

New Jersey Freshwater Wetlands Mitigation Council Meeting

December 8, 2008

9:30 a.m.

Claudia Rocca called the meeting to order, read the Sunshine Law statement and stated that public notice for this meeting was given on September 23, 2014 to the Secretary of the State's office and written notice was sent to the following newspapers; The Newark Star Ledger/Trenton Times, The Camden Courier Post, and the Atlantic City Press.

Review and approval of the October 7, 2014 Council meeting minutes.

Ms. Susan Lockwood motioned to approve the minutes. Ms. Patti Burns seconded the motion. Ms. Claudia Rocca, Mr. David Roth, Ms. Susan Lockwood, and Ms. Patti Burns all voted in favor of approving the minutes.

Update on the Mitigation Fund.

Jill Aspinwall stated that as of October 31, 2014, the balance of the fund is \$8,319,921.96. Since the last report Council has not received any new monetary contributions, four projects have received payments, with the amounts reflected in the contract balance. The total amount of money under contract is \$6,525,989.53. There are three conceptual proposals that total \$2,290,000.00. If all projects are funded, including the conceptual proposals the total amount allocated would be \$8,815,989.53, creating a deficit of -\$496,067.57.

Old business

Review and approval of a resolution upholding the Council's June 2014 decision to terminate the Union County grant agreement.

Ms. Patti Burns motioned to approve the resolution. Mr. David Roth seconded the motion. Ms. Susan Lockwood, Ms. Claudia Rocca, Ms. Patti Burns, and Mr. David Roth all voted in favor of approving the resolution.

New Business

Review of a proposed monetary contribution from Francisco Salas in the amount of \$3,534.00 for impacts to 0.093 acres of freshwater and coastal wetland as a condition of a stipulation of settlement.

Ms. Jill Aspinwall stated that this was a proposed monetary contribution in the amount of \$3,534.00 for impacts to 0.093 acres of freshwater and coastal wetlands. The applicant was required to perform mitigation in accordance with the terms of a stipulation of settlement between Mr. Salas and DEP. Mr. Mike Schuit, Deputy Attorney General, was present to provide additional information on the proposed monetary contribution. Mr. Salas and his attorney were also present.

Mr. Schuit stated that the stipulation of settlement was entered into to avoid a taking, and stated that the property is on 0.4 acres in Brick, Ocean County on an infill lot. Mr. Schuit stated that there were water, sewer, and gas services adjacent to the property that could serve the property. As a condition of the settlement agreement, the property owner reduced the area of impact and proposed to build the single family home on pilings. The total footprint of disturbance from the

home would equal 30'x50', and total disturbance from the house and driveway would equal 46' x 88'. Mr. Schuit stated that this would be a de minimus impact. In addition, Mr. Schuit stated that the remainder of the property would be deed restricted in perpetuity under a conservation easement. Mr. Schuit stated that the regulations were used to determine the amount of the monetary contribution, by using the general permit amount of \$38,000 x 0.093 acres. The Department and the Attorney General's Office support the monetary contribution to the Council.

There was a discussion among the Council and the public as to whether or not this was an enforcement case or if there is a penalty. In addition, there were questions raised as to whether there had been any land filled before an approval from DEP. Mr. Ira Weiner, Counsel for Mr. Salas, stated that while there may have been fill placed by the previous owner, the current owner had not placed any fill on the property and there had been no enforcement action or penalty on the property.

There was a discussion on how the deed restricted land would be managed, whether the land to be deed restricted is contiguous with other wetlands. It was stated that the Department would hold the deed restriction.

Mr. Mark Renna stated that the impact is within watershed management area 13, which is the only watershed management area that does not have a bank. Mr. Renna believes that the Council should require that the applicant purchase credits in a nearby area or an adjacent watershed management area since this is an enforcement case. Mr. David Roth asked how does the public appeal or comment on a stipulation of settlement. Mr. Schuit stated that the stipulation of settlement will appear in the DEP Bulletin and that public notice would be given to nearby property owners within 200 feet of the project. Ms. Nina Chen of the Nature Conservancy commented that the price of \$38,000/acre of impact is 1/10 the cost of private bankers, and asked how this was fair. Mr. Weiner repeated that the stipulation of settlement was not as a result of any enforcement action and that the property owner has purchased the property in 2002. Mr. Weiner said that the property owner had completed his due diligence on the property by obtaining maps from the US Army Corps of Engineers that showed no wetlands on the property. It was only after purchase that the DEP determined that there were wetlands on the property. The stipulation of settlement was entered due to the possibility of a taking because prohibiting construction of the house would deny the property owner any economic benefit of the property.

There was further discussion by the Council and the public, that this project dates back very far and has undergone extensive litigation. It was stated that the applicant did not ask to skip the mitigation alternative of purchasing credits from a wetland mitigation bank, because one does not exist. It was further stated that it was very appropriate for this project to be before the Council.

