

Wetland Advisory Council
MUCC Facility
December 16, 2011
Meeting Minutes

Council Members Present: Dan Coffey, Gary Dawson, Sue Elston, Jeff King, Scott Piggott, Joseph Rivet, Erin McDonough, Russ Mason, John Niemela, Donald Uzarski, Susan Harley, Lee Schwartz, Steve Shine

Council Members Absent: John Konik, Deena Bosworth, Todd Wyatt

Conference Call Participation: Andy Such, Grenetta Thomassey, and Gildo Tori

Others Present: Dan Wyant, Kim Fish, Melanie Haverman, Brian Wharf, Dina Klemans, Amy Lounds, Ken Sikkema, Maggie Cox, Todd Losee

The council discussed the meeting minutes from the November 7, 2011, meeting. A member discussed whether or not the last sentence of the second bullet, second page could be struck and another member indicated the word “exemptions” under the second bullet of the first page, be struck. With those corrections, the council voted and approved the minutes.

Legislative Update, Senate Bill 744

The hearing was cancelled because they had caucus. The hearing will be rescheduled for the first meeting in January.

Statute Reports from Subcommittees

Grenetta Thomassey gave the status report for the Environmental Protection Agency (EPA) Program Requirements and Federal Coordination Subcommittee.

- They are waiting to get feedback from the committee about the State Programmatic General Permit (SPGP).
- Scott put forward additional proposals related to the cranberries and those are still being worked on.
- There is still more work to do on the exemptions. They plan on continuing conversations with the drain commissioners and the Ag community, etc.

Jeff King gave the status report for the Permit Processing, Efficiency, and Program Structure Subcommittee. He distributed the, “Wetland Advisory Council Permit Processing and Efficiency Subcommittee Status report to the Council as a whole 12/16/11” document.

- The last recommendation to make was under, “Task (ii) The appropriate role of local units of government and conservation districts in the administration of this statute.” They concluded that the opportunity for either local units of government or conservation districts to administer the statute was not going to happen. Everyone seemed to agree that the educational aspect of it was a good thing. So they are recommending that, short of funding coming to the department, that everything that can be possibly done to educate the local units of government and the conservation districts be done to

encourage them to communicate with their groups who ultimately end up as permit applicants. They just will not have permitting authority and probably never will.

- The other recommendation which is on page three where it says, "Methods to assist... individuals proposing a use or activity for their personal home site." The recommendation was that the Department of Natural Resources (DNR) has the authority to permit all wetland restoration and enhancement projects, but with the understanding or caveat that it could potentially create other issues for the Department of Environmental Quality (DEQ) in terms of their current program.
- With regard to using the two parameter approach on the wetland delineation methods, in spite of the goal of having a consensus on council recommendations, consensus was not met even on the subcommittee.

It was mentioned that the EPA would need to weigh in as to whether they would accept or approve the different parameters. However, Sue indicated that because it would be a change to the proposed assumption, a full review, which is quite a lengthy process, would have to be done to determine if the DNR has the authorities the DEQ does under statute. It was also mentioned that a determination of what the cost would be for the DNR to take over some of the authorities and would it be worth it. There would have to be some internal discussions with the Wildlife Division to make sure they really understood what all those roles and responsibilities would be.

Gary indicated that he though having the Wildlife Division in the restoration role has a lot of value to add with the biologists taking place in offering advice and planning to field staff and thinks there is a potential value added from a planning prospective that they would bring to the table. It was also mentioned that some states use their DNR to really manage their wetland program and they have funding mechanisms through different types of grant money that are actually prioritized based on wildlife habitats.

Kim indicated that there is a bigger agency group that is not just permitting staff, MUCC, the Fish and Wildlife Service, Department of Agriculture and NRCS that do come together on a regular basis to look at those regional planning long-term type issues and work together.

Joseph Rivet gave the status report for the permit Processing, Efficiency, and Program Structure Subcommittee.

- The first issue discussed was funding and it was explained that at this point the Public Sector Consultants (PSC) has not developed a strategy for funding. But the WAC has been awarded a foundation grant through the MUCC that allows PSC to be hired to develop a funding structure recommendation. This was discussed at length and PSC was just engaged last week.
- The minor permits (MPs) and general permits (GPs) are issued.
- Wetland Banking - A lot of work has been put into the recommendations of the department in the program reform proposal.
- The last issue is the ongoing public input which Joseph though was a pretty easy conversation to have during the end of our efforts.

Director Wyant – DEQ’s Wetland Reform proposal

Kim distributed another version of the Wetland Program Reforms Document while the Director started talking about them.

