no longer meet the definition of

a wetland today. He remarked that converting an area that had the hydrology of a wetland currently would be very difficult to convert to most agricultural purposes beyond just removing the trees. Mr. Parkowski responded that this related to a discussion in prior meetings on how the aerial maps analyzed by DNREC don't match up with the US Army Corp's definition of wetlands, which was related to the historical nature of landuse.

- Mr. Ross commented that it's important that the committee understands the history of tax ditches in the state of DE. He remarked that the ditches were requested and sometimes funded by the US government. He expressed how it's difficult for property owners to have done what the government asked them to do, and then receive backlash for doing it. Mr. Ross mentioned how this connected back to his prior request for the committee to "ask, not demand" from landowners to get buy in on wetlands resource protection. He stressed that a lack of buy in from landowners would limit success of resource protection.
- Mr. Parkowski thanked Mr. Ross for making an important point that the committee would need to look at. He mentioned that with any program there are two components: carrots and sticks. Sticks are regulation, whereas carrots are incentive programs. He mentioned that forming a subcommittee to look at possible carrot incentives would be a good course of action for the committee to take.
- Mr. Morrill inquired about the difference economically between mechanized land clearing and manual land clearing, and what the environmental impacts of mechanizing wetland forest practices. Mr. Parkowski responded that since you can cut trees at the stump level in a wetland, you can timber there. In his opinion, the biggest problem is the roads you use to get to the timbering location and whether or not you need to cross a stream to get to your location. Mr. Michalski agreed with Mr. Parkowski and stressed the need to leave the tree stumps under the current regulations.
- Mr. Michalski mentioned that he brought copies of the DE Forestry's Association Best Management Practices Manual if any committee members were interested in taking a copy.
- Mr. Parkowski announced a break to the meeting at 10:30

Presentation on Federal Wetlands Regulations including Nationwide Permits and General Permits used in DE and the Permitting Process in other states by Ed Bonner of the US Army Corps of Engineers

- Mr. Parkowski called the meeting back to order at 10:45.
- Mr. Parkowski outlined that the next part of the meeting would focus on nationwide and general permits, that are on the federal level. He stressed that it's important for the committee to understand what permits are easier and which permits are more difficult to obtain, and mentioned that general and nationwide permits are much easier to obtain than individual case by case permits. Individual permits are so difficult to obtain that general permits are the only way that most developers can exist in the federal system. Mr. Parkowski illustrated this point by sharing with the committee that he called the Philadelphia district of the US Army Corps of Engineers to inquire how many individual permits were issued. There were 5 individual permits issued over the past 3 years: 3 of them were to resolve enforcement cases and the other two were very minor. Mr. Parkowski referenced a hand out that Mark Biddle (DNREC – Div. Watershed

Stewardship) had provided, and asked if this part of the meeting was Mr. Biddle's topic. Mr. Bonner asked if Mr. Biddle would like him to start, and Mr. Biddle replied that he would like Mr. Bonner to speak to the nationwide and general permits.

- Mr. Bonner began by commenting that nothing gives him more delight to say no permit required, and he hopes that while he says that he's guided you towards what are good and bad policies and what are good and bad projects. He sees himself as a resource to the public. He also made a comment about the slide in Mr. Ross's presentation that demonstrated tax ditches in Sussex County and cautioned about the need to pay attention to details. He commented that the CD canals and the tax ditches would be drawn exactly the same way on such a map.
- Mr. Bonner then recapped last meeting where he discussed the questions of determining freshwater wetlands, determining what are regulated freshwater wetlands, and determining what are regulated activities in freshwater wetlands. Today's presentation would focus on the process of permitting. He noted that he likes to think of the nationwide permit as a "carrot" because it shortens the process.
- The process starts with the application:
 - The application will be looked at by the Army Corps of Engineers. They may have questions about the permit.
 - The Army Corps of Engineers then has to coordinate the application with federal agencies, state agencies and the general public.
 - All decisions by the Army Corps of Engineers must be made in the public domain, so there is a 30 day public notice.
 - During this time period anyone can comment on the project. If the Corps deems a response valid, a public hearing will be held, and 30 more days will be added to the notice.
 - Mr. Bonner listed the US EPA, Department of the Interior, National Marine Fisheries Service, NRCS, and the USGS as common federal agencies that send comments.
 - Phil McGinnis (DE Association of Realtors) asked if those were the only agencies who send comments because those seemed to be agencies that would not approve of projects. He wondered if agencies more amendable to certain projects such as the Department of Agriculture can comment. Mr. Bonner responded that any government agency can respond to a public notice. The Corps has an agreement with the EPA, National Fisheries Service, and the US Fish and Wildlife Service that any comments by these agencies need to be addressed by the Corps and the applicant before a project can move forward. Mr. McGinnis then asked if all federal agencies are notified. Mr. Bonner responded that they are. He reflected that prior to the internet, the Corps used to mail out a paper copy to federal agencies and adjacent property owners. However, now they post the notices to their website.
 - Comments from the agencies and general public are assessed by the Army Corps of Engineers. The applicant is then sent the comments and is able to rebut them. Depending on the comments, this can be simple or very time intensive.

