

WETLANDS

Update

Volume 14, Number 1

August 2008

Greetings from the President:

As the VAWP rolls along in its 14th year, it's interesting to think back to what we were in the beginning and what we've become today. The VAWP started as a group of concerned wetland practitioners who wanted to see a certification program developed and implemented in Virginia for wetland professionals, and more specifically, for wetland delineators. VAWP membership consisted of a pretty even blend of practicing wetland consultants, academic/research scientists, and state and federal regulators at the time.

In the early years, VAWP devoted much of its time and energy working toward the development of a wetland delineator certification program, while offering a mix of workshops that allowed the membership to see what other members were working on. It also provided a bridge of communication between the regulatory agencies, the regulated community, and academia.

As years passed, and the delineator certification program came closer to reality, VAWP began to focus workshops more toward keeping membership informed of the rapid fire regulatory changes that were beginning to take place, while continuing to offer workshops on applied wetland science.

Somewhere along the way, the state began having budget difficulties, and travel to association meetings was drastically cut for state employees. The VAWP saw a dramatic drop in state employee membership at that time. Not long after that, similar cuts were made for federal employees, and our federal regulatory membership also dropped dramatically.

We have now largely become an association whose membership is composed primarily of working wetland consultants, along with a handful of loyal federal and state agency members who have stuck with us through the years.

I can't express enough how important it has been that these handful of regulators have stuck with us. They've continued to help us keep the lines of communication open between regulatory agencies and the regulated community, which may be one of the most important functions of today's VAWP.

As the professional delineator certification program has come to full fruition, the VAWP has continued to act as a platform for communication between the regulated community and the regulatory community. In addition, VAWP is now striving to bring members workshops that offer hands-on applied training that may help them with delineation certification efforts and wetland/stream mitigation efforts.



**Virginia Association of
Wetland Professionals**

c/o LandMark Design Group
5544 Greenwich Road, Suite 200
Virginia Beach, VA 23462

www.vawp.org

OFFICERS & COMMITTEES

President

Robin Bedenbaugh
HDR Engineering, Inc.

Vice President

Kristen Shacochis-Brown
Kerr Environmental Services

Secretary

Lesley Leonard

Treasurer

John Lowenthal
Landmark Design Group

Archivist

Ryan Winz
City of Chesapeake

COMMITTEES & CHAIRS

Members are encouraged to actively participate in any of the committees that have formed to facilitate VAWP activities.

Membership

Marsh Zellhoefer
HDR Engineering, Inc.

Newsletter

John Lain
McGuireWoods LLP

Wetland Certification

Robin Bedenbaugh

Programs & Website

Sandy Williams
Blueskies Environmental
Associates, Inc.

Nomination

David Mergen (Immediate Past President)
City of Chesapeake

(see President's Letter continued on page 2)

President's Letter (continued from page 1)

The VAWP board continues pretty much as it always has; working quietly behind the scenes to address issues most current, and those it feels are of most interest to our membership. While I have been slow in getting this president's letter written (which has caused our newsletter editor and staff to wait to get the newsletter out), the board has been diligently working to plan workshops for the year. We have already held three, and are just a few months away from the fourth workshop.

The first two workshops provided instruction on winter botany and winter delineation. They were offered by membership request, and the board is considering offering those types of workshops more often. The third workshop addressed the many regulatory changes in the past year. A number of things have happened that will affect everyone who practices in the wetlands field. More changes have taken place already this year, and more will be come before the year is over.

The May workshop was very informative regarding the status of these changes and how they will affect us. Last year, we saw the push for VDEQ assumption of Section 404 regulatory authority. That fell through for the last legislative session, but draft legislation is ready for introduction in the next session.

We have seen the changes brought about by the rulings in the Rapanos and Carabell cases – changes still evolving today, because the guidance and “clarifications” issued by Corps and EPA headquarters have seemingly caused more obfuscation than clarification. We

have seen final issuance of the Mitigation Rules from the Corps, and later this year, we expect to see some finalized form of the regional delineation manual supplement.