The Director talked to the group as to why they were coming to the Council with a proposal. He stated that it is our position and the administration’s that we maintain a wetlands program and not turn it back to the federal government and that it is in Michigan’s best interest. We do not want it to go back. He said strategy- wise, we have to run a reform package at the same time we run a funding package because we have to introduce a budget in February that represents how the Department is going to fund it. We know we are ahead of the PSC recommendations, but there was no choice. He said that we have to put markers down in both cases – on funding and on policy – and move forward. That means that we have to have something in place before October 1 next fiscal year. This proposal represents the work of this group so the Director really wanted to recognize the chairman and all the committee chairs, and he wanted to also recognize Kim and Amy and Todd who have done a tremendous amount in short order. He stressed that this it was not complete, that it will change going forward, and we will have to talk about how it changes and the process that is utilized once it gets to the Legislature. He said that his goal is to continue to use the advisory council because it is the right diverse group of people around the table and it is his hope that feedback continues back to the advisory council as we move forward. He said his goal was to get the Council’s feedback today, then get a draft bill from a bill drafter, then send that out to get your feedback, and then go to the Legislature and continue to work with them. And then it is up to the sponsors to determine how they are going to perceive it. He said that we owe it to the Department to fashion a position. And the Advisory has a responsibility to represent your interests, and that everyone individually has a responsibility to their interests.

It was asked if the Advisory Council was going to remain in tact throughout 2012 to help with the process and if the Council will continue along and do what the legislature wants us to do in a parallel effort or reconstituting the Council in a different way? The Director said that he envisioned utilizing the Council for feedback and that he would like to see the Council continue to do its work as before.

Kim Fish went over the Wetland Program Reforms Proposal. She mentioned the first bullet were items they already talked about in the Council. There is still some work to do with the agricultural community and with the drain commissioners with regard to exemptions. Draft language has been sent to EPA for their feedback and that this was actually the only bullet that we actually have statutory language for. The second bullet with regard to the MP/GP categories, are out there, they are being used. Although there some issues that are coming up— things that were not thought of when they were being developed or when they wee actually being used in the field, and basically just running into issues that were not anticipated. Those issues will continue to be a work of progress for a while but overall, there has been some pretty good feedback on most of those categories. The next bullet has been being talked about on and off. The legislature failed to institute a fee for the minor project in 303 and the fees we do have in 301 and 325 differ for the categories. So as part of the proposal, we would like to clean that up and create a fee for minors. For example, if someone, right now, comes in and wants a minor project permit under 303, the fee falls under the “all other” category which is \$500. The proposed fee would be somewhere between \$50 and \$150, but it would be a lot less than \$500. The next bullet on Enhanced Mitigation Banking has been an issue that we have been hearing about for several years. We have been having ongoing discussions and we are hearing that we need to do something to improve mitigation banking in the state. Although we do have

mitigation banking in the state, they may not be located in strategic areas where there is a high demand or need. And in other cases they do not have enough credits, or the credits are sold very quickly. So we are looking for some creative ways to improve mitigated banking and some of the ideas are: increasing the service area size, releasing credits to municipalities similar to an In-Lieu fee program, but not exactly the same, and we are having some discussions with Duck Unlimited. about that idea, and devoting a staff person to mitigation banking to assist with the development and to answer any questions, and to be able to commit the time to work with bankers to get the banks up and running as fast as possible. The next bullet also deals with mitigation banking for mitigation banking done outside of the banking program. We are looking for ways to improve the flexibility of mitigation requirements. Currently, it is simply ratio based, based on the amount of impact and then the type of wetland – you have a minimum ratio you have to meet for mitigation. Some of the things we have been thinking about is looking at trying to find a way to reduce the focus on on-site mitigation, provide some more flexibility in those mitigation ratios and possibly look at a consideration of functions and values of the wetland that is being impacted versus the mitigation that would be created or restored, allowing consideration for beneficial additions like high value habitat if that is incorporated into a mitigation plan, and assist local governments in prioritizing wetlands for use with their community with an opportunity to engage outside partners and create mitigation – the kind that goes hand-in-hand with mitigation banking. There are a lot of details to work out but those are some of the things being thought about. The next bullet on page three – SPGPs – Discussions have been done with the Corp. of Engineers to look at what types of activities we might be able to issue SPGPs for. And the purpose of these are to reduce the duplication remaining in those Section 10 Waters so people do not have to get two separate permits. The next bullet at the top of page 4 – this is where we have taken the Governor’s mantra – relentless positive action. We have had some discussions with EPA, started with Region 5, and elevated to headquarters. And we have had discussions with the Corp. - both district and headquarters. We are moving up the chain to look at trying to pursue the idea of making federal funding available for actual operation of state and tribal wetland programs. We are also reaching out to the various organizations, associations, state wetland managers, ECOS, Aqua trying to get their support. We have reached out to the other great lake states so we are going to be pursuing this idea and moving it up to the Governor’s office hopefully contacting the Michigan Congressional Delegation and keep moving it forward. We are hopeful that we might be successful in 2013 but who knows. The next bullet on page four is just kind of a recap. The new Memorandum of Agreement (MOA) has been signed with EPA. It clarifies roles and responsibilities of the state and federal agencies and we think it will result in a reduction of oversight on projects and applications. There is still some work to be done with some of the details but we are working on implementing the MOA. And the last bullet has been implemented. As mentioned before, the advantage of that is that it does make Michigan consistent with the rest of the states in the way the Corp. is implementing the program so we can use the same methodology.

