



Delaware Nutrient Management



Meeting Minutes of the Technology Subcommittee August 29, 2017

The Delaware Nutrient Management Commission

In attendance:

Sub-Committee Members Present: Chairman Kenny Blessing, Wayne Hudson, Jessica Inhof, Robert Palmer, Richard Sterling, Bill Vanderwende, Scott Webb

Ex-officios Present: Secretary Michael Scuse, Nutrient Management Administrator Chris Brosch

Commission Members Present:

Sub-Committee Members Absent: Laura Hill

Commission Members Absent: Mark Adkins, Jim Elliott, Brenna Goggin, Ken Horeis, Larry Jester, Bud O'Neill

Others Present: Deputy Secretary Kenny Bounds, Bob Coleman, Julia Moore, Brooke Walls, Clint Gill, Aaron Givens, Debbie Absher, Sally Kepfer, Kerin Hume, Marcia Fox, Robert Emerson, Kevin Donnelly, Joel Wharton, Sydney Rigg, Amy Shober, Terra Eby, David Baird, Tim Riley, Bruce Snow

This meeting was properly notified and posted as required by law.

Call to Order/Welcome:

Chairman Blessing called the meeting to order at 1:00 p.m., and welcomed everyone in attendance.

Approval of Minutes:

Unanimous approval of minutes dated July 7, 2017.

Discussion and Action Items:

Compliance goals and schedule for DDA inspections – Administrator Brosch

- In addition to the standard information of Agenda and Meeting Minutes from the July 7 meeting, Administrator Brosch called to attention a few other documents in the information packets:
 - The deliberative draft of the Standard Operating Procedures for Nutrient Management Compliance, supplied only to Commission members, is an FYI to share progress achieved per action proposed at the last SC meeting. The final draft will be brought to either a subsequent DNMC meeting or to this committee, depending on where we get to at this meeting.
 - The letter on DDA letterhead is a copy of the letter drafted for Kelly Shenk / EPA at the Chesapeake Bay Program Office. It includes a Deliberative Timeline of Goals and Outcomes for NM Compliance Checks. This timeline lists our goals, the outcomes, anticipated completion dates and actual completion dates.
 - It is intended that this list would drive today's discussion about our compliance goals and our schedule.

- The last item, most notably, is the ultimate goal the EPA would like to see us get to. That is the reason we are trying to close the gap between our inspection protocol hovering around 3% of random inspections of farms and get it up to a full 10%.

Discussion with Partners regarding their compliance efforts for inspection protocols – Administrator Brosch

- Referencing the first item on the 2nd side of the Timeline drafted for Kelly Shenk / EPA (Document Conservation District inspection protocol), Administrator Brosch asked for comments. None were voiced immediately, and he noted that he understood there had been discussions.
- David Baird, District Coordinator for Sussex Conservation District, introduced himself and agreed to speak on behalf of all three state Districts regarding the request made at the last meeting for the Districts to assist NM in providing data from their audits in order to help the state meet the 10% number the EPA is expecting.
 - The Delaware Association of Conservation Districts (DACD) is opposed to becoming engaged with doing follow-up audits/inspections for compliance with nutrient management plans, but are willing to work with DNMC, DDA and DNREC to find an acceptable solution.
 - They are concerned about the lack of detail in the current proposal, about how the inspections/audits are to be conducted, and for what purpose (Chesapeake Bay only or statewide effort?).
 - He reviewed how this proposal compares to the other activities of the Districts, noting that there is a big difference between them – namely the option of choice.
 - Ag BMP Inspection is based on a **voluntary** contract with NRCS and/or the Districts as Cost Share Programs and provides accountability for taxpayer dollars. It also provides documentation for DNREC to submit to the Chesapeake Bay (CB) Program.
 - The Districts have had a role in Stormwater management from the beginning of the program and it took 5-10 years for them to shake the reputation as being the bad guy on regulations. There is a fee for service, so there is a built-in mechanism to pay for that resource, but they collect on an as-needed basis.
 - Nutrient Management Plans (NMP's) are **required** under law, and not voluntary.
 - He called out two sections of the NM Law as additional rationale for their concern:
 - 2247 (j) is the only place in the law where the Districts are mentioned – stating that the “State shall make nutrient consultants available through the conservation districts to provide free nutrient management plans assistance to anyone requesting such assistance.” Currently they are doing 20-22 plans a year in Sussex, which equates to a little over 4,000 acres. It’s not a big bang.
 - 2247 (c) makes no mention of the Districts as part of this effort – “Animal Waste Plans, Nutrient Management Plans and records of implementation shall not be considered as public records under FOIA and shall not be disclosed, except, however, that they shall be made available to DDA and the Commission.” Because the Districts appear to have been specifically excluded from this language, they don’t believe they even have the right to access that information from the landowner as part of an inspection or other procedure. So how can they write these plans?
 - Probably most important is the reputation of the Districts with Cooperators. They have a 70+ year history of working with their Cooperators providing financial and technical assistance on a voluntary basis, and much of their success is based on the years of trust they have developed with each other. They are a service provider, and feel they are being asked to perform what is regulatory in nature. They are concerned what impact that would have on their relationships. And referring to the last SC meeting, he asked why the relationship of the Private Consultants is different from their relationships with their Cooperators.
 - Chairman Blessing: Knows that the Commission got where it is because of trust from the regulated community, that we have been doing the best we can by them, and we are not violating that trust.
 - Secretary Scuse: Doesn’t see trust as a major factor because of the work the Commission has done over the last few years, really since 2000.
- Secretary Scuse took over, stating “this is the situation – because we haven’t done the inspections that needed to be done, because we don’t have the manpower to do those inspections at the level that they (the EPA) want, and because we put in a number of 100% that we all know we can’t validate, the EPA gave us a number, saying we aren’t in compliance.”
 - Because of the work over the last few months, and our commitment, they reduced the number and we are now at or near it, based on our load reduction.
 - But we have to show them we are doing some sort of audits to make sure our producers are in compliance with the regulations and their NM plan.

