

# Wetland Advisory Committee

## Meeting Notes- final

March 12, 2014

(Approved April 9, 2014)

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### Agenda Items:

1. Welcome 9:00am
2. Review and acceptance of the February meeting notes
3. Responses to questions presented by committee chairs on unique wetlands
  - a. Category 1 nontidal wetlands of Delaware- Mark Biddle, DNREC
  - b. Potential Framework for a Category 1 Wetlands Program in Delaware- Virgil Holmes, DNREC
4. Landowner incentives subcommittee report
  - a. A Natural Resource Protection Incentive Ordinance
  - b. Revitalizing the Forestlands Preservation Program
  - c. A Conservation Credit Exchange
5. Committee Discussion of Future Direction and Actions
6. Public Input

### Materials Distributed:

1. Agenda
2. 2 tables from Virgil Holmes: Comparison of State and Federal Programs for Category 1 Wetlands for Resource Management and Permitting. These documents can be found [online](#).
3. Handout from Jim McCulley on density bonuses. Can be found [online](#).
4. Brochure on Delaware's Forestland Preservation Program from Mike Valenti can be found [online](#).

### 1. Welcome and Announcements

- Mike Parkowski (MP) called the meeting to order at 9:07am. He had 3 announcements: DNREC will provide a review of Category 1 wetlands and a potential wetland program today. Also presentations from the carrot committee and we will vote on an incentive program at the next meeting (April 9). Also at the next meeting that the Department present on a comprehensive program including all federal regulated wetlands and the details and benefits. We need to begin to draft recommendations, allow the Department to prepare drafts, and work together to present them formally to the committee for consideration. Not everyone will be happy with the outcome but everyone should be able to express their opinions through recommendation notes. Numerous alternates are present today.

### 2. Review and accept February meeting notes:

- Marty Ross asked that his comment on page 9 be replaced with his ½ page transcript.

- Mr. Parkowski asked Frank to go back and review Marty's suggested edits. A vote to accept the February notes will occur next meeting (April 9).

### **3. Responses to questions presented by committee chairs on unique wetlands:**

**Presentation on Category 1 Wetlands in Delaware** by Mark Biddle of DNREC, Division of Watershed Stewardship 9:12

- Continuing on Bill McAvoy's presentation last month and addressing questions from the committee regarding Category 1 unique wetlands. Answers the 8 questions brought up by the committee following the presentation last month.
- Break down flow chart shows acreage starting from nontidal wetlands down to ownership of Category 1 unregulated wetlands
- Q1: total acreage of Category 1 wetlands? 18,758 acres, 8% of all nontidal (NT) wetlands statewide. Ranging from 94 acres of peat-land fens to over 7,000 Coastal Plain Seasonal Ponds (CPSP).
- Q2: how was this number derived-mapped or field verified? 18,758 acres was determined using maps with some ground-level verification. More Category 1 wetlands verified on the ground than any other type across the state which makes the estimates more accurate.
- Q3: How many Category 1 wetlands are isolated? 12,983 acres are not isolated (regulated and connected to a waterway downstream) and 5,775 acres isolated (not regulated and not connected to downstream waterways)
- Q4: How many are regulated by the Corps? 12,983 acres
- Q5: How many are vulnerable? 5,775 acres that are isolated and currently not protected through regulation. Majority are CPSP. Bar chart to show the magnitude of Category 1 wetlands; Category 1 wetlands make up 2.5% of all nontidal wetlands in Delaware and 1.5% of all land area in Delaware.
- How many are privately owned? Pie charts showing ownership of all Category 1 wetlands by county; the large portion of protected lands in Sussex County is likely due to ownership of the great cypress swamp.
- Wetland ownership breakdown again starting with all NT wetlands in DE 242,630 acres, 18,758 acres of Category 1, 12,983 acres of regulated and 5,775 acres unregulated; 4,019 acres privately owned isolated wetlands
- Q6: what are recent losses to Category 1 wetlands? 28 acres, 3 acres Atlantic white cedar (AWC), 4.75 ac Bald cypress swamps, 20 acres of CPSP which relates to roughly 80-100 CPSP lost and the species that they supported.
- Examples of Category 1 losses:
  - Hartly CPSP for single family housing
  - AWC in Coverdale for borrow pit; most likely not isolated because of a stream next to it, not sure if this was permitted
  - Newark, CPSP for Route 273 extension; likely mitigated for by DeIDOT depending on the timing of the project and the isolated Supreme Court decision. *Phil McGinnis*: does that imply that we might not have issued a permit? *MB*: Not necessarily; if done after isolated SC decision a permit may not have been needed. *PM*: Would a permit have been issued if needed? *MB*: Yes. Is DeIDOT's policy to

mitigate even if you don't need a permit? *Terry Fulmer*: If we didn't get a permit we probably didn't mitigate. We just follow the rules.