Joseph asked about the status on Ag and drains. Kim said that the status is about the same for both. Draft language was shared and some feedback and input was received.

Scott Piggot indicated that he met with the Department and the exemption issue was discussed. One of the things put forth was a proposal to look at a permit-by-rule to parallel with the exemption changes. Language was offered that would provide, what is being suggested, for the permit-by-rule proposal for the exemptions that Michigan would no longer have. Scott then distributed the, “Wetland concerns/solutions of the Michigan Farm Bureau” document. He indicated that it was simply a proposal with the intent of making their points clear. One of the items that needs to be more clear between transitioning between exemptions and agricultural activities,, and could we create permit-by-rule for some of those activities exempted in areas

that were not ongoing farming operations. Kim wanted to clarify that her understanding from their meeting was that there would be notification to the department. Scott said that he is suggesting notification. That basically if someone moves forward they have to be within very discreet categories and with notification to the department, they can move forward. But there is also language that they have to understand if they do not meet the categories, another kind of permit will be required. It is notification but it does not require prior approval.

Sue Elston said that she did not agree with the statement that Michigan regulates wetlands the federal government does not regulate. That their scope of jurisdiction is similar to ours right now with the pending changes in the regulatory guidance coming out but that the state may regulate less and that it is going to be clear as mud to figure it out because there are nexus issues. She thought the state is in a very good position now to regulate everything they have jurisdiction over and that she did not think in terms of water of the U.S., that they regulate more. Sue said that the issue boils down to the significant nexus and that is a very difficult thing to make a determination on. To determine jurisdiction for isolated wetlands one would need to do a significant nexus determination on every one of those sites, which is the way the federal program is right now. She thinks that most of the wetlands that are regulated by the DEQ would be regulated by the federal government.

Joseph indicated that 301 and 303 need to be differentiated because when you are talking about linear ditches, it could be both. Joseph's concern is that the nexus issue is very difficult and complicated. There is a concept among drain commissioners that if it goes back to the feds, there will be a whole lot of unregulated activity and that our lives are going to be easy. Joseph's concern is that it could be more complicated because all of these permits will have to go through the nexus – determination of jurisdiction. He is concerned that one may be doing more work determining whether or not just to go through the permitting process.

Jeff King brought up a scenario where the jurisdictional determination issue is critical in an enforcement case. With the state, if you try to issue a cease and desist order on a project, based on jurisdiction, you have to have a pretty good case and know whether the state has jurisdiction. Under the federal program, he wanted to know if there was some opportunity for the federal government to step in in an enforcement case and say that until jurisdiction is determined, you must cease and desist. Sue said that typically it is the Corp. that sends out the cease and desist letters. That they make the determination regarding the jurisdiction before letters are sent out, a form is filed and an office contact is done, so a jurisdiction determination is made when we go forward with the enforcement case. Kim indicated that there is an opportunity for the federal agencies to jump in if there is a procedure under the MOA that identifies how we are supposed to coordinate with the federal government when it comes to enforcement actions. It is the state's responsibility to take enforcement action in most cases unless it is in an area that we have joint jurisdiction. Then we have an obligation to notify the Corp. if we find a violation. If the state cannot take enforcement action, the state is obligated to notify EPA in those areas where we have assumed the authority in the state. So there is a specific process to follow.

Scott was asked from what state he took his language from for his proposal; he indicated it was New Jersey. However, Sue E. indicated that that language was not being used for regulating their wetlands but that it appeared to be floodplain legislation, and she did not think that was how New Jersey ran their program because the way it was written in his proposal, it would not satisfy federal requirements under 404. Scott said that he was just using a template for his suggestion. He said there are things that obviously needed to be added.

