Fall 2012 Habitat Goal Implementation Team Meeting
"Wading thru Regulation to get to Restoration
Meeting Minutes
Wednesday, November 28, 2012
Cacapon State Park
Berkeley Springs, West Virginia

Participants: Jeff Horan (Chair, MDNR), Jana Davis (Vice Chair, CB Trust), Jennifer Greiner (Coordinator, FWS), Nicholas DiPasquale (Director CBP, EPA), Hannah Martin (Staffer, CRC), Jim Hedrick (WVDNR), Debbie Hopkins (FWS), Lee Karrh (MDNR), Denise Clearwater (MDE), Bernie Marczyk (DU), Julie Winters (EPA), Karl Blankenship (Bay Journal), Angie Sowers (USACE), Josh Burch(DDOE), Mary Andrews (NOAA), Rich Takacs (NOAA), Tai Chang (FWS), Jack Frye (VA CBC), Jim Thompson (MDNR), Nancy Butowski (MDNR), Ralph Spagnolo (EPA), Joe Berg (Biohabitats), Pete Hill (DDOE), Steve Saari (DDOE), Tony Watkinson (VMRC), Steve Strano (MD NRCS), Sadie Drescher (CWP), David Rider (EPA R3), Jessica Martinsen (EPA R3), Joseph DaVia (USACE Baltimore), Rich Starr (FWS), Neely Law (CWP), Serena McClain (American Rivers), Bob Greenlee (VDGIF), Mark Secrist (FWS), Albert Spells (FWS), John Schmidt (FWS), Erik Michelsen (SRF), Rich Mason (FWS), Matt Whitbeck (FWS), Kevin Smith (MDNR), Erin McLaughlin (MDNR), Gary Berti (TU), Dustin Wichterman (TU), Mitch Keiler (FWS), Adam Griggs (ICPRB), Linda Miller (EPA R3), David Thorne (WVDNR)

Action Items:

- Jeff Horan will draft a set of recommendations to be submitted to the Chesapeake Bay Program Management Board. These will be sent to the meeting participants for comments then to the Habitat GIT Steering Committee for finalization before presenting to the Management Board.
- Discuss options for a follow up forum to continue dialogue

Summary:

The purpose of the fall 2012 Habitat Goal Implementation meeting was to continue the dialogue between regulatory representatives and practitioners about the permitting process for habitat restoration projects within the Chesapeake Bay Watershed. The goal of the meeting was to develop a set of suggestions to be presented to the Chesapeake Bay Program Management Board that would help facilitate a clear and timely path for approval of appropriate and desirable habitat restoration projects.

During the meeting, it was determined that everyone is working toward the same goal of achieving clean swimmable/fishable water. There was also recognition that the TMDL has generated pressure to get restoration projects completed. This has established precedence across the community of practitioners to propose and finalize restoration projects to meet the goals stated in the TMDL. The combination of a plethora of restoration projects being proposed within state and local WIPs by many agencies and NGOs, along with the addition of new

regulatory staff and process to address the Bay TMDL environment, has created challenges for practitioners and regulators alike.

The regulatory representatives present at the meeting repeated throughout the day the need to engage the regulatory agencies early on in the application process by utilizing the pre-application consultations that were offered by each regulatory agency present at the meeting. By engaging the regulatory agencies early, practitioners are able to interact with the regulatory agencies as partner agencies to develop the best project possible with high benefits and low risks to the ecosystem. It was also suggested that when appropriate, those agencies awarding grants to fund restoration projects should be communicating with the regulatory agencies before awarding funds. By encouraging pre-application consultations, the grant agencies will be able to determine which proposals have the highest chance of obtaining permits and therefore will know which projects are deemed "good restoration projects" that will be able to utilize the funding as soon as it is awarded, versus those projects that may have permit challenges..

Given the pressures from the TMDL goals, there was a request from the practitioners in the meeting for the consideration of using general permits for restoration projects, such as Nationwide 27, to generate a more efficient permitting process and expedited review. The general permits create a "restoration lens" (examples found in VA, NH, WI, and PA) that are specific to restoration projects rather than grouping development and restoration projects under the same permitting process. In Virginia for instance, certain resource agencies are eligible for more streamlined general permits for certain restoration projects like stream restoration and living shoreline projects. This brought up the suggestion that we create a mechanism for certain permit applications submitted by certain resource agencies to utilize a different expedited permitting process that would reduce time spent obtaining permits.