Internally, the VAWP board was forced to make a change that also affects you – raising membership dues. The VAWP has held annual membership dues at \$20 for the past 13 years. Unfortunately, rising costs have forced us to raise dues to \$35. We have lost about \$4,500 over the last two years (we subsidize each year's annual meeting from membership dues), because dues have failed to cover annual meeting costs. The rising costs of meetings and workshops are one reason we are not covering costs, but there may be a number of others.

One likely contributor is that many of us have not been diligent in paying dues. Dues are technically tied to the calendar year, which means they are due the first of the year. Many of our returning members (myself included) often don't remember to pay dues until the first workshop, and sometimes we don't remember at all.

A couple of months ago, I reviewed the membership list with Marsh and noticed that a substantial number of regular members are not showing as having paid in the past two or three years. And some of those members have been attending workshops, claiming the member registration rate.

This results in a loss to the VAWP, because we've not collected dues from those individuals or the higher non-

member workshop registration fees – which would have partially offset not having collected dues. We recognize there have also been cases of members paying at meetings, but somehow that information doesn't make it to the membership list keeper.

The board is trying to find a better way to get this information conveyed, but one of the best ways is for members who pay annual dues at meetings to make sure they fill out a membership renewal form that can be sent to the Membership Committee chair.

I would also like to put out a call to the membership for interest in taking over the Membership Committee chairperson position on the board. Marsh Zellhoefer has retired and will no longer act as chair. Several board members are trying to fill in while we search for a replacement, but we would like to see someone volunteer to take over this important responsibility. If you have any interest, please contact a current board member.

Thank you for your continuing support of this wonderful organization. We have many new faces, and I encourage new members to volunteer and get involved. You can call a board member, or just approach one at the next meeting, and let us know you are interested in volunteering.

Best Regards,

Robin



Marmot



Muskrat

OOPS!

In the fine tradition of the University of Florida Athletic Department, who put a picture of a crocodile instead of an alligator on the front cover of the annual Gator football media guide a few years ago, one of the pictures included in the last VAWP newsletter under the article about muskrats was apparently . . . a marmot. Sorry 'bout that!

Corps and EPA Propose New Regulations for Mitigation



On April 10, 2008, the Corps and EPA issued joint final regulations setting new standards for mitigation activities designed to promote the federal government's goal of "no net loss" of wetlands in the United States.

Avoidance and minimization of aquatic resources are still the first steps in project design. While the regulations establish consistent requirements for compensatory mitigation, mitigation banks, and in-lieu fee mitigation – to help "level the playing field" among these options, they give preference, where applicable, to mitigation banks and in-lieu fee mitigation over permittee-responsible mitigation.

The final regulations emphasize the appropriate location of mitigation sites based on watershed considerations; identification of aquatic resource impacts and appropriate mitigation using functional assessments methods where available, appropriate, and practical, as well as evaluation of the success of mitigation projects. The regulations provide a list of suggested information for an analysis of watershed conditions and needs (including consideration of trends in habitat loss, cumulative impacts of development, sensitive species, site conditions and chronic environmental problems). The final rule requires measurable standards and consistent and standardized project monitoring for all mitigation projects.

The regulations acknowledge the difficulties in inherent mitigation for some types of aquatic resources, streams

included. For these resources, mitigation may require in-kind restoration or enhancements, and avoidance and minimization are key.

The agencies have simplified the process for using existing mitigation banks, and they have improved and streamlined the process for establishing new banks. New agency review time frames for proposed banks will help make establishing new banks more predictable.

The Corps and EPA have made mitigation banks and in-lieu fee programs more consistent. Within five years of the effective date of the final regulations, the agencies propose that in-lieu fee programs meet the same standards as mitigation banks. In-lieu fee programs that do not meet the mitigation bank standards within the required time frame must stop selling credits.