- Thought it was made clear at the last meeting that we are not asking for detailed, drawn out audits of every single farmer the Districts are doing a compliance report for. We just need data – simple, easy, not farm specific – just, is the farmer following the plan, yes or no? Simply review this when updating a farm.
- It's agreed that the current plan is not specific at this time, and maybe that is the next step we need to take.
- But wouldn't the farmer rather have one of us (Districts or NM) visit rather than the EPA?
- DDA is asking for some simple help to keep the EPA at bay so we can give them a number they will be satisfied with and then move forward. We will have to deal with the EPA on the next Chesapeake Bay model, and we don't want to deal with both issues at the same time.
- David Baird: Still concerned, will that be all?
- Secretary Scuse: We will work with you to come up with something that the Districts are comfortable with. The EPA wants a number – we audited 100, and 80 were compliant. Maryland is at 72%, Virginia is at 76%. We are making great progress and are closer to 90 – but we cannot prove it right now.
- David Baird: Perform audits just on the plans the Districts are preparing?
- Secretary Scuse: Yes, and we will ramp up our audit procedures to get as close to the 10% as possible. But we don't think the EPA will accept the numbers from the private side.
- David Baird: Why the two sets of standards?
- Secretary Scuse: The Districts are quasi-government, but the private consultants are not. There is profit there, and they want to keep their clients. The Districts are a service provider.
- Deputy Secretary Bounds: To reiterate, we do not want to make you a regulator – just a reporter. And we don't a plan to be administrative or considered to be in default on a technicality. We need it to be something meaningful. Our intention was never to dictate to you how to do it, just to start a process to move forward and develop it together.
- Administrator Brosch: Our hope was that the Districts could do a separate but equal job on the inspection site, but we wouldn't call their process an audit. Then by the end of the year, after a lengthier standard for NM audits is signed off by the DNMC, the Districts (with DDA) would develop their own protocol, a lighter version that the Districts would own and implement without a great degree of constriction.
- David Baird: So it's a manpower issue at DDA?
- Secretary Scuse: It's the same for all of us, but we have to get there to keep the EPA at bay.
- Commissioner Palmer: What happens if they find someone that is not compliant?
- Secretary Scuse: We would hope that the Districts would explain the effect to the Chesapeake Bay and ask them to please follow the plan developed for them and be responsible.
- Deputy Secretary Bounds: We are not asking for anything different than what the Districts are already doing. Just collect that data and summarize the results of the Districts' printed reviews so we can report compliance.
- Administrator Brosch: The other thing the EPA wants us to do is document how that procedure works. What you are doing may not be working, but the knowledge transfer is still good.
- Bruce Snow (Farmer): Is unaware of any mechanism for what DDA wants in an audit. The goal is 10% - what does DDA want out of that? Putting on the amount of fertilizer I say I am? Phosphorous counts? Is there a mechanism in place to ask the Districts/Consultants to audit?
- Secretary Scuse: That is what we just committed to do! We are not looking to make this a burden to anyone. Maybe the Districts can take an additional 15-20 mins per plan? We don't want anyone spending 2-3 hours at some farm – there should be a way to check if the last plans prepared were followed.
- Deputy Secretary Bounds: That is really the intention of this – to set a plan to move forward and develop the details. This is the framework.
- Kevin Donnelly: The NM Program has FOIA exemptions under the law, but Title 3 Districts don't. Could we think about extending the DNMC protection to the Districts, in order to shield their producers?
- Administrator Brosch: 100% right. DDA deals with FOIA every week with CAFO's because they are not protected. That provision does protect Annual Reports, and if the Districts have their own Annual Report to give to this department that includes that “did it right / didn't do it right” number, there should be a way to employ that mechanism to apply to that data.
 - Will take the action to contact Legal Counsel to clarify.
- Chairman Blessing: For a long time our priority has been keeping privacy, and this has been our fight many times. Like on Annual Reporting, it's a collective number we need.
- David Baird: Does it get into the issue of who does have access to the information, because they are not mentioned in the law when it comes to evaluating records associated with their plans.
- Administrator Brosch: Not sure how they would write a plan without going over those historic records. Would assume those producers would all fid a private planner.