Joseph wanted to know how far along this conversation was in the Department? Kim said that as Scott indicated, he just presented his concept last week and that we are taking a look at it and we are looking at what New Jersey has in their program. Joseph said that he has discussed the exemption language with the drain commissioners. There are two remaining issues that will get the drain commissioners to a point to where they can discuss internally. One is: inclusion of Best Management Practices (BMPs) in GPs. The second is that drains developed before 1972 were exempted and may have been improved since then. They want a start date saying anything prior to this new statute is considered the same thing as current drains, so from his prospective the drain commissioners are probably 80 percent. His sense for Ag is that is about 50 percent.

Scott indicated that if permit-by-rule for the portion of the exempt activities that would no longer be exempt and implement federal language, if we were able to fit in that concept, then there would be something to talk about. He does not think we should be regulating all the things they do under the wetland program and he thinks that it is separate than the agriculture exemptions.

Joseph wanted the difference of exemptions and permit-by-rule explained. Sue said that exemption means there is no jurisdiction; no permit is required at all, it is just something not regulated. Permit-by-rule is essentially the same thing as a GP and MP, and it is almost like a permit being issued up front.

There was some discussion about fees. Ken Sikkema said that he took the Director's comments helpful as saying we want the program, we are going to the legislature to get their endorsement and part of that is we have got to fund it. He said it looks to him that what the director is proposing is a short-term funding program – to get through *fiscal year (FY) 2013*. It sort of buys time to look at a long-term funding program. The Director indicated Ken was exactly correct. And that he wanted to convey a sense of urgency around that very point. If we do not get the program right, we do not have a program and we will know that in the next year. So he does not want to underestimate the sense of urgency. Kim wanted to assure the Council that every year we put together budget documents and that the documents that were sent to the state budget office did include an explanation of the work that the council is doing and that our request was a temporary request for FY2013 and I think they understand that.

Grenetta was interested in knowing how the jurisdictional determination process was going? Melanie indicated the EPA review process is 15 or 21 days and then it goes to headquarters if we disagree, and the process could take a while. If there are non-jurisdictional waters, EPA has 21 days to review. But that is just talking about the EPA part because the Corp. does the initial determination.

Joseph explained that he thought as a Council the administration wants to keep the program, and our job is to improve the program and make sure we fall within the federal guidelines. But that the ultimate question of whether or not there is a program is a decision for the legislature and that is a different argument. However, Grenetta indicated the only reason why the Council is here at all came out of the question of whether we should have the program or not. She is saying that when this proposal is done, there has got to be some context about the consequences of sending the program back.

Andy indicated that he would like to get on the record that they support Grenetta's efforts to make sure that this report addresses the consequences of not having the program in Michigan.

Todd talked about significant interest from a lot of the group to the legislature to enhance the mitigation banking program. Stakeholders say they really need more availability for banks, need credits that are available at different times, and we need the process to go smoother, and we need someone to help us along the way to make this work.

Amy indicated that one of our biggest barriers for banking has been that a bank sponsor has to recoup their costs pretty quickly. They are putting out the money to develop the bank so they put them in areas where there is a lot of demand for credits. Most people are not interested in putting that money up front so we are hoping with this revolving loan fund, we could create a mechanism that would help get banks in areas of the state where there may not be as much demand. Another key part is that in certain parts of the state, there are a lot of opportunities for restoration. However, there are a few key problems such as our service area in the UP is fairly small so we may be combining some of those.

Susan wanted to know what the preservation ratio was which Amy indicated is 10:1. Amy said that typically in the banking program almost all our banks are restoration.

Todd talked about the Sault Ste Marie project where the municipality put out quite a bit of money to hire a consultant and put together a task force with state and federal agencies and the business community. They are accessing every parcel, every undeveloped parcel in the city limits for its value in economic development. They are basically making two maps which are being merged into one map when they do an assessment. The long-term plan of trying to identify the best places to develop with recognition that there will be some natural resource impacts and then how do you either mitigate for those and how do you protect what you have left with the natural resource? It will be an interesting conversation for us for high economic development value and high natural resource value. That actually should be concluding this year. The key for the how the municipality's map helps the municipalities is that they should have their ducks in a row when they come in for a permit application.

Joseph wanted to know when they would have something specifically to review maybe early January, end of January? The next meeting was not scheduled because all these meetings have been coordinated around the Director's schedule, so the next date will be e-mailed to you.

The meeting adjourned at 11:34.