- The Corps then considers the wetland impacts of a project. If an impact is unavoidable, the regulation requires that the applicant mitigate that impact by restoring a wetland, creating a wetland, or another activity.
- If you have to compensate for a loss, you need a plan. You must address the how and when of the compensation. These will be requirements for the permit conditions.
- Mr. Bonner reflected that he has only worked on one permit denial in his past 33 years with the Army Corps of Engineers, and stated that the system is set up to work with applicants to get permits accepted. However, the nature of the process of public comments, reviews, and rebuttals can extend the process. Mr. Bonner commented that he would love to be able to guarantee a 60 day approval, but that's not how the process worked. He gave an example of the Americana Bayside development in Sussex County, which was a very large project that took a year and a half to be permitted.
- Mr. Bonner commented that the nationwide permit can shorten the process. There is a provision for general permits in the Clean Water Act, which states that the Corps can issue general permits for projects that are similar and minor. The reason they are called nationwide permits is the theory that they are applicable nationwide. When a nationwide permit is issued, the Corps doesn't have to coordinate with the general public. Skipping the public comment phase of the permit allows the Corps to sometimes be able to issue permits in 30 days or less.
- Mr. Bonner then opened the floor for questions.
- Ms. Goggin inquired if this was the same process that states with a dual permitting process have to go through. Mr. Bonner replied that he was only speaking to the Corps process. He further clarified that states can have their own process. State freshwater programs and processes don't have to be as stringent as the federal process as long as the state does not want to assume a freshwater wetlands program. For example, if DE wanted to develop a freshwater wetland program for a specific watershed or a specific habitat type, that would be an option. This can create a dual process, where both a state permit and a federal permit are required for a project, having a state programmatic general permit is a way that states (such as PA and MD) can address this issue. With this process, there may be certain activities that require a federal permit, but the Corps doesn't get involved because the applicant applies to the state and the state forwards a federal approval along with the state approval. Certain cases like those involving an endangered species may necessitate the Corps becoming involved with the permit.
- Ms. Goggin then asked if an applicant can take their permit to the Corps for approval if it is denied by the state. Mr. Bonner responded that this cannot happen – a denial from the state is a denial, unless the state denies the permit based on a federal decision, in which case the Corps might be able to address the basis of that denial. Mr. Bonner further clarified that when the Corps issued federal permits, those permits must be in line with different state programs. For example, in DE, the Corps has to make sure it's permitting decisions are in line with the DE Coastal Zone Management Program and DE's Water Quality Certification which is in § 401 of the Clean Water Act.
- Mr. Morrill asked the inverse of Ms. Goggin's question – if a state approves a permit, can the Corps object or overrule it? Mr. Bonner responded that the Corps wouldn't overrule it, but a federal permit would need to be issued. So it is possible to get a state permit, but not a federal permit, and an applicant would need both to proceed. Mr. Morrill followed

up to ask if that could happen with a statewide general permit. Mr. Bonner responded that, if the Corps gets a programmatic general permit, and if the applicant has met the terms of the general permit, the state will give you the Corp's general permit.