- Blackbird area CPSP ag loss; was drained but hydrology was difficult to drain
- CPSP that was developed around leaving no buffer for the pond which likely now has diminished function and habitat.
- Through incentive program we've discussed how to protect these CPSP and these examples show potentials. First example would be a possible easement of a CPSP and a buffer without acquisition. Second would be better for outright acquisition- there is a cost for acquisition and maintenance costs long term. 3<sup>rd</sup> example crosses multiple parcels and would need consensus from all landowners to protect this pond.
- A copy of this presentation can be found [online](#).
- Questions: Mr. Parkowski asked if this analysis uses our accepted definition of wetlands? *Mark*: Yes.
- Jim: can Ed clarify, in the development process it is difficult to find a wetland that the Corps does not regulate. Ed: Philly district is liberal but still there are some wetlands we would have a hard time reaching to. We are looking for a surface connection and is where the process becomes so long. If there is a connection we will assert jurisdiction. Regulations use subjective terms such as 'nearby, adjacent or in the vicinity' and depending of the expertise of the consultant and builder we may not assert jurisdiction. Example of the avoided pond was legitimate under the Corps program. It affects the pond but development stopped at the edge of the wetland. The idea of buffers has been tenuous. *Mark*: DE has extensive ditching and may have caused many potentially isolated wetlands to be connected. We could account for that. Most CPSP are shallow depressions.
- Phil: does the Kent Conservation program allow drain into the wetland or does it go somewhere else? Frank: need to provide an upland stormwater management before it ran off into the wetland. Needs to be a water quality management before reaching the natural wetland.
- Mr. Parkowski: Any argument with the Corps about what is isolated or not it will not be quick. When you go through the Corps it goes up the chain of command and is difficult to reverse. There is something called Sackett Decision to get to court on federal decisions if you want to pay. This discussion is more than a categorization when dealing with a liberal district of corps. The administration of the program at the federal level versus what it could be on the state level is very different. Hope that is not lost on this process.
- Marty: [Mr. Parkowski's] comment is appropriate. That's the reason that I've always questioned it; that even if it's not technically regulated as a practical sense these get protected because of what you just stated. If there is a question about it the process to resolve it, the gray area, is so expensive that people just say 'we'll sidestep it' in an overwhelming majority of areas because they realize that they will not prove that it is or it isn't and the cost to try to prove it is prohibitive. So while it technically may not be protected in reality, and the practical aspect is, that it ends up being protected. *MP*: some programs assume that approval requests will go away but landowners don't see it that way because if they own the property they should be able to get the approval which pits two interests against each other.

**Framework for a Category 1 Wetlands Program in Delaware** by *Virgil Holmes of DNREC, Division of Water*  
9:36

- As a follow-up, that assumes that the landowner goes through the process. Sometimes they don't.
- Will provide a framework geared toward Category 1 state program.
  - Category 1 wetlands comprise 1.5% of total state land area, isolated wetlands currently not regulated are 0.5%, not isolated are 1.0% of Delaware's land area.
  - Staff requirements to regulate isolated = 0, not isolated = 1 additional staff that can be acquired in-house. Current staff for tidal wetlands program is about 1 person per 15,000 acres as a basis
  - Fiscal requirements are zero provided we can utilize existing DNREC staff member.
  - Resource considerations: Category 1 are unique communities, not highly prized for development, agriculture or forestry because they are wet and difficult to drain. They do not exist on existing cropland based on reviewing maps. Regulation of Category 1 wetlands can co-exist with forestry activities assuming there is an approved timber management plan.
  - Table comparing what Corps does versus what the state could do. Under isolated Category 1 wetlands, based on court decisions, the Corps does not regulate Category 1 wetlands, the state could. For non-isolated Category 2 wetlands both the state and the Corps could regulate. Resource definition: under a state program would be stable, under the Corps has been a changing definition that the EPA is currently revising, causing uncertainty. State would map Category 1 wetlands, the Corps does not so a delineation would be required. Resource management would occur at state level, Corps does not. The state has local knowledge, Corps has minimal local knowledge. The state is proposing an incentive program and the Corps does not offer its own. Resource staff: the staff has 20 individuals involved in wetland resource management and none at the Corps.
- Paul Morrill: Regarding the resource definition, if we had a PGP would we be immune to future EPA decisions? *Virgil*: We would establish an MOA with the Corps separating us from that. The EPA could reach in but they have not shown a desire to do that in other states.
- Marty: That's just not true. I've already provided the committee with 2 concrete examples in a previous presentation given by Mr. Bonner where in the state of Michigan, one of the 2 states that have assumption of the 404 program, EPA has over-filed at least a couple of times and have pushed the strength of the regulation beyond the Corps definition so for you to stand there and say that the EPA has not demonstrated that they will step in and over-file is simply factually inaccurate. Additionally, if I don't mind since I've already started and my blood is almost about to boil, we've already shown that the aerial imagery that was mapped wetlands is highly inaccurate. We know that they are not accurate. Based on the delineations that we do on the ground. Jim McCulley has testified to that in the original presentation in November. So to indicate to the committee that mapping is a good thing for predictability when we know there is such error is misleading. *MP*: has a lot of experience with this. One of the reasons that the tidal program works so well is because the maps removed uncertainty. During the process the landowner is notified can respond. With the federal system you won't know until time and money has been spent to know what is regulated or not. To suggest that mapping is an evil thing does not take into account what is being done. At least there is an opportunity to challenge it. Otherwise, you are correct that we don't know every square inch of the state because the amount of resources needed to determine that would be enormous.