- Commissioner Palmer: Think it's a context in regulations – most regulations are written for the assessment of compliance with these regulations. Information can only be supplied to DDA. But if it's on a voluntary capacity, which the Districts operate under, then that information could be presented if requested and that puts them in a position where a lot of Cooperators would say no. That makes their numbers less and less.
- Secretary Scuse: We don't want to put the Districts in a difficult situation. If a producer doesn't want to provide information, then the Districts should just move on. We want to make this the very best program in the country. We don't want to jeopardize the trust and cooperation of the agricultural community.
- David Baird: Regarding the 10% goal – Sussex County is just a small fraction. Where will the rest come from?
- Secretary Scuse: DDA will need funding to get additional staff – maybe from DNREC or EPA – to dedicate 1 or 2 people just to perform audits. We're close enough to it, so we can show our compliance is much better than Maryland and Virginia.
- Deputy Secretary Bounds: Conversations indicate that the EPA is favorable to consider our plight.
- David Baird: If additional funds are found elsewhere, the Districts would prefer to let DDA handle this and keep them out of it.
- Secretary Scuse: Agreed, but we need a short term fix right now. Then later we can look at who we can let off the hook. If the state was in a better financial situation he would be going to the state assembly asking for funding for people; but right now we do need the assistance of the Districts, until we can get to the proper staffing level.
- Administrator Brosch: Virginia answered EPA questions about BMP's with the help of their Districts. They came up with a 7-question survey to determine if those audits had been followed, and it satisfied their questions about verification.
- Commissioner Webb and Sally Kepfer: What would happen if the EPA ended up on someone's Delaware farm and asked for names?
- Secretary Scuse: We would not give any names and will confirm with legal counsel to make sure it's not forwardable (Administrator Brosch's action).
- Administrator Brosch: The EPA performed an Animal Agricultural Assessment which involved a review of audits on would-be CAFO's, and all personal identification information was redacted when it was sent to the EPA. They were satisfied with that. That response should set a precedent for a similar activity if they want to see those Delaware plans that failed.
- Robert Emerson: Who audits the Private Consultants?
- Secretary Scuse: NM audits are done at random, so there is a chance of both Private Consultants and the Districts being audited by DDA more in depth.
- David Baird: Assuming this goes forward, what is an example of what the Districts will do?
- Administrator Brosch: Use Perdue, in Virginia, as an example. They asked open-ended questions about BMP's that are performed on the farm, and the degree to which the farmer is able to answer those questions helps them navigate toward Compliant or Not Compliant.
- Secretary Scuse: Administrator Brosch and his team will meet with the Districts to get to what the Districts are comfortable with, in order to get that answer.
- Commissioner Blessing: There should be a way to develop a checklist, since Delaware has the ability for all the agencies to get together to bring this thing forward. And no matter who writes the plan, all should be held to the same standards – because sooner or later, those not doing so will be questioned and wish they had complied.
- Note: We have to remember that is the Federal Government we are talking about, not the State.
- Administrator Brosch: For CAFO's, we perform the audit function in lieu of the feds, so they get to oversee it. Our NM is not in lieu of any federal requirement, so they don't have any oversight, except in the CB Model.
- David Baird: So is this proposal to audit plans statewide or just in the CB watershed?
- Administrator Brosch: Personally, would prefer not to target any specific watershed. The CB program has made it clear that numbers statewide will be applicable to the CB portion.
- Secretary Scuse: That way all producers statewide are on the same playing field.
- Administrator Brosch: Funding would get touchy, but workable. If funds were given for specific CB audits, then any other funding we have would be used for non-CB watersheds specifically.
- Administrator Brosch: To go back to the question about the penalty matrix – the intent of the review is to look at how accurate that matrix is to today's economy. Don't know how old it is, but it has only been employed once in the last few years, and it worked.
- Secretary Scuse: If we pick up a non-compliant farm, we have the tools in place to make sure they come into compliance. But that is not what we're asking the Districts to do. Just help us with the numbers.