Ms. Susan Lockwood motioned to approve the monetary contribution. Mr. David Roth seconded the motion. Ms. Susan Lockwood, Ms. Claudia Rocca, and Mr. David Roth all voted yes. Ms. Patricia Burns voted no.

The motion failed.

Presentation by staff on New Jersey's Draft In-Lieu Fee Instrument.

Jill Aspinwall summarized the goal and objectives of New Jersey's ILF Program. Ms. Aspinwall stated that to provide a third-party compensatory mitigation option for unavoidable impact to waters of the United States and waters of the State approved by the State of New Jersey,

To provide a third-party compensatory mitigation option for enforcement actions approved by the State of New Jersey; and to ensure New Jersey's mitigation program is as stringent as the Federal In Lieu Fee rules.

Ms. Aspinwall presented a detailed description of the In-Lieu Fee document in order to provide the Council and the public an overview of the In-Lieu Fee document. The presentation highlighted the following components of the In-Lieu Fee document:

- EPA has concurred with the provisions of the document.
- The document sets forth the guidelines and responsibilities for the establishment, use, operation, protection, monitoring, and maintenance of the ILF Program to assure the work associated with the ILF Program produces the necessary compensatory mitigation credits to compensate for unavoidable impacts to waters of the United States, including wetlands, that result from activities authorized under New Jersey Freshwater Wetlands Protection Act Rules, Coastal Zone Management Rules and the Coastal Permit Program Rules.
- Identified the goals and objectives of New Jersey's ILF Program.
- Sets forth the qualifications of the NJDEP.
- If the Program Administrator does not perform in accordance with the ILF Program, including ensuring the timely completion of mitigation projects, the NJDEP may not authorize any permittees to make a monetary contribution as an acceptable form of mitigation. During this suspension of authorization, the NJDEP would reevaluate the effectiveness of the ILF Program and make any necessary changes.
- The ILF document outlines the qualifications of the Council, which was established by the FWW Protection Act
- The Program Administrator shall act as the recipient of all monetary contributions into the ILF Program and shall play no role in any regulatory decision made by the NJDEP determining the nature and extent of any required compensatory mitigation, or determining the appropriateness of any specific monetary contribution.
- The State will be divided into both a primary and secondary service area. The primary service area will be the service area in which the monetary contribution was collected in, and where the impact occurs. The service areas will include both freshwater and tidal waters as the ILF Program covers the entire State.
- The amount of a monetary contribution shall be determined based on the type of authorization or permit received by the permittee.
- The total number of credits that will be generated from an ILF Program project will be determined by the Program Administrator
- To implement the ILF Program, the Program Administrator is authorized to sell advanced credits to provide compensatory mitigation for impacts authorized by the NJDEP within each service area.
- The NJDEP will only consider the Council to be a feasible alternative for mitigation if the Council maintains a minimum balance of 10 advance credits and the NJDEP is satisfied the Council is accurately accounting for its mitigation obligations and advance credits.
- Sets forth the guidelines for processing a grant from the Council.
- In the event that the Council is not performing in accordance with this ILF document, its enabling statute, or its implementing regulations, the NJDEP will reevaluate whether using the Council is a feasible means of ensuring mitigation. If NJDEP determines the Council is no longer a feasible alternative for mitigation, prospective permittees will be directed to other forms of mitigation.

There were brief discussions regarding the ILF document primarily relating to the public's perception that there was not adequate time to review the draft ILF and that there should be a longer public comment period. Ms. Aspinwall stated that the document had been made available three weeks prior to the Council meeting and ample time was provided during the Council meeting to hear the comments. There were no substantive comments received on the document.

Review and approval of the Draft In-Lieu Fee Instrument.

Ms. Susan Lockwood motioned to approve the ILF document pending EPA's approval. Ms. Patti Burns second the motion to approve the ILF document.

Ms. Susan Lockwood suggested a roll call vote:

- Patricia Burns yes
- Susan Lockwood yes
- Claudia Rocca yes
- David Roth yes

Proposed meeting dates for 2015.

- February 10, 2015
- April 14, 2015
- June 9, 2015
- August 11, 2015
- October 13, 2015
- December 8, 2015

Public Comment

There was a discussion regarding the increase in fees for a monetary contribution and the status of appointments to the Council. The proposal to increase the fees for a monetary contribution is currently being reviewed by the Department's legal affairs. The proposed fee increase is subject to rule making schedules and deadlines. The appointments to the Council were sent to the Governor's office and we are still awaiting information on the status.

The next meeting date has been tentatively scheduled for February 10, 2015.

ADJOURNMENT: Ms. Claudia Rocca motioned to adjourn the meeting. Mr. Dave Roth seconded the motion. Ms. Susan Lockwood, Ms. Patricia Burns, Ms. Claudia Rocca, and Mr. David Roth voted in favor of adjourning the meeting.