- Brenna: Mark, your November presentation and in Virgil's original presentation was for all wetlands, what we're seeing today is just Category 1, and Category 1's have been more verified than any other type? *MB*: Not readily but by concept, when you focus on a specific type you can determine an accurate signature. No map is perfect but the more you focus on the ground the more accurate the maps will be. It is impossible to check them all; this is a tool to predict where things are. For Category 1 they have been more verified.
- Virgil: I also had concerns for the mapping effort in regards for the drier wetlands but the wetter wetlands have a distinct, wet signature on maps. *Ed*: you are not regulating from the aerial photograph, but screening; it is a guidance. *Virgil*: That is a good point. In the tidal program if someone challenges the maps we will field visit the line in the field with the landowner and a consultant. Property owners can challenge the lines.
- Paul: a case in Delaware City that was mapped on tidal wetland maps that stopped our progress until we could show positively that there was a freshwater spring. The tidal maps are used in a regulatory way. The incentive program: are there problems if the state incentive program were layered onto the federal regulatory program? *Virgil*: no, putting an area outside of impact. Could compliment. In Michigan the Corps regulates 100's of 1000's of permits, and to say that based on a couple of examples that EPA overreaches is an exaggeration. Program considerations: only minor changes to existing statutes and regulations.
- Hocker: does not believe that no new existing staff will be needed. We have heard about how DNREC is so understaffed and you contradict that by saying the program will be supported by existing staff and funds is not believable. *Virgil*: in OUR program we have made considerable changes to increase efficiency. This would not be a significant addition to our existing program.
- Virgil resuming his presentation:
  - Implementation process: updating existing tidal wetland statute, updating tidal regulations, develop an MOA with Corps, create Category 1 maps, develop an in-lieu fee program for mitigation.
  - Creating maps: would prepare draft maps, hold workshops for public input and viewing, change maps as necessary, adopt Category 1 wetland final maps, change maps as needed in the future.
  - Table comparing federal to proposed state program from a regulatory perspective; would support plant list updates every 10 years, delineations would not be required for Category 1 because they would be mapped. Would be field visited if questioned. Jurisdictional determinations would not be required from the state. Isolated areas not required because they would be mapped; would have abbreviated permits, in-lieu fee, staffing, prompt responsiveness, and offer an appeal of decisions to the public.
  - Permitting efficiencies for Wetland and Subaqueous Lands Section 2011-2013, reduced permitting time by 14 days while the number of permits has increased.
- A copy of this presentation can be found [online](#).
- Phil: if a recommendation for a permitting program is made how will the average process time be affected? *Virgil*: not many are demanded of and many are regulated so we don't expect a large permit load.

- Brooke: Regarding the plant list: if fed updates every 6 months and state does every 5 years will there be issues? *Virgil*: the 2 lists are for different uses, but a determination would likely favor the landowner.
- Marty: Just trying to reconcile how you plan on fulfilling your goal of protection isolated 1's when you have a process to permit their destruction? *Virgil*: We have pretty tight guidelines for impacts in tidal wetlands but need to allow for utility lines, highways. Need to have a permitting program but intent is to protect the unique resources.
- Paul: for Terry: if a fed aid project, how would the 273 loss work under a state program? Would you be left with 2 processes? *Terry*: we spend a lot of time developing projects to do the least harm. We already do the permits and mitigation so it might not be that much more work.
- Ed: NEPA comes first, then permitting. Paul: may be an advantage to working through a state program instead of federal. *Terry*: will have to get permits no matter what, if faster and involved an in-lieu fee process that would be better for us and save a lot of time. DNREC could deal with their wetland mitigation priorities.
- Phil: regarding the permitting table: how many can the Department do without a regulatory permitting program? *Virgil*: a key is the ability to map these areas. Couldn't do many of these without maps and an MOA with the Corps. Without a regulatory program the maps would just be guidance. Currently, the tidal maps are the limit of DNREC's jurisdiction. If they were just guidance they would still have to do a delineation. Maps allow the state to pre-determine the extent of jurisdiction.
- Brenna: how is the Corp's efficiency for permitting? *Ed*: I review permit applications, but the process length is in determining if the wetland in question is a regulated wetland or not. The review process is reasonable but the preliminary stuff takes a long time. *Virgil*: the intent of the proposed state program would be to eliminate that preliminary stuff [determining jurisdiction].
- Jim: you say the Category 1 wetlands aren't pressured. If they are regulated there will be pressure. Are you suggesting an enforcement program? *Virgil*: why more pressure if we have a regulatory program? *Jim*: landowners will minimize anything that impacts the value of their property. An incentive program would provide value to those resources. *Virgil*: we don't have good records of people NOT going to the Corps or getting a permit. If you have maps we can avoid that. We would have more bodies available to look for those unpermitted activities.
- Deb H: how does this compare to other states? Do they have maps? Seems like a steady plant list would have a lot of benefit to landowners. *Virgil*: many states have a program similar but we are unique that we have mapped our tidal wetlands.
- Wilson: This may work in 2014 but where will we be in 2020 when you come back looking for more staff and funding when demand increases and program needs to grow? *Virgil*: hard to predict but the mapping is a huge help in terms of man power because the number of permits is the most challenging. We review ALL activities in tidal wetlands. The mapping allows us to review a proposed activity in the office. I don't see a great increase by adding the small amount of Category 1 acreage. *Wilson*: worries that the time to process will grow in the future. *Virgil*: this shows an average of 42 day review time and many permits that come in are turned around in a week's time.
- Paul: Is this proposed program for all permits, does it include Nationwides? *Virgil*: If we assumed an isolated Category 1 program they would be outside of the Corp's program so people would come just to us. If it is not isolated there could be instances where the impact proposed was large enough that the