The new regulations include additional public notice provisions for permit applications and mitigation banks. Public notices for permit applications will now include information about how applicants propose to avoid, minimize, and compensate for unavoidable impacts.

As with most new rules, these regulations include changes both "hoped for" and "not hoped for." However the regulations add consistency and reduce the timeframes required for mitigation bank and in-lieu fee project approval. ■

¹ Department of the Army, Corps of Engineers and U. S. Environmental Protection Agency, Compensatory Mitigation for Losses of Aquatic Resources; Final Rule 73 Fed. Reg. 19,594 (April 10, 2008). The final regulations add language to both the Corps regulations in 33 C.F.R. Parts 325 and 332, and EPA's regulations at 40 C.F.R. Part 230.

EPA Memo Questions Post-Rapanos Enforcement

Reps. James L. Oberstar and Henry Waxman sent a joint letter to EPA Administrator Stephen Johnson questioning EPA's enforcement protocols following the U.S. v. Rapanos 2006 Supreme Court case.

The letter included an internal EPA memo from Assistant Administrator Granta Nakayama to Assistant Administrator for Water Benjamin Grumbles that commented on enforcement issues since Rapanos, and the combined Corps\EPA guidance

implementing the decision. The main point of the memo was that Rapanos and its associated guidance have adversely affected EPA's Clean Water Act enforcement docket.

According to Nakayama, more than 500 Clean Water Act enforcement cases were negatively affected after the issuance of Rapanos and the subsequent guidance, including approximately 300 dropped cases, 150 cases where the enforcement priority was lowered, and 63 cases where the lack of CWA jurisdiction

based on Rapanos was used as an affirmative defense in an enforcement action.

The congressmen felt these numbers were significant, since EPA's total enforcement docket for 2007 included 1,000 cases. Thus, Rapanos arguably caused a drop of approximately one third of EPA enforcement actions. Some people will think this is good, some will think it's bad, but either way it's an interesting insight into internal EPA workings. ■

DEQ Issues Guidance on Ditches and Preservation as Compensatory Mitigation

Ditch Guidance

On May 13, 2008, DEQ issued Guidance Memorandum No. 08-2004 "Regulation of Ditches under the Virginia Water Protection Permit Program." The purpose of the guidance is to identify types of ditches that should be considered part of state waters, and therefore be subject to the state's water protection permit regulation.

The guidance states that DEQ has jurisdiction over all surface waters including wetlands, thus ditches containing surface waters are jurisdictional. However, it states that certain activities in ditches are not regulated if DEQ determines that there is a low level of risk to water quality, and to fish and wildlife resources.

Sample Ditches Considered by DEQ

- Ditches excavated in wetlands are jurisdictional. Compensation will be determined by whether the ditch contains vegetated wetlands or open water.
- Activities in ditches associated with prior converted cropland are not regulated; however, if the ditch goes through abandoned prior converted cropland, it is regulated.
- Ditches excavated in uplands containing wetlands or open water may be regulated, if the ditch is connected to another surface water (upstream or downstream), or the proposed activity will affect the upstream or downstream waters, or will affect a threatened or endangered species. However, activities in ditches excavated through uplands that receive water solely from artificial sources are not regulated. Examples include roadside ditches that solely convey runoff from the road, agricultural ditches that convey excess irrigation water, and ditches that claim water applied in greenhouses.



- Activities in channelized streams (streams that have been widened, deepened, straightened, cleared or paved, or relocated into a ditch) are likely to be regulated based on a positive answer to any of the following questions:
 1. Is this a new channelization?
 2. Has the channelized stream naturalized (developed stable pattern, dimension, and profile)?
 3. Will the activity alter the stream's physical, chemical, or biological nature?
 4. Will the stream's functions and values be diminished?
 5. Will the activity alter the physical, chemical, or biological nature of other waters?
 6. Will rare, threatened, or endangered species (i.e., mussels) be affected?
 7. Will the activity degrade the stream beyond the level proposed by the activity (i.e., cause new/increased instability due to inappropriate pattern, dimension, and/or profile)?