- Mr. Ross disagreed with Mr. Bonner on this point. He referenced an example of the EPA overruling a permit in MI (one of the two states that has assumed a § 404 program). In that particular case, a county wanted to build a road for an economic development area, and the state approved the permit, but the EPA over filed on the program. Eventually, the litigation became too expensive for the state and the county and the permit was dropped. Mr. Bonner clarified that when MI assumed a § 404 program, that made the decision MI rendered on a federally substituted program and not on a federal program. Mr. Bonner mentioned that a similar case has occurred in NJ, and commented that MI has had a program for about 30 years. Mr. Ross then countered that the MI § 404 program wasn't assumed until the late 90's, and that they had an audit of the program around 2003. Mr. Ross explained further that it took approximately 5 years from the time the state passed a § 404 assumption law and the actual assumption of the § 404 program from the federal government. Mr. Ross also noted that during this federal audit of the program the EPA wanted MI to make its program more stringent, which is still an ongoing debate today between the EPA and MI. Mr. Ross commented that the EPA and Corps don't rescind their right to over file state applications ever.
- Mr. Parkowski agreed with Mr. Ross that even if a federal program is delegated to a state, the federal government will reserve the right to override state provisions. He also noted that there may be a provision in the Clean Water Act for the EPA to override Corps decisions.
- Ms. Goggin then asked Mr. Bonner if he could further clarify. Mr. Bonner stated that he wanted to make two points:
 - That MI implemented their program back in the 90's, so it's been nearly 20 years, and 1 project denial wasn't a bad rate. Mr. Ross countered that he gave 1 example, but there were actually 2 projects that were stopped, due to a mitigation effort.
 - Reckoning back to the idea of the CD canal being shown as the same on a map as tax ditches, Mr. Bonner reflected that generalities need to be supported. Sometimes when it comes to controversial projects there might be details to the application that are not apparent when you're looking at things from a distance. Mr. Ross responded that that the blue lines that showed the tax ditches were from a quadrant he is very familiar with, because the business he owns sprays agricultural products along all of those ditches. He knows they were all ditches because he's walked all of them personally.
- Mr. Bonner asked if he answered Ms. Goggin's question. Ms. Goggin responded that she is trying to understand the difference in permitting process between DE and MD and PA which have a state programmatic process. Mr. Parkowski stated that he felt this was a good transition into the next topic on the agenda – what other states are doing with permitting. So the committee could have a general framework of the situation, Mr. Parkowski explained that the Corps has the ability to delegate parts or all of its program to states. In NJ and MI, they have assumed the entire program, and had to change their state laws and their regulations accordingly. The federal government can delegate less than the whole program as would happen with nationwide or general programs. In both of

these instances, the state decision is generally accepted by the federal government, but is still subject to veto by the Corps or the EPA. Mr. Parkowski agreed with Mr. Bonner that the vast majority of state decisions will be upheld, but noted that there will always be exceptions. Mr. Parkowski stated that he felt the committee would need to consider since there will always be a federal program, if there are merits to having a system where you deal with the state government rather than the federal government in the permitting process.

- Ms. Goggin replied that things had become a bit muddled for her. She asked if it can be nationwide permits, general permits or both that the state assumes. Mr. Bonner replied that it's useful to think of general permits as permits in the generic sense. The permit has terms and conditions, but a blank space for the applicant line. Nationwide permits are permits that are applicable nationwide and only the Corps headquarters has the authority to issue those. Regional and district offices of the Corps have the authority to issue general permits on a more localized basis, which are referred to as programmatic general permits or regional general permits. Mr. Bonner noted that DE has had general permits for about 30 years. There are two of them: The first permit is for work on manmade artificial lagoons down the shore, and the second one is for docks. These are programmatic general permits, but on a very narrow scope. Virgil Holmes (DNREC – Div. of Water) commented that the committee has 2 copies of those permits in their packets.
- Chris Bason (Center for the Inland Bays) asked a question related to § 401. He inquired how a Corps and state determine whether or not a proposed impact is going to violate state water quality standards. Mr. Bonner responded that it is the state's responsibility. He noted that this can cause problems because there's no simple empirical formula you can plug those variables into to come up with a definitive answer. The Corps will generally defer to the state or the EPA to make those assessments. He mentioned that there will always be exceptions, but you can't regulate on the exceptions.
- Mr. Parkowski asked Mr. Bonner what the breakdown is between applicants who have to deal with individual permits vs. applicants who deal with the nationwide permits. Mr. Bonner responded that the vast majority are nationwide permits. He also noted that all regulatory programs are reactive – they respond to applicants. However, effective programs will get to applicants before they submit their applications. They will inform applicants of the policies, what they need to do, and what they should do. Currently, many private consultants fill this role; however, regulators are expanding into this role by creating pre-application processes to help landowners have successful permits.
- Mr. Morrill asked if general permits could modify the conditions of nationwide permits. For example, could general permits change parameters or allow a different definition of wetlands? Mr. Bonner responded that once a nationwide permit is issued, it can be restricted by region wide conditions, but nothing can be done to broaden it. When a state programmatic general permit is developed, the nationwide permit will be suspended and the programmatic general permit will take its place. Mr. Morrill further inquired that this meant you could suspend the nationwide permits, but not modify them. Mr. Bonner responded that modification can happen as long as it's narrower. For example, nationwide permit 18 is a generic permit that gives you 1/10th an acre of wetlands. That can't be changed to 1/3rd of an acre, but it could theoretically be made smaller. Mr. Morrill asked if in terms of functions and values if you'd be able to distinguish different