Corps could be involved. Most cases if it fell under the guidelines of a nationwide permit it would just be handled by DNREC.

- Frank: how does not having Category 1 regulated maps help or hurt you with silviculture interactions? *Mark Davis*: we have a forestry BMP manual that we use and encourage. *Mike Valenti*: we know where these wetlands are and we advise to not harvest in the areas but it is their decisions. In dry years there is no regulation to say they cannot go in and harvest.
- Mr. Parkowski: We have a total membership of 28. For the actions on the table to pass we need 19 positive votes and 7 negative votes is sufficient to defeat. I would like everyone to vote on each question separately and explain their vote. Will take comments from the public first.

Break 10:20-10:32

- Mr. Parkowski: would like to announce the question that we are considering and allow the public to speak before the vote is taken. The question is: “does the committee recommend that DNREC be given the authority to adopt a freshwater wetland program to protect Category 1 wetlands that are currently regulated by the Corps assuming federal nationwide permit authority is delegated to DNREC?”. Welcomed DNREC Secretary Collin O’Mara to speak on this first.
- Sec. Collin O’Mara: thank you all for agreeing to serve on this committee. I know it’s been a lot of time, and I also know that you’ve spent a lot of time both in the room but also engaged in this issue and discussions elsewhere. I’m actually standing before you today not just as a potential participant of [a program] but as frustrated party with the status quo. There hasn’t been that much development over the last few years in our state that hasn’t had to go through the Army Corps program but DNREC and DelDOT actually probably have had more permits going through the program than anywhere else. I’m frankly tired of having projects delayed by the Army Corps process. This is not a complaint against the Army Corps at all. This is a criticism of resource allocation starting at the federal level. When Frank Piorko’s folks have to basically hang out at the office in Dover because the one person who has staffing responsibilities for wetland permitting in Delaware either isn’t there, isn’t answering his phone or trying to catch him as he’s walking out, that’s unacceptable. There is a lot of rhetoric about DNREC this and DNREC that but if you call the DNREC wetland section you get your call returned immediately. Virgil Holmes has done a remarkable job taking a program that has been a problem for a long time for many of you. When I first got here Senator Hocker dropped a bill basically saying if you don’t get your permit within a couple weeks you get it automatically approved. I threw a little fit at the Legislature and he told me to calm down but I committed that day that we were going to fix the program. So we brought in some private sector experience to do that. We’re turning permits around in a matter of weeks now, 41 days average turnaround, down 20% compared to a couple of years ago. We can do a better job with this program than the Army Corps can. They just simply don’t have the resources. If you look at our ability to map the resource so there is all the predictability so folks don’t have to question whether a delineation is going to be challenged. You look at the timeliness, the ability to actually deliver permits in a timely fashion and actually have some commitments around that. You look at the ability to have appeals rights. Right now, if you don’t agree with the Corps good luck with that because you are going to wind up in some kind of Neverland because there is no environmental appeals boards. There is no ability to go to the Secretary. There is no ability to go immediately to the courts. There is a lot more