This may also open the opportunity to consider mechanisms to allow certain agencies to partner with NGOs and local governments to allow certain project to be eligible under such a general permit. As a result of an expedited process, the resource agencies would be able to obtain more permits, complete more restoration projects, and therefore work faster toward meeting the goals set by the TMDL. Practitioners also requested to have regulatory agencies consider establishing a pilot process to move forward with innovative restoration methods while still maintaining the integrity of the regulatory process. This would include the consideration of exemptions by exercising discretion by the regulatory agencies in the "gray zone" edges of impact with measures built in to ensure success, such as providing extensive post monitoring data.

Monitoring data was established as a vital component to accelerate the permitting process. The regulatory representatives stated that providing data in the pre-application consultation was very useful to assure an efficient review of the project application. By using data to support the intent of the project as well as the intended design for the project provides scientific validity that can speed up the time to get a permit. Practitioners were also open to the idea of conducting extensive monitoring after an innovation project was implemented in order for the new method to be considered by the regulatory agencies as a valid alternative method for restoration projects.

During the presentations by practitioners described uncertainty centered around definitions of habitat, particularly regarding stream restoration projects (ex. stream vs. wetland vs. ditch vs. swale and ephemeral vs. intermittent vs. perennial). This lack of clear

understanding was frustrating for the practitioners since if a project was deemed a certain type of ecosystem, a different set of guidelines would be used by the regulatory agencies when reviewing the permit application. One suggestion was that regulatory agencies might look into distributing staff based on specialties rather than geographic regions to ensure the same standards were being used across the watershed. Another suggestion was to create opportunities for regulators and practitioners to work together on better methods to measure and articulate resource tradeoffs and definitions that would allow the process more rapidly.

Minutes:

1. **Welcome—Jeff Horan (GIT Chair, MDNR)**
    - Special thanks to Jim Hedrick, Denise Clearwater, Jana Davis, Julie Winters, Jennifer Greiner, Hannah Martin, Mary Ann Ottinger, the Habitat GIT Steering Committee, and NFWF for their work on planning the meeting.
    - The Habitat Goal Implementation Team (GIT) is part of the Chesapeake Bay Program. It is composed of a steering committee and four workgroups; Fish Passage Workgroup (Chair-Mary Andrews, NOAA), Submerged Aquatic Vegetation Workgroup (Chair-Lee Karrh, MDNR), Wetlands Workgroup (Co-Chairs- Denise Clearwater, MDE and Bernie Marczyk, DU), and Stream Health Workgroup (Co-Chairs-Mark Secrist, FWS and Ron Klaunda, MDNR).
    - The Habitat GIT is working with the new Stream/Sediment Coordinator group from the Center for Watershed Protection. The group was awarded a multiple year cooperative assistance agreement by the US EPA. The team consists of Neely L. Law, PhD and Project Manager, William Stack, P.E. and Project Quality Assurance Officer, Sadie Drescher, watershed planner, and Lisa Fraley-McNeal, research specialist. The group will focus on modeling support, coordinating partnership scientific input and programmatic evaluation, reporting and verification.
2. **Meeting Purpose—Jana Davis (GIT Vice Chair, Chesapeake Bay Trust)**
    - The discussion about permitting hurdles began at the Fall Habitat GIT meeting in October 2011. The goal is to get good restoration projects in the ground faster. Practitioners, regulators, and others were present at the meeting to discuss case studies put into four different 'buckets' that seem to be reasons why the permitting process has been delayed in some cases
        - **i.** Four Buckets
            1. Information lacking/Incomplete application
            2. Regulatory hurdles/Caught up in the process
            3. Legitimate debate (scientific basis, definitions, other)
            4. Conflicting science/tradeoffs
3. **Regulatory Perspectives (Federal and State)**
    - Nicholas DiPasquale, Chesapeake Bay Program Director , US EPA-The Chesapeake Bay Program is highly involved in figuring out how to move forward on restoration efforts while still respecting the permitting agencies and maintaining the integrity of the regulatory process. Phase II WIPs has created a workload issue for permitting

authorities and there is a great need to start getting reductions to meet the TMDL restoration effort.

i. Next Steps- Getting EPA and USACE permitting authorities together with bay restoration practitioners to map out concerns and reengage applicants and see if it will improve the process. Suggested improvements: 1. Clarify restoration techniques and definitions 2. Granting agencies-such as Chesapeake Bay Trust-to have a check in to make sure proposed projects have been discussed with permitting agencies and have received feedback 3. Funding-delays in permitting might mean loss of funding.