types of wetlands in a programmatic general permit. Mr. Bonner responded affirmatively. He mentioned the Chesapeake Bay Critical Habitat Types in MD. One option he stated might be of interest to DE are Delmarva Bays, which are isolated wetland pockets that are unique to the Delmarva Peninsula. The state could theoretically draft a regulatory general permit for that habitat. He reminded the committee that 99% of his program at the Corps is a result of litigation, and these details are subject to change in response to future Supreme Court decisions.

- Ms. Goggin clarified that if DE were to do a programmatic general permit for the Delmarva Bays, it wouldn't have to be any more stringent than what the Corps is already regulating. She said it seemed like PA is the model of a state that isn't taking over any more control over what the Corps already has, and seems like it focuses on providing a consistent application process. Mr. Bonner agreed that it creates a simplified application process. He also cautioned that since DE doesn't have a freshwater wetland program to fall back on, it might be at a disadvantage implementing the state programmatic general permit compared to MD and PA, since they already had processes in effect. An important first step for DE, if it wants to go the route of a programmatic general permit, may be implementing a freshwater wetlands program. He also stated that the Corps always has the right to come in on a federal permit and take discretionary action or to demand that the permit be an individual case-by-case permit.
- Mr. Parkowski noted that the meeting was running short on time. He noted that Mr. Bonner has given the committee the mindset that there is flexibility out there for the different routes that DE could take for its regulation of freshwater wetlands. He summarized that the permit doesn't have to be more stringent than the federal permit, but could potentially be. He also noted that the state permit could not be less stringent. He requested that 15 minutes be given in the next meeting for someone to speak to programs in surrounding states. He reminded the committee that they had resources on the topic in their packets from the Environmental Law Institute. Mr. Bonner stated that would probably come to him again. Mr. Holmes stated that he has information on how the state program currently interacts with the Corps, which would be important for the committee to know. Mr. Parkowski asked Mr. Bonner if he'd be able to address programs in NJ, MD, VA, PA, and NC. Mr. Bonner responded he could address these states:
 - NJ – NJ wrote and approved a Freshwater Wetland Protection Act in 1987. It had two provisions
 - To develop their own state program
 - To assume the federal programThe second part wasn't necessary. NJ could have developed their own state program without assuming the federal program. In 1990 a memorandum of agreement was signed between the NJ DEP and the Corps to share resources in wetland delineations. The Corps agreed to accept their wetland delineations on properties that were based along a federal procedure. In 1992 or 1993 the EPA accepted their program for assumption in freshwater or § 404 areas. Section 10 (tidal) waters cannot be assumed.
 - PA – PA does not want to assume the federal program. However they save resources by relying on the Corps to do wetland delineations, which they accept in their state permits. The programmatic permit in PA has three categories. Category 1 and 2 are projects that might qualify for a waiver or general permit and the

Corps doesn't get involved at all. Category 3 will bring it to the Corps for some review, but the programmatic general permit can still be used. All the Corps does for the majority of PA's programmatic general permits is enter and log the information.