ability to have a successful program if it's at the state level. I've never been in a place that embraces state primacy more than Delaware does; having the state handle its own projects. There is nothing more frustrating than to have this variable. The Corps has done a good job with the resources they have. A lot of uncertainty is brought in. But there is a reason why we do a better job at the local level providing these kinds of permits. There is a long history in DNREC of having problems with different permit programs. I completely acknowledge that, but I think it would be hard for anyone in this room to not acknowledge that over the last 5 years under the Markell administration that permits are getting more predictable. They're faster and we're more responsive than any time in the past. It's easy to say that 20 years ago there was this permit that was a problem or 15 years ago I had this experience or 5 years ago. The majority of individuals that caused some of those challenges are no longer with the agency and we've been doing great work and actually have more metrics than we've ever had before. I'm here on behalf of the Governor. The Governor had made commitments over the years that this would be a priority. It's something that we agreed to last year to have a committee rather than running legislation. We worked with Senator Venables and Senator Hocker and others helped with the composition of this committee. My request is really simple. I've had conversations with many of you and the conversation has been: as long as you don't [repeat] the 1999 legislative approach of Categories 1, 2, 3, 4, and 5, which was too big, that we could have a conversation with something else. We're only talking about Category 1 now. We're not talking about 1, 2 and 3 which many folks in this room agreed made sense for a program. We're talking about Category 1. If we can't agree in this room to protect Category 1, that are the most important ecological resources in our entire state for habitat, for biodiversity, for flood abatement, for water quality we have a gap between the rhetoric around natural resource protection and the reality. I am completely committed to having the Department of Agriculture be the lead in working with us on wetlands that are on farms or in forests. I think that the expertise in forestry in particular should be at the forefront and so this won't be DNREC program alone, DDA will be with us every single step of the way. I think there needs to be a tight conversation with the development community around processing and commitments around timelines. I'm absolutely committed to that but on behalf of the governor I'm asking each of you to vote FOR these 2 recommendations because I'm absolutely confident that Delaware can do a better job than the Army Corps does today. We can do it faster, we can do it cheaper, we can do it more efficiently and more predictably and with more appeals rights than folks have right now and if that's not a compelling business case I'm not sure what is. As someone who is applying for permits all the time the uncertainty and the timing challenges are a headache. When you are trying to bid out work when you don't know when the permits are going to be there and then you've got contractors who are lined up to do the work who can't start work because you're waiting for something, that's unacceptable particularly at a time when we need to get work done. So I'm asking each of you and I know folks have had a lot of conversations beforehand but I'm asking each of you to vote for, vote yes, for both of the 2 questions. I'd be happy to answer any questions but I do think this is the right thing for the state, the right thing for the economy if we can be more efficient, it's the right thing for the environment because we can be more protective. And also I do think there is an opportunity to not look at this as either a regulatory program or an incentive program. I think particularly for the isolated we should have an incentive program. It should be both. It shouldn't be either or. We should be incentivizing as well but we do need a base layer of protection. I'll give you one case example recently: In the Inland Bays, there is a project in Love Creek. It's one of the most amazing

vernal ponds in the entire state, a Coastal Plain Pond. It's gone through the planning process and actually kind of stalled in Sussex County now but they are proposing to turn it into an RV park. There are no protections on this at all. I would love to protect it through Open Space. The valuation on this was several, several, several million dollars; significantly more than we have been appropriated in the last couple of years and so an incentive alone will not protect it where the economics work. That might work in western Kent County but there are some places where an incentive alone is not sufficient. I think there are things that we can do to work on it to make it structured where over the years you can provide that level of value but an incentive alone is not going to be sufficient to protect these. You are going to need both. And that's why we've been talking from the beginning about carrots and sticks together. I don't want anyone to be in this room and be thinking that if we have just an incentive program that it will be just as protective as if we had a program that's combined. We can do something that is uniquely Delaware. I'm absolutely convinced that we can come up with a solution that works for everybody and it's going to require, unfortunately, a few more meetings but I'm asking for everyone to vote yes for these questions to allow us to get to that point where everyone is comfortable to make those votes. I'd be happy to answer any questions. I'm extremely grateful for the amount of time that everyone has put into this. Mike has been driving our team hard to get the information that you want. I'm grateful to our team for the amount of time that they put into the presentations and I hope that you all have the information that you need to make a decision that you are all comfortable with and hopefully a decision that will be better for the economy and better for the environment here in Delaware.

- Mr. Parkowski: comments from the committee or the public:
  - Venables: why not see the incentives presentations before the vote? Mr. Parkowski: is a chicken and egg question, permits vs. incentives. Would like the consensus of the committee: 9 would like to see the incentives before the vote, 10 would like to have the vote first. Will defer and exercise his power to suspend the vote until after the incentive presentations.

#### **4. Landowner Incentives Subcommittee report 10:45**

Has 3 presentations that deserve merit and consideration by the committee. Thank you to the presenters and the carrot committee members for time and contributions.

##### **Presentation on A Natural Resource Protection Incentive Ordinance by Jim McCulley of Homebuilders Association of Delaware**

- Proposing the concept, not the details today. Will be different in each county and municipality. Will not work on all properties. Gives ability to protect more natural resources than just wetlands.
  - Tremendous value of natural resources to the public and very little value to the landowner who wants to sell to a developer. Resources are viewed as a liability that reduces the value of their land.
  - Wetlands and resources are very well protected during the development process these days. Landowner knows that resources will limit the profit they can make. Landowners are not subject to the same scrutiny as developers. The trick is to get value for the landowner way