- Joseph DaVia, Chief MD Section North, Baltimore, US Army Corps of Engineers- USACE in Maryland works alongside Maryland Department of Environment to grant permits for projects concerning past, present, and future navigable waters (Section 10, Rivers and Harbors Act) with the goal of achieving clean water (Clean Water Act). General permits, such as Nationwide 27, can be obtained for projects with minimal impact, net increase in aquatic resource function and service, and does not involve a conversion to another aquatic habitat type (ex: conversion from a stream to a wetland or vice versa). Individual permits can also be obtained for a project that has more than minimal impact but it must pass a more rigorous process that assesses historical property, safety, floodplains, etc.
    i. Cause for delay-environmental concern like loss of resource, incomplete applications, in-stream SWM, in-stream impoundments/dams, blocking aquatic organisms/FP, no alternative options, changes to stream hydrology/sediment transport, restoration projects in perennial streams, forested floodplains, and adjacent wetlands. i.e. regenerative storm water conveyance
    ii. Recommendations-avoid impacts to waterways/move upstream, focus on degraded systems and not stable ones, pre-application consultations (get the regulatory agency involved early on in the application process), site selection is key, pre-application meetings for projects proposed for grant funding, MDE, pre-application form, JE meetings monthly are a good forum for pre-application consultation.
    iii. Next Steps- USACE has agreed to work with the EPA Chesapeake Bay Program and EPA R3 regulatory office to explore options for addressing concerns and improving the permit process
- Jessica Martinsen, Regulatory Team Leader, EPA R3 Section 404 Regulatory Program- The EPA regulatory agency implements the Clean Water Act to restore the integrity of the nation's waters. CWA Section 404 is jointly administered by EPA and USACE and EPA acts as the commenting agency by providing comments on applications, while USACE grants the permits. The EPA regulatory agency has a veto authority to deny disposal of materials into certain sites and also has the authority to elevate special cases that has been deemed important areas by the EPA.
    i. EPA specific recommendations: baseline assessment data of existing system to drive goals and objects of the project, criteria and general principles used to develop the design, additional information on past restoration work that

will support success on the applicants project, scientific support for experimental projects, expected benefits and risks

ii. General recommendations-engage stakeholders early in the process through pre-application meetings (could result in an improved project with help from regulatory agencies), understand stressors to the system and its landscape position, understand tradeoffs and provide to regulatory agencies upfront, site selection is important, provide baseline assessment data to drive the goals and objectives of the project

- Tony Watkinson, Chief of Habitat Management, VA Marine Resources Commission- The VMRC serves as stewards of VA marine and aquatic resources by protecting the tidal waters and homelands for present and future generations. The Habitat Management Division within VMRC is responsible for habitat/permitting surveying of the states own submerged lands.
    i. VA successes- 1. *General Permit for Stream Restoration Projects*-The general permit applies to emergency situations and water quality improvement projects involving activities in VA non-tidal waterways. The permit recognizes more agency involvement in stream restoration projects designed to improve water quality, includes standard permit conditions, and recognizes partner agencies involved with water quality restoration projects. 2. *Senate Bill 964* called for a general permit to be developed in regards to living shorelines. The bill encourages the use of living shorelines as the preferred alternative for stabilizing tidal shorelines, defines living shorelines, requires VMRC to develop a general permit, and requires VMRC to develop integrated guidance for management of tidal shoreline systems.
- Denise Clearwater, Special Projects Coordinator, Wetlands and Waterways Program, MD Department of the Environment- The MD Wetlands and Waterways Program is guided by the Waterways Construction Act of 1933, Tidal Wetlands Act of 1970, Nontidal Wetlands Act of 1989.
    i. Cause for Delay—Nature of the project, conflicting resource goals, choice of restoration method, construction techniques, incomplete site plans, permission from adjacent landowners can delay review of the application. Special conditions and coordination, requirements from other entities, public notice and hearing, and need for special conditions may also slow implementation. Alternations to water levels are a “red flag.”
    ii. Recommendations-utilize pre-application consultations to coordinate with regulatory agencies before you submit a permit application and apply for funding, take advantage of monthly JE meetings, use clear specific language when presenting the proposed project, include a contingency plan in the application to support the sustainability of the proposed design, present a post monitoring plan, include all required information in application, agencies to prepare additional guidance on information requirements; discuss expanding instructions for restoration projects in new joint application with Corps of Engineers.

iii. Next steps in MD- The next JE meeting has been scheduled for Dec 19th to meet with agency restoration practitioners. Maryland is coordinating with other agencies on guidance for ditch/ephemeral stream identification and on ways to get information requirements clear for permit applicants.