- MD – MD is similar to Pa. MD has had a freshwater wetlands program in place for approximately 20 years. The MD programmatic permit has 100's if not 1000's of activities. Some of these permits may get brought to the Corps, but the vast majority are handled by the state.
- Porter Schutt (Co-Chairman) clarified that from what he was hearing, it sounded as though all of these states were in agreement with the Corps about the definition of a wetland. He asked if the process of permitting was faster in these other states than in DE. Mr. Bonner stated that he'd be making a guess, but said in his estimation the process was faster in these other states. The question of whether something is a federally regulated wetland does not come into play when a state has its own freshwater wetland program, so that eliminates that part of the process. Jim McCulley (Home Builders Association of Delaware) disagreed and stated that the process he sees in DE is much, much faster than what he sees in PA or MD. The majority of the work he does is having wetland delineations performed and then avoiding the wetlands entirely or obtaining a nationwide permit if avoidance is not possible. He remarked that this strategy is much faster than dealing with state programs in PA or MD. Mr. Bonner agreed that if you can avoid the wetland, the process is phenomenally faster, but that's not always possible.
- George Haggarty (New Castle County Planning) clarified that avoidance would be quickest because you do the delineation and see the wetlands. However, if you do end up needing a permit, the wetland delineation can only tell you where the wetlands are. It can't determine if they are jurisdictional. Mr. Bonner stated that if you go to his headquarters and ask, they will definitely tell you the programmatic general permits are faster. They're looking at the process from the Corp's prospective.
- Ms. Goggin asked if MD did their own delineations or if they relied on the Corps like PA. Mr. Bonner responded that there is an agreement in MD, and they do share the responsibility. Ms. Goggin referenced one of Mr. Bonner's prior comments in which he mentioned that staff in the Corps is decreasing as responsibility increases. She asked if DE similar to PA asked the Corps to assume responsibility of delineation would cause delays in the permitting process. Mr. Bonner responded that it wouldn't change the timeframe because NRCS and private consultants would be spending the time in the field doing the delineation, and it would be up to the Corps to review those reports, and then come out to the site briefly to verify the report. Ms. Goggin asked if that was the MD version. Mr. Bonner responded that it is the PA version.
- Mr. Parkowski commented that Mr. Bonner was making an important point – these states have gone with the federal jurisdictional definition simply because there is in place a mechanism for making those determinations. Coming up with a different definition of wetlands would involve creating a whole infrastructure around that definition. He asked Mr. Bonner if he could also speak to NC even though it's not in the Corps jurisdiction of Philadelphia. Mr. Bonner responded he wasn't familiar enough with NC and their program. Mr. Parkowski inquired if VA was in his jurisdiction. Mr. Bonner responded that it is not, but could say that VA doesn't have a statewide programmatic general permit in VA, but they have specific general permits in VA. Ms. Goggin asked if they had a

freshwater wetlands program. Mr. Bonner responded that VA does, but it is not as extensive as MD's.

- Mr. Parkowski thanked Mr. Bonner for his time speaking to the committee and commented how Mr. Bonner's experience is a valuable resource for the committee. He mentioned that he wanted to open the floor soon to public comment. He wanted to warn the committee in advance that at the next meeting, he would start asking for committee members to individually give their opinions on the materials that have been presented so far. Mr. Parkowski also stated that he would like to form a "Carrot" incentive subcommittee to look at possible incentive programs to encourage landowners to adopt practices that are beneficial to wetlands. He proposed that Andy Manus head the committee, and asked for volunteers for the committee now or later via email. Mr. Ross commented that he would recommend that NRCS chair the committee. Mr. Parkowski responded that NRCS could co-chair the committee with Andy Manus. Ms. Goggin and Mr. McGinnis volunteered. Mr. Parkowski encouraged future volunteers for the committee to get in touch with NRCS committee members and Andy Manus. Mr. Parkowski then opened the floor to public comment.