- before the development process. 2 options: need to pay them for the resource or provide value to the resource.
- Suggesting here to provide density bonuses: works for landowners who want to sell to a developer or if they have a resource but don't want develop and wants to sell density credits. Density calculation for natural resources at the time of development with possible bonuses, higher for higher value resources. Category 1 would be 4x density bonus. Category 2 would receive 3x. Can sell the density credits in exchange for easements or take those bonuses on their own land. Ex: density bonus allows increase from 3 units/acre to 4.56 units/acre and save the natural resources (forest, wetlands, and open space) on the property. Requires giving up some single family homes for townhouses.
  - *Handout with photos of example*
  - Cost: public must accept high density development. Studies show that the public wants to buy in high density with shopping by walking, less shoveling and mowing, and builders build high density.
  - In the future, could consider even higher density development such as 8 units/acre, the runoff and percent of impervious surfaces goes down. Examples such as Annapolis Towne Center.
- A copy of this presentation can be found [online](#).
  - Andy Manus: we are hoping for feedback on how to structure the administrative support necessary to implement the concept on each of the 3 ideas presented here today.
  - Heffernan: Collin's point that we need incentives and a regulatory program. Would this concept work better in partnership with a regulatory program? Jim: wetlands are protected by the Corps. Has not found wetlands that are not protected by the Corps. Category 1 losses are occurring not to development but because landowners see reduced property value. Landowners who are not under the scrutiny of development and fall under the radar of the Corps enforcement and impacting wetlands well before the development process begins. Regulations will make resources viewed as even more of a detriment. Developers are not looking to fill Category 1 wetlands.
  - Venables: would go further to say that in 2005 Glatfelter came up with 41 parcels in Sussex County. He wanted to protect animals and access to woodlands. Made a deal to get \$11 million into the Bond Bill in exchange for the 11,000 acres. During the Miner administration they put \$22 million more in a line item to protect his additional 12,000 acres of woodlands. Ended up paying \$22 million for 2000 acres of woodlands. Why don't we just buy it or use eminent domain if this property is so important. The incentive program is better, gentler than a regulatory program.
  - Mr. Parkowski: The Glatfelter acquisition is part of your legacy and was the most significant land purchases of that type in Delaware.
  - Andy: in response to Rep. Heffernan, this tool was in the spirit of SB78. The 3 tools presented here today are components to a comprehensive freshwater wetland program.
  - Mr. Parkowski: Need to have buy-in on the county level for buying density credits or else there is no marketplace for them. If the landowner doesn't want to sell and get the amount for that density and the developer doesn't want to pay a certain amount for that density there is a gap. I would like you to refine your concept to include how the market would work under this system. *Jim*: has talked to each county already. Has to be a county-adopted incentive program. The state would be involved by

categorization the wetlands. TDR's are out of this concept. This would work best when the bonus and density is taken on site. All counties agreed it was worthy of considering. *MP*: please bring back an implementation plan after consulting the counties. The only difference between this and the TDR seems to be focusing on all valuable natural resources compared to farmland or land in open space. *Jim*: could present a potential model using Kent County. *MP*: It would be helpful to see how the concept could become a reality. We are supposed to make recommendations to the legislature that have potential of becoming reality.

- Frank: Why wouldn't the proposed level of Category 1 protection dovetail with the incentives that you have described assuming that the public utilities will allow the densities that we're talking about? *Jim*: could dovetail and protect many more resources.

**Presentation on Revitalizing the Forestlands Preservation Program** by Mike Valenti from Delaware Forest Service, Dept. of Ag 11:11

- Signed into law in 2005 and has lain dormant for years. Is a subset of the Ag Lands Preservation Program and is designed to protect working forestlands to ensure the critical mass of forestlands. Without a forest industry or the ability to derive income there is no incentive to landowners to keep it as forest.
  - Emphasizes the ecological and economic benefits of protecting land, and also allows hunting and provides forest products. Forest timbering is allowed under the easement but harvesting must be done under an accepted management or stewardship plan written by a professional forester. 10 acre minimum. Must be outside of growth zone. No subdivisions recorded on the property. All woodland must be in the forest preservation area, cannot carve out portions. Must be all woodland in the FPA.
  - Phase 1: landowner enrolls, agrees to a 10-year enrollment with a rolling 5-year renewal. Allows a seasonal structure (hunting cabin). Depending on size, up to 10 acres for residential use. Only forest and wildlife management activities are allowed while in the program. No rezoning allowed.
  - Phase 2: landowner applies, state pays for appraisals, highest and best use and a forest-only value is given to property, full-market value is determined for development rights. Before the property goes into the program or the state buys the development rights a survey is done, paid for by the state.
  - Selection process: Can earn up to 100 points for soil type productivity. Can earn 1 point for every percentage that you discount the value. In theory you could discount the whole thing and make it a donation for 100 points. 10 point discount for a state resource area, and 10 points for a natural area, for a total of 220 points maximum. Selection is based on a ranking from the final score.
  - Benefits: property taxes are eased except for residential and ditch tax; no realty transfer taxes if sold. New subdivisions within 300 ft of FDA will have deed restrictions saying that forest management activities are likely to occur. Benefits to landowner: substantial payment for permanent preservation, and afforded additional rights to farm and legal protection.