The following information should be reviewed to determine if a linear feature is a stream or a ditch: topographic maps, aerial photographs, soil surveys, and previous design plans (e.g., VDOT and locality drainage plans). Field observations must also be used to determine if there is a stream channel upstream and/or downstream of the linear feature, and if the feature is a channelized stream. The same information should be used in an enforcement case to determine if a feature is a stream.

Preservation of Wetlands as Compensatory Mitigation

On June 9, 2008, DEQ issued Guidance No. 08-2009 "Use of Preservation for Compensatory Mitigation in VWP Permits." The guidance is intended to provide a basis for consistent mitigation crediting of approved preservation proposals.

For preservation to be credited at all it must be utilized in conjunction with creation, restoration or mitigation bank credit purchases, and must be sufficient to achieve no net loss of wetland functions. In other words, preservation

(Continued from page 4)



can't be used as stand alone mitigation, and wetlands must first be compensated at a 1:1 ratio before preservation can be used to provide additional mitigation to bring the overall mitigation package to the overall required ratio such as 2:1 or 1.5:1.

For stream mitigation, the proposed preservation must achieve no net loss of stream function. The USM will be used to determine required credits for the stream impacts, and the number of credits obtainable through the proposed compensation practices.

Stream preservation as a sole source of mitigation should only be used for exemplary systems under documentable threat of loss of degradation. If a system is not considered "exemplary," as determined by an examination of factors set forth in the guidance, compensation must be obtained through enhancement or restoration.

The evidence also states that preservation should not receive credit, if the proposed preservation areas were avoided during project design as part of the avoidance and minimization project. Therefore, it is important to negotiate preservation credits upfront, rather than to try and achieve credit once a permit applicant has been asked to place a restrictive covenant on streams and wetlands that will not be impacted on a permittee's site. ■

Process for State Assumption of Section 404 Wetlands Permitting Program

The Clean Water Act provides states the option of assuming administration of the Section 404 permit program in certain waters within the state's jurisdiction. Should Virginia officials decide to seek authorization from EPA to administer Section 404 of the CWA, it must submit certain information to EPA for its review and approval.

To assume the Section 404 program, the following must be submitted to the EPA regional administrator:

- A letter from the governor requesting program approval.
- A complete program description.
- An attorney general's statement that the state's laws and regulations provide adequate authority to carry out the program.
- A memorandum of agreement between the EPA regional administrator and the Virginia DEQ director.
- A memorandum of agreement between the secretary of the Army acting through the chief of engineers and the Virginia DEQ director.
- Six copies of all applicable state statutes and regulations.



By statute, EPA has 120 days in which to review a state's program submission. The 120-day statutory review will begin on the date of receipt of a complete submission of all of the above items. The state and EPA may extend this statutory review period by agreement.

Within 30 days of receipt of the application submission, EPA will determine whether it is complete, and notify that state of its determination. Once the program submission is considered complete, the EPA regional administrator will publish notice of the application in the Federal Register and the largest newspapers in state, in order to attract statewide attention. This notice will allow for a public comment period of at least 45 days.

A public hearing will be held not fewer than 30 days after the notice of the hearing is published in the Federal Register. The EPA regional administrator will then prepare a summary of significant comments received and his response to these comments, and respond individually to comments received from the Army Corps of Engineers, Fish and Wildlife Service, and National Marine Fisheries Service.

Within 120 days of EPA's receipt of a complete program submission (unless an extension is agreed to by the parties), the regional administrator will approve or disapprove of the program, based on whether the proposed program fulfills the requirements of the regulations and the CWA, taking into consideration all comments received.

As of now, DEQ has not yet submitted an application, nor has it filed the legislative changes that would need to be approved during the 2009 General Assembly session in order to file an application. ■