Public Comments

- Mr. James H. Baxter IV addressed the committee. Mr. Baxter began by asking the committee to pull up a picture of a Hercules stump puller while he began speaking. Mr. Baxter referred to the tax ditches that Mr. Ross has put up on a slide earlier in his presentation. He stated that those ditches existed for drainage to allow farming to feed people. He stated that food is the backbone of this country and of the world. Mr. Baxter stated that the United States is the top provider of food to the world, and that it is the one business that is viable in the country and does not fluctuate a lot throughout different parts of economic down turn and upturns. In reference to Mr. Bonner's comments about generalizing blue lines on maps, Mr. Baxter stated that he could jump over many of those tax ditches, but he would not want to swim across the CD canal. He mentioned the importance of scale on maps, and noted that the tax ditches would not show up if the map was on a topographic scale. He also stated that those ditches are not navigable, except maybe in a pair of waders.
- Mr. Baxter wanted to relate to the committee some of his personal experiences with regulation over the last 12 months, but wanted to start off with some history about himself and his family. He has been farming since he was old enough to crawl. His grandfather, who had to leave the meeting early due to family celebrations, was his mentor. He remembers riding in his grandfather's lap while pulling up stumps, so he would argue with anyone who would say that is a bad thing. When he graduated from college in 2002, he began his fulltime farming operation at Baxter Farms. He is a fourth generation farmer on the Baxter side of his family. He has two young sons who also love to farm, so there is a potential fifth generation in the family. He mentioned that his family is farming because they have a genuine love of what they do.
- For the past 12 months, Mr. Baxter has been trying to convert a currently forested piece of property to farmland. Mr. Baxter researched this tract of land on historicalaerials.com and confirmed that this piece of land was farmed in the past, so they're currently in the process of converting it back. NRCS sent a letter and a map to

Mr. Baxter explaining that out of the 45 acres of land on that property, he can clear 3. According to the NRCS, he can't clear the land because there is Pocomoke soil on the tract that is known for being hydric. Mr. Baxter disagreed strongly with this assessment because his family has been farming Pocomoke soil types for 6 and 7 generations on this particular farm because it was in his mother's side of the family. He said the ground was very prosperous and their equipment isn't getting stuck all the time. He was baffled by how this area could be considered waters or wetlands. He asserted that the state was trying to decipher what a wetland is and in the process was taking profitability away from him and his family. He told the committee that his life depends on the property and the soil on that property. He assured the committee that he was not going to out and destroy the environment that his children have to grow up in just so he can make a living. He stated that it was important to reconsider some of the ideas of what we refer to as waters and wetlands and consider what exactly we're doing. He referred to the billions and billions of people in the world that are constantly growing in numbers. He stated that it was going to be up to farmers to feed those people, and US farmers feeding those people will help the country stay viable in the worldwide market.

- Mr. Baxter asked if anyone on the committee had looked up the Hercules stump puller, and several committee members raised their hands. Mr. Baxter explained to the committee how this stump puller worked by rigging it to a mule. He noted that his great grandfather bought one of these in 1904 when he moved from Baltimore to Georgetown, DE and bought his first piece of land. He reflected on how his grandfather also used to use this machine. Mr. Baxter noted that the stump puller is an example of how deep his roots go in farming and how his family loves what they do. He urged the committee to take into account what he's saying about his family and his children and what he's trying to do. He stressed that his livelihood is a stake, his children's livelihood is at stake, and his family's enjoyment is at stake. He reiterated that he wasn't going to destroy the environment, and that he's only trying to operate his land.
- Mr. Baxter closed by referencing back to the land he is trying to clear stating that he is in the process of hiring a private consultant to perform a delineation on the property so that they can clear the once productive piece of farmland to be farmed again.
- Mr. Parkowski thanked Mr. Baxter for his comments. He clarified that the state doesn't have a freshwater wetland program, so Mr. Baxter's current issues with clearing his land are with the federal wetland program. He noted that the committee is limited to discussing what can be done at the state level. Mr. Baxter responded that he would ask then at the state level the committee considers doing things Delaware's way, the way it needs to be done, regardless of the federal level. Mr. Baxter also referenced a prior figure from DNREC of 300,000 acres of wetlands in the state.
- Mr. Parkowski commented that this comes back to an issue the committee has discussed: the difference between aerially determining a wetland and performing delineations. He said it was an important distinction to make and be aware of and he thanked Mr. Baxter for bringing the committee first hand, on the ground experience as to what it's like to have to deal with these distinctions and regulation. Mr. Parkowski asked if anyone else would like to talk.