- Case study: in 2009 \$1 million was provided, TNC matched \$500,000. Selected 9 of 14 properties and protected 872 acres at a cost of \$1.45 million. Was discounted at a 66% rate of the property value that the landowner took in order to be protected.
- Needs a dedicated funding source. The mechanisms are already in place to proceed, could increase public interest with funding. Already have 30 forest properties in waiting. Could be more. This would help protect wetlands. Could offer incremental protection to forests. If the program had even a small amount of money could have protected so many since its inception. Ag Lands Preservation Program preserved 110,000 acres over 17 rounds. The forestland program could make similar progress. With a dedicated source of funding we could leverage other funding with NGO's, counties, foundations, and environmental groups. Will not protect all the wetlands we are looking to protect but will help.
- A copy of this presentation can be found [online](#).
- MP: agrees that a benefit is that it is already a program. Is your recommendation for us to recommendation for a permanent funding source for the program? Yes.
- Could the ranking systems be adjusted to benefit wetlands more? *Mike*: Scoring would have to go through the board first and maybe a legislative process. Key is to protect working forests, so harvesting is going to be allowed. If the intent is to protect with no harvesting this is not the best way to go.
- MP: The point is that this program is designed to enhance forestry as an industry. Harvesting in forested wetlands would not change and this program may be aside from what this committee is looking for. *Mike*: a lot of small woodlots that will never be harvesting and they are getting some value out of them. *MP*: the scoring system takes into account what kind of resource is there.
- Jim: because this protects working forests that will be cut I would recommend getting less points if you have Category 1 wetlands. Maybe a better program for more typical wetland types (Category 2). *Andy*: DNREC presented that 80-85% of freshwater wetlands are in forested areas so a program that is in forested areas would provide a way to protect and manage these areas properly. Also, during the round of selection, were able to prioritize to the state forester the areas that contained a high probability of freshwater wetlands, that were close to headwater stream areas, and that were close to existing conservation lands for interconnectedness.
- Marty: The big issue with dedicated funding initiatives is how to keep them dedicated. As we know with the transportation trust fund, the ag land preservation fund- both have dedicated sources of funding but at whom they seem to get moved about with budgetary process. From my perspective the public is getting a bit tired of passing or agreeing with dedicated funding sources that ended up being used for other things. Is there a way for legislation to put meaningful definition to the word dedicated? *MP*: No, one legislature cannot bind another legislature. You can only get an earmark for the intent of how funds should be spent. The only mechanism out there is a bonding appropriation, but is not absolute.
- Venables: the ultimate goal is to balance the budget. Open Space and Forestland Preservation are the first areas restored when funds become available. The secret is that we have got to create more jobs through incentives to open more businesses. We are killing ourselves with regulations and high cost of business.

- MP: The Open Space Program and Farmland Preservation Program have been hugely successful. After 18 years of funding we have 110,000 acres of permanently protected farmland which is 20% of farmland in Delaware, and 10-year agreements for 65,000 acres. Combined that is 1/3 of all farmland in Delaware. We hope to do that with forestlands as well. If we can capture that it will be a legacy for the children of the future. It may be hard to imagine some of these areas being targeted for development but in the future if we don't want Delaware to look like Long Island it is programs like this that will make the difference.
- Venables: the administration should put more emphasis should be put on this but it has fallen out of our priorities of late.
- Paul: Governor proposed the Clean Water Initiative which we support, will be highly leveraged and gains considerable protection by the fact that funding is locked in. Seems a logical decision to pursue incentives here.
- MP: Please take this consideration home for next time for a possible recommendation vote. For Jim's concept as well we could vote.

**Presentation on A Conservation Credit Exchange** by Brenna Goggin of the Delaware Nature Society

11:40

- A Conservation Tax Credit (CTC) is a donation; a landowner gives a donation or a permanent conservation easement and applies for a tax credit. There are currently 16 states that offer CTC programs. Benefits: Owners get a financial reward for protecting their land, states meet their goals of conservation through tax policy rather than a general fund, and public reaps the benefits of lands being preserved in open space at a fraction of cost.
  - Components: each state defines who is eligible differently: what is the fair market value that is used, what is the cap the amount of credits allowed in one year, who is eligible to accept donations, is there is sunset date, are they transferrable?
  - Delaware has a structure in place for a CTC in 2000; allows for 40% of fair market value of donated land. Maximum value is \$50,000 per landowner with annual limit of \$1 million. Our cap is very small compared to other states. Original bill had sunset bill of 10 years, in 2010 amended so now has no sunset date. Eligible lands and entities are state agencies and land trusts with a carry forward of 5 years but do not allow transfers.
  - North Carolina has oldest CTC, created in 1983.
  - Virginia allows for transfer of credit. More incentive for a landowner who has incurred losses to transfer tax credits to someone who does need credits.
  - Options for Delaware: increase our fair market value to align with other states, increase our cap, redefine to include wetlands, make credits transferrable by amending the original legislation.
- A copy of this presentation can be found [online](#).
- MP: Current tax provisions in Delaware are not great. Do you have the resources to provide more details? Provide suggestions to change the legislation? Could you quantify the change? *Andy*: Ron Vickers could show more. *MP*: could DNREC show what the current status is and what it could be?