4. Practitioner Perspectives: Case Studies

- Rich Starr, USFWS—Information Requirements for Stream Restoration- Will Harmon and Rich Starr are developing a tool that could be used by permit applicants as well as regulator reviewers to assist with obtaining and granting permits for stream restoration projects. The recently published stream functions framework serves as the basis for the tool. It is a hierarchal framework that illustrates the relative relationship of stream functions and parameters that can be used to describe those functions. The framework sets measurements and designable goals with a function based assessment. The functional parameters are defined with specific measurements in or to quantify the productivity of the project. The measurements fit in performance standard with functioning, functioning at risk, and not functioning parameters so both practitioner and regulator can measure function lift over time.
    - **i.** Challenges-evolving science and innovation has led to a lot of restoration approaches that can be used, many applicants enter the permitting process with a preconceived design method and process about how to treat the site, need for standards related to stream restoration projects
    - **ii.** Recommendations-Don't go into permitting process with a preconceived design. Be open to suggestions and alternatives
    - **iii.** Current Efforts/Next Steps- Currently working with MDE on customized training for information that is needed by the regulators to review projects and information to be required of applicants.
- Serena McClain, American Rivers—Differing State Regulatory Approaches for Dam Removal- There are numerous different types of dam removals (removed by hand, machine, bypass channel, etc) because there is no cookie cutter approach to dam removal and fish passage. The approach needed for each site is dictated by the site, present species, regulatory process, etc.
    - **i.** Challenges- multiple permit applications (adds time and cost), lack of permit specifically for restoration projects (restoration and development projects are viewed through same lens), need for continuous Federal/State and state interagency communication, permitting costs, inflexibility (science is usually ahead of the regulatory process)
    - **ii.** Consequences of Delay- Multiple permits often mean an increase in cost and time and sometimes an increase in time results in loss of funding.
    - **iii.** Recommendations- mechanism to view permit process through a restoration lens in order to weigh long-term benefits against short-term impacts, separate application specifically to dam removal, develop single point of contact that can coordinate with federal and state and state interagency, dam removal taskforces, simplified process with joint permit applications, pre-application consultations are helpful.

- Jana Davis, Chesapeake Bay Trust—Living Shorelines, Habitat Trade-off Debate- The Ferry Point project (Queen Anne's County, Maryland) was presented as an example of habitat trade-off debate regarding living shorelines in Maryland. MD laws from 2008 call for living shorelines and are encouraged by most agencies as studies support higher fish densities in vegetation vs. bare sediment and shoreline armor. The debate focuses on the need to look in a holistic manner to provide the strongest functional life when planning restoration projects. This project was proposed to the Chesapeake Bay Trust for funding in 2008 and a pre-application meeting with MDE was held in 2009 with seven agencies. Not all agencies were involved in the initial pre-application meeting and that led to the need to have many more meetings and re-drafting the proposal. After five years of revising with no permit obtained due to debate on habitat trade-off (practitioner prioritized living shoreline in accordance with MD law and science while regulator prioritized shallow un-vegetated habitat), more money has been needed than expected in the initial budget and erosion rates have caused major destruction at the site and another survey and new design would be needed if this project will be pursued.
    - **i.** Challenges- Regulators and practitioners are not on the same page when it comes to prioritizing living shorelines, pre-application meetings can be useful but only if all necessary agencies are in attendance, delays in permits allows the environmental condition to continue to degrade without restoration.
    - **ii.** Consequence of Delay- Time does equal money. Longer it takes (up to 5+ years in this case) can mean loss of funding or even more money because the environmental situation degrades to a point of additional surveys needed to be conducted to reassess and redesign project.
    - **iii.** Recommendations-Make sure all necessary agencies attend the initial pre-application meeting and if they cannot attend cancel or reschedule the meeting. Regulators need to become adaptive to best available science to effectively review permit applications in a timely manner. Tradeoffs occur and need to be addressed based on science (in this case, MD law and science calls for living shorelines, however the regulatory agency did not prioritize this need).
- Erik Michelsen, South River Federation—Defining Waterbodies and the Impact on Restoration- The Davidsonville Wildlife sanctuary was presented as an example of restoration projects requiring a need for clear definitions regarding waterbodies. This is an agricultural site with a farm pond that has high level of bacteria and turbidity due to animals on site. The goal of the project was to implement a step pool storm conveyance system to keep nutrients from leaving the farm pond and running into Beard's creek. During the permitting process, it was deemed that the waterbody was in fact a stream and that caused the project to not receive a permit to date due to flooding risk.
    - **i.** Challenges- As soon as the project site was determined to be a stream rather than an ephemeral channel, certain laws and regulations were needed to assess the project by the regulatory agency that precluded the proposed

design for the project. MDE expressed certainty that the channel was under its jurisdiction.