- Mr. Holmes noted that he didn't need to talk today, but he would like to be put on the agenda for next week, so he could present how the state currently interacts with the Corps. Mr. Parkowski asked Mr. Piorko to put Mr. Holmes on the agenda and also distribute his presentation to the committee. Mr. Piorko responded that Mr. Holmes's slides were already in the committee's possession.
- Gary Warren wanted to commend the DE Forestry Association for pointing out the use of BMP's because the farmers in NRCS consistently use BMPs and to qualify for those there are rules and regulations to abide by. Mr. Warren pointed out that NRCS recently released a report that showed 26% less N runoff and 46% less (Phosphorus) because of these practices. The practices examined in that report don't include everyday practices that good farmers like Mr. Baxter's family do that don't get funded by the NRCS. Mr. Warren concluded that it would be a good idea to look at BMPs that are in place now and how we can improve them.
- Mr. Parkowski thanked everyone for their comments, and reiterated that of all the programs he's worked with in DE, the way the forestry system works with BMPs and the Dept. of Agriculture is probably the most efficient way to operate under a federal jurisdiction. If delegations become involved in the committee's process, that would be a good approach to look at. He has seen many instances where people needed to clear areas that include wetlands, and it was a matter of going down to the Department of Agriculture and showing them what you're doing and then proceeding with the project using the BMPs that are reviewed by the Dept. of Agriculture.
- Mr. Bason requested that Mr. Holmes in his presentation next meeting, discuss in further depth one of his slides that referenced regulated mapped non-tidal wetlands of 400 or more contiguous acres not used for agricultural purposes in 1973. He was particularly interested to know if they've been mapped or if permits have ever been issued on those wetlands. Ms. Cooksey responded that it was referring to Cyprus swamps in lower DE. Mr. Bason asked if the Cyprus swamps were the only habitat involved in that regulation. Mr. Parkowski responded that with respect to tidal wetlands, they have to be mapped or they're not jurisdictional. If areas haven't been mapped that were supposed to be mapped, Mr. Parkowski said the committee should address that.
- Mr. Bason requested if Mr. Holmes could talk about water quality standards and how the permitting process work in DE. Mr. Parkowski responded that DNREC has many different divisions and sections and mentioned that Mr. Holmes comes from the water quality side of things. He asked Mr. Piorko if Mr. Holmes could address that in his presentation. Mr. Piorko responded that would be possible and will happen at the next meeting.
- Sen. Robert Venables commented that he was bothered by the DNREC report on lost wetlands and said that it appeared to him that the numbers had been fudged. He asserted that this could have a major impact on public opinion. He referenced places in his hometown that were developed and deemed not to be wetlands that were classified as lost wetlands. He implored the committee to make sure those figures weren't fudged. He commented that all through government, data will be changed to get public opinion to change, so that votes can be won.
- Mr. Parkowski responded that Sen. Venable's observation was interesting and probably valid, although he wouldn't have worded it the same way. He said the

difference in the DNREC maps is a result of people looking at resources in different ways. Mr. Parkowski reminded the committee that DNREC clearly admitted their definition of wetlands was based on soil types and aerial photography and not the same criteria the Corps would use to define wetlands. Mr. Parkowski said this was a distinction that would have to come out in the final report and be one of the things the committee addresses and reviews.