- Administrator Brosch: Penalties apply to those who may fail and are negligent about doing the fixes that are recommended. That's when those penalties are taken into account.
- Secretary Scuse: This is what the DDA does overall, no matter which department, - work to get [Delawarean's] into compliance. After that, then the penalty phase goes into effect.
- Chairman Blessing: DDA doesn't penalize until the department has exhausted all resources to resolve the issues. There is a lot of give and take first. If someone is brought to court for non-compliance, it is truly a bad situation.
- Next Steps: Distributed day after meeting as an Action Item list:
 - Administrator Brosch to meet with the Districts to increase their comfort levels and discuss what they would be comfortable doing to help NM meet EPA requirements for Delaware (item 1), as well as to begin the process for writing an Inspection Protocol document for their use when performing their plan rewrites (item 4).
 - Meeting set for Oct 3 from 11:00-12:30 at DDA
 - Administrator Brosch to follow up with Jennifer Singh, Legal Counsel, regarding extending NM's FOIA exemption under law to the Districts, to shield their producers (2).
 - Verified that this can be done
 - Committee Members and Partners to review the draft of the NM Standard Operating Procedure provided at this meeting (3).
 - Input required to Administrator Brosch as determined within 3 weeks after meeting, with goal to have all compiled and document firmed up by 4th week.
 - Tentative meeting scheduled or 19th or 20th (date is very fluid)
 - DDA leadership is to look for additional funding sources to provide temporary manpower to perform NM audits to get us to the numbers required by the EPA.
 - Goal is to accomplish this by end of calendar year 2017

Next Meeting: Will be scheduled when needed.

Adjournment: Chairman Blessing adjourned the meeting at 2:15 p.m.

Approved,

F. K. Blessing, Technology Sub-Committee Chairman
 Delaware Nutrient Management Commission
 Jlm

Attachment: Follow-up Actions

Follow-up Actions from Technology Subcommittee Meeting (DNMC)
August 29, 2017

1. Secretary Scuse suggested that district specific working meetings should be scheduled
 - a. HOST: DDA
 - b. ATTENDEES: Districts and DDA, Marcia Fox, NRCS
 - c. PURPOSE: increase comfort levels of Districts and discuss what they would be comfortable doing to help NM meet EPA requirements for DE; also see #4
 - d. WHEN: within next 2-3 weeks
 - e. WHERE: TBD
2. Follow up with Jennifer Singh, Legal Counsel
 - a. WHO: NM
 - b. PURPOSE: NM has FOIA exemption under law, but Districts do not have that exemption. Consider options, in order to shield their producers
 - c. WHEN: ASAP
3. Review the draft NM Standard Operating Procedure
 - a. WHO: Committee and Partners
 - b. PURPOSE:
 - i. to modernize NM audit protocol and improve water quality
 - ii. to provide guideline for partners to use when preparing their own protocols
 - c. WHEN:
 - i. provide comments to NM Administrator Chris Brosch as they are determined within the next few weeks
 - ii. goal is to have them compiled and document firmed up in 4 weeks
4. Additional Partner Inspection Protocol document
 - a. WHO: Districts will be the authors
 - b. PURPOSE:
 - i. to add continuity for Districts when performing their plan rewrites
 - ii. not meant to be as strict or lengthy as NM SOP
 - c. WHEN: complete by end of calendar year 2017
5. Look for additional funding sources
 - a. WHO: DDA leadership
 - b. PURPOSE:
 - i. temporary manpower to perform NM audits so DE gets numbers to meet EPA requirements
 - ii. would not immediately exclude the need for the Districts' immediate assistance
 - c. WHEN: by end of calendar year 2017