ii. Consequence of Delay- continuous nutrient pollution to surrounding waterbodies, creating worse situation

iii. Recommendations- Cooperate with local government to get support, clearly define waterbodies, regulatory agencies exercise some discretion and look at net impact, be open for innovation, regulators act as facilitators and partners to achieve clean water goal

- Steve Strano, USDA/NRCS—Regulatory Permitting Example from MD Eastern Shore-
  i. Challenges- uncertainty as to why the 100 year floodplain is important to the MDE regulatory process, NRCS is involved with numerous voluntary restoration projects and does not have the time to do pre application meetings on site, definitions of streams in MD causes permitting issues due to practitioner uncertainty
  ii. Consequence of Delay- not able to complete a high number of voluntary restoration projects that NRCS could potentially coordinate due to too much time spent focusing on certain projects that are caught up in the regulatory process.
  iii. Recommendations- Regulatory certainty to some extent on jurisdictional determination of streams and floodplains, general permit, don't regulate ditches with groundwater flow as streams, more flexibility in limits of disturbance allowed to implement activities that improve environmental quality, develop risk class system to distinguish between projects and allow flexibility on low risk projects that are areas of little to no infrastructure, allow NRCS to use technical knowledge to know if a project is in a good site and will be sustainable

5. Discussion Points

- USACE only requires a PCN in some regions, not all. This causes delay for some agencies in MD.
- JE meetings are not always an option or solution for pre-application meeting venues because sometimes the right people aren't always at the meetings and it is not open to the public.
  i. If you are setting up a pre-application meeting with regulatory agencies and you feel that not all essential agencies will be represented, cancel and re-schedule for a time that all agencies can attend.
- Restoration projects are different in nature than creation/development projects.
  i. Development projects do not have the same requirements for monitoring and maintenance compared to restoration projects, yet they are on the same permitting track.
  ii. USACE are currently discussing permitting options regarding restoration vs. mitigation vs. development projects.

- If the regulatory agencies are provided the information to weigh the issues and understand the tradeoffs, the regulatory agencies will be able to do their duty and make appropriate decisions given the numerous issues to consider beyond habitat.
- A wetland framework, similar to the stream framework (Starr presentation), could be developed to apply to wetland restoration projects.
- There is a need for a clear scientific checklist that defines ephemeral vs. intermittent streams (watershed area, slope, soil types, etc) to better understand how a site will be regulated.

6. **Issues and Solutions Table** – The following table summarizes the presentation discussion topics surrounding permitting issues and possible solutions. The issues are summarized by categories to discuss solutions that correlate in order to ultimately communicate to CBPO and Management Board to begin a higher level discussion.

Issue	**Solution**
Big Picture	
1. Regulatory intent- Many regulatory vehicles were meant to deal with impairment projects, not restoration projects	-Consider a specific track for restoration projects
2. Time is $-Potential for lost funds (e.g., ULO), Time also can lose projects	
Process Issues	
3. Framing on applications- "words are important"	- improve applicant training - provide opportunity for pre-app - clarity on requirements-specific requirements on permit applications to insure there is adequate assessement - distinction on requirements -justify site selection -permit evolution (e.g., gps, bifurcated permit process)
4. Workload for regulatory agencies is increasing/anticipated backlog due to TMDL	
5. Completeness and quality of applications	
6. Standards/quality/rigor of information and data required for *voluntary* restoration projects (vs. other types of projects, e.g., mitigation, development)	
Issues that need Consensus	
7. Appropriate use of Nationwide 27 and possible regional conditions. Clarify specifics	- rely on science - find consensus on what we know, and what we don't know (for new
8. Habitat conversion issue (streams to	

wetlands and vice versa) and "what is a stream" issue	areas of scientific research) - develop clear definitions (for, e.g., streams) and guidance (less case by case)
9. Idea of avoiding waters of the U.S. (relative to BMP list from which restoration community works)	
10. Habitat trade-offs-how to deal with some trade-offs in cases of net biological uplift	