- Sen. Venables wanted the records show that the [loss] has been eliminated to show it wasn't wetlands, in the beginning before they got the files.
- Mr. Parkowski responded that this all demonstrates that wetlands are in the eyes of the beholders. Sen. Venables responded that we need to make it a more exact science. Mr. Baxter informed Mr. Parkowski that the idea of making it a more exact science was the point of his public comment.
- Mr. Bason said that he's had the same thoughts and concerns about the maps from the DNREC reports, but he didn't want to make it a black and white issue. He stated that there's always error in mapping, and that study was intended to be for a planning level perspective. He reiterated that if you want to know if something actually a wetland, you have to be on the ground. However, he feels that the DNREC study shows, even with its error, is we are losing a lot of wetlands, and that's why this committee has been convened. He concluded by stating that he knows the people who wrote the DNREC study, and doesn't think they would fudge any data one way or the other because they are good people.
- Mr. Parkowski responded that Mr. Bason made a fair statement. Mr. Parkowski said that this dialogue demonstrated that there is a tremendous difference of opinion in what is and isn't a wetland and what needs to be protected and what does not need to be protected. He expressed a hope that the committee doesn't change the statewide definition of wetlands, citing how other states with programmatic general permits have maintained the Army Corps of Engineers' definition. He also agreed with Mr. Bason that DNREC clearly stated that the mapping exercise was done from a planning perspective and did not use the Army Corps of Engineers' definition of wetlands.
- Mr. Ross added that he thought the point the Sen. Venables was pointing out is that you can't say you lost something that you never had. He stated that it was okay for DNREC to say they think these lands that are not regulated should have been, and if they had been, we would have lost a certain number of acres. However, he said it's not okay to claim that unregulated lands have been lost, because it creates a public perception that something's getting through a loophole when it isn't.
- Mr. Parkowski thanked Mr. Ross for his comment and mentioned that he felt it's been discussed enough that the committee understands the point.
- Sen. Gerald Hocker commented on Mr. Ross's prior point that the notes from September that were approved were different from the ones on the website. He thought the meeting notes should be corrected. Mr. Parkowski responded that Mr. Piorko would be addressing that issue, to which Mr. Piorko agreed. Mr. Parkowski guaranteed that Mr. Ross would review the notes and alert the committee to any discrepancies.
- Mr. Manus reminded the committee that the Carrot committee as it currently stands includes himself, Jayme Arthurs, Jim McCulley, Brenna Goggin, and Phil McGinnis.

He asked if Dr. Mike Valenti could also join the committee. Mr. Parkowski asked if Dr. Valenti was an official member of the committee. Dr. Valenti responded that he was sitting in for Mark Davis. Mr. Parkowski responded that that was sufficient, and that Dr. Valenti could join the committee.

- Rep. Debra Heffernan introduced herself to the committee. She explained that she represents a district in the northern part of the state, but that she was from Kent County and knows what tax ditches are and what wetlands look like. She informed the committee that her background was an environmental toxicologist and that she worked in the field of environmental remediation of brown fields on all different types of properties. She concluded by telling the committee she was happy to be here, listen, and add to the conversation. Mr. Parkowski responded that the committee was happy to have her.
- Mr. Ross informed Mr. Parkowski that Mr. Chip West would be his alternate. Mr. Parkowski reminded the committee that there is allowance for people to designate alternates and requested advance notice from members.
- Josh Littleton (City of Seaford –LLG) raised one issue to consider related to voting. He wanted to clarify that it was the majority of those who are eligible to vote, and not who are present. Mr. Parkowski responded that the issue was a bit different than that. There must be a majority of the entire committee to pass something, which is a rule in place unless a committee member takes steps to reconsider it.
- Mr. Parkowski adjourned the meeting at 12:12 PM.

Attendees: Bolded names were present

Name	Agency
Chris Bason	Center for the Inland Bays
Edward Bonner	U.S. Army Corps of Engineers
Sarah Cooksey	DNREC – Coastal Programs
Mark Davis (Mike Valenti partial alternate)	Dept. of Agriculture
Tim Deschepper	Town of Middletown – LLG
Hal Godwin	Sussex County Planning
Brenna Goggin	Delaware Nature Society
Mary Ellen Gray (Sarah Keifer alternate)	Division of Planning – Kent County
George Haggerty	New Castle County Planning
Rep. Debra Heffernan	Delaware House of Representatives
Sen. Gerald Hocker	Delaware Senate
David Hugg	Town Hall (Smyrna) -- LLG
Sally Kepfer (Jayme Arthurs alternate)	Natural Resource Conservation Service
Josh Littleton	City of Seaford – League of Local Govts.
Andy Manus	Land Conservationist

Robert McCleary (Terry Fulmer alternate)	DelDOT
Jim McCulley	Home Builders Association of Delaware
Phil McGinnis	Delaware Association of Realtors
Brian Michalski	Delaware Forestry Association
Paul Morrill	Committee of 100
Michael Parkowski	Delaware Bar Association
Frank Piorko	DNREC – Watershed Stewardship
Marty Ross	Delaware Farm Bureau
Alex Schmidt	Council of Engineering Companies
Porter Schutt	The Conservation Fund/Open Space Council
Sen. Robert Venables	Delaware Senate
Bob Walls	Farm Services Agency
Rep. Dave Wilson	Delaware House of Representatives

In addition, 15 members of the public were in attendance.