- Heffernan: Regarding the 3 incentive programs presented, what does Collin think in regards to pursuing them? *Collin*: presentations were fantastic and supports them in conjunction with a regulatory program. There is a huge potential to leverage more funding from somewhere like TNC or Mt. Cuba. There is a lot of potential. DO not have to choose either or. We can do a more efficient incentive program and regulatory program.
- Brenna: Since 2000 we have 23 projects with protection of 366 acres which is low. If we offered transferrable credits we could be see more substantial benefits.
- Ron: Applications go to his office. Numbers have been low in recent years. Tax credit taken thus far total \$759,000, but left on table is \$3.5 million of credit value not being used by landowner. Have discussed raising the cap. For upland forest, developable land and wetlands. Were successful in 2010 to become a 10-year program. Revenue loss by state has been minimal. Values gained by the protection of the land has more than balanced that out. 40% value should go up; maybe 50% or 60%. If a transfer credits comes into play, keep it simple and focused.
- Paul: Historic preservation tax credits are transferrable and there is an active market close to dollar for dollar.
- MP: After 14 years it isn't marketable and performance has been dismal. Just a theoretical concept. What would make it marketable? If you could sell it we could see different results.
- Andy: we will come back next month with all 3 concepts with administrative and implementation structure and take comments on tax credits and 3 counties for Jim's idea for a vote to create recommendations? *MP*: does committee have enough understanding to come back with a vote for decision to make recommendations?
  - Paul: Ag Land Preservation and Open Space Programs have potential in this area as additional sources of protection for forested wetlands. *MP*: Open Space is primarily a natural resource program and they acquire fee-interest and easements and have a ranking system based on value. The function of the Ag Land Preservation Program is to protect ag land for farming in the future. Open Space includes ag land that has some ancillary

## 6. Public Input

- Gary Warren: The Ag Program *is* an environmental program. Only 66% of preserved lands are tillable ag lands, the woods are preserved too. Farmers are the 1<sup>st</sup> environmentalists. Also, of the 2 states that have taken over the federal program it is too soon to tell how things are going but there are issues. We don't have enough information and need to look at the big picture. Maybe a hybrid program of ag land preservation without the state buying it. *MP*: Are you saying we should abandon the Open Space Program? *GW*: No. Combine the efforts. Open Space purchases now have to be managed into eternity. Proposing an additional tax to take care of the land. Not sure we are getting bang for our buck. We need to cut expenses on management. Do things in a more focused manner. Programs have been successful but may need to be reevaluated. *MP*: So Open Space should be merged with Farm Preservation not eliminated? Yes.
- Ron Vickers: for future meetings it would be nice to have up front what Categories are currently exempt and off the table.

- Andy: To be clear, the 2 questions will be handled next meeting and we will handle some further descriptions of all 3 incentive programs? Yes.
- Adjourn 12:05

Next meeting is Wednesday April 9, 2014

**Attendees: Underlined names were present or represented by an alternate**

Name	Agency
<u>Chris Bason</u> - <i>EJ Chalabala alt</i>	Center for the Inland Bays
<u>Edward Bonner</u>	U.S. Army Corps of Engineers
<u>Sarah Cooksey</u> - <i>Bob Scarborough alt</i>	DNREC – Coastal Programs
<u>Mark Davis</u>	Dept. of Agriculture
Tim Deschepper	Town of Middletown – LLG
<u>Hal Godwin</u> - <i>Todd Lawson alt</i>	Sussex County Planning
<u>Brenna Goggin</u>	Delaware Nature Society
<u>Mary Ellen Gray</u>	Division of Planning – Kent County
<u>George Haggerty</u>	New Castle County Planning
<u>Rep. Debra Heffernan</u>	Delaware House of Representatives
<u>Sen. Gerald Hocker</u>	Delaware Senate
<u>David Hugg</u>	Town Hall (Smyrna) -- LLG
<u>Sally Kepfer</u> - <i>Brooke Brittingham alt</i>	Natural Resource Conservation Service
<u>Josh Littleton</u>	City of Seaford – League of Local Govts.
<u>Andy Manus</u>	Land Conservationist
<u>Robert McCleary</u> - <i>Terry Fulmer alt</i>	DelDOT
<u>Jim McCulley</u>	Home Builders Association of Delaware
<u>Phil McGinnis</u>	Delaware Association of Realtors

<u>Brian Michalski- Leslie Merriken alt</u>	Delaware Forestry Association
<u>Paul Morrill</u>	Committee of 100
<u>Michael Parkowski</u>	Delaware Bar Association
<u>Frank Piorko</u>	DNREC – Watershed Stewardship
<u>Marty Ross</u>	Delaware Farm Bureau
<u>Alex Schmidt</u>	Council of Engineering Companies
<u>Porter Schutt</u>	The Conservation Fund/Open Space Council
<u>Sen. Robert Venables</u>	Delaware Senate
<u>Bob Walls</u>	Farm Services Agency
<u>Rep. Dave Wilson</u>	Delaware House of Representatives

In addition, 30 non-committee members were in attendance.