

# WETLANDS

## Update

Volume 13, Number 1

March 2007

### Dear Members:

I want to take this opportunity to thank all of you for your confidence in my abilities to perform the duties of VAWP president during 2007. I have been a member of the VAWP since 1998, and have been working within Virginia's professional wetland community since 1997.

I believe I can bring a unique perspective to our organization because I have worked within local government as a wetland professional for the last 10 years, serving as a regulator and a member of the regulated community.

I am very excited about our upcoming constructive and educational workshops aimed at expanding your existing knowledge and providing new information on current environmental or wetland issues.

One of our purposes as a professional organization is to bring together wetland scientists, regulators, managers, design professionals, attorneys and other wetland professionals, in an independent forum that promotes discussion and exchange of ideas on wetland issues important in Virginia. I believe that we exceeded this goal during 2006, and I am working with our membership, committee chairs, and VAWP board members to further exceed these expectations in 2007.

Your board members have been working diligently to arrange our upcoming winter and spring workshops, and topics such as "Watershed Management," "Wetlands/Streams Functional Assessment," and "Wetland Soils" are being discussed and planned.

In addition to planning future educational workshops, board members and committee chairs are actively tracking and participating in ongoing regulatory and legislative initiatives dealing with the VADEQ's Section 404 assumption, improvement of the VWPP's "status quo," resolution of VADEQ/USACOE "friction points," revisions to the USACOE's SPGP, and ongoing adoption of the SAAM/SICAM stream assessment methodologies.

We are using our e-mail distribution list and/or the VAWP newsletter, to make you aware of pertinent discussions and important updates surrounding these federal and state initiatives.

Certification Committee Chair Robin Bedenbaugh has been working to communicate concerns from the VAWP to DPOR on the current status of the certification program. Specifically, a letter has been sent to DPOR expressing support for the revised language within § 54.1-2206.2 subsection A, Parts 1 and 2, that was submitted to the General Assembly May 25, 2006, as House Bill No. 5013.

Furthermore, the VAWP board has requested that DPOR and the VPSS&WP board revise the statutory language again, as well as revise similar language in its final regulations (18 VAC 145-30-40 Qualification for Examination) that would effectively remove the requirement for supervision by a certified wetland delineator.



### Virginia Association of Wetland Professionals

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

[www.vawp.org](http://www.vawp.org)

#### OFFICERS AND COMMITTEES

##### President

David Mergen  
City of Chesapeake

##### Vice President

Tim Davis  
VHB

##### Secretary

Lesley Leonard

##### Treasurer & Nomination

John Lowenthal  
Landmark Design Group

#### 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.

*Continued from page 1*

I thank Robin for all his hard work and dedication to this initiative to ensure that the intent of the Virginia Certified Wetland Delineator program remains realistic and effective for Virginia's wetland professionals.

In closing, I thank the VAWP again for this opportunity to be of service to the organization, and I encourage all of you to get involved with our ongoing and future goals and initiatives while we continue to improve discussion and transmission of ideas on Virginia's important wetland issues. If you have any questions, suggestions, ideas or concerns for the betterment of the organization, please feel free to contact me at (757) 382-6307 or [dmergen@cityofchesapeake.net](mailto:dmergen@cityofchesapeake.net).

David E. Mergen  
President

## UPCOMING CONFERENCES



**VAWP Winter Workshop:  
Unified Stream Methodology Training**  
March 14, 2007  
Embassy Suites Hotel  
Hampton, VA  
Register: [www.vawp.org](http://www.vawp.org)

**National Mitigation Banking  
Association Annual Conference**  
April 10-13, 2007  
St. Louis, MO  
Register: [www.mitigationbanking.org](http://www.mitigationbanking.org)

**Environment Virginia 2007**  
April 10-12, 2007  
Lexington, VA  
Register: [www.environmentva.org](http://www.environmentva.org)

## Unified Stream Methodology for Use in Virginia

The Norfolk District Army Corps of Engineers and the Virginia DEQ released the Unified Stream Methodology (USM) in final draft on Jan. 18, 2007, and it was implemented Feb. 1, 2007. VAWP will host a conference on March 14 in Hampton to provide training on this new methodology.

The USM resulted from a collaborative effort between the Corps and DEQ to establish a unified and consistent method for use in Virginia to assess proposed stream impacts and determine stream mitigation requirements. It replaces both the Corps' Stream Attribute Assessment Methodology (SAAM), and DEQ's Stream Impact and Compensation Assessment Methodology (SICAM).

Building on both previous methods and lessons learned, the USM was implemented in accordance with the following guidelines:

- For projects already authorized by the Corps and DEQ, if authorized construction in streams has been initiated (or completed), those projects remain authorized and the permittees remain subject to all of the terms and conditions of their permits. If authorized construction in streams has not been initiated, permittees may choose whether to proceed subject to the terms and conditions (and mitigation requirements) of their permits, or they may request permit modifications to address their mitigation requirements under the USM.
- For all other projects under review by one or both agencies before Jan. 31, 2007, applicants can use the USM or the more restrictive of the SAAM or SICAM.
- All permit applications for stream work received by both agencies after Jan. 31, 2007, will be reviewed using the USM.
- Any mitigation bank prospectus submitted after Jan. 31, 2007, will be reviewed using the USM. All other banks that have been approved have the option of reassessing their stream credits using USM, upon coordination and approval by the Mitigation Bank Review Team.
- All trust fund estimates made after Jan. 31, 2007, will be based on a review using the USM.
- The Corps and DEQ will accept comments on the USM until March 19. After that date, DEQ and the Corps will determine if any revisions should be made to the USM.





## Regulatory Update: Proposed DEQ Staff Increases

DEQ has announced that Gov. Kaine has included six full-time employee positions in the 2007 budget, as well as funding to improve service delivery for DEQ's VWP permitting program. DEQ says the new positions are not tied to or based upon the assumption of the Section 404 program.

The positions will be used to meet workload needs in DEQ's Tidewater and Northern Regional Offices; provide a dedicated enforcement position to focus on wetlands enforcement cases, priorities and policies; provide coordination services for historic resources and threatened and endangered species impacts under the State Programmatic General Permit; and improve the guidance, training and coordination available for DEQ staff and the public.

### HB 2539

In 2006, DEQ worked with stakeholders to reach a consensus on regulatory changes that addressed the permitting concerns leading to the introduction of HB 1185 last year dealing with agricultural water use. This group agreed that the current VWP statute was difficult to understand, and unclear in some respects.

DEQ has worked with the Virginia Farm Bureau, Chesapeake Bay Foundation, Nature Conservancy, Virginia Agribusiness Council, and other stakeholders to draft legislation that restructures the VWP statute into a new article containing several sections that more clearly spell out when permits are required for water withdrawals, as well as what conditions and factors are considered for different types of impacts. The legislation was passed during the 2007 General Assembly session and is expected to be signed by the governor.

### SPGP Amendments

DEQ intends to take a more active role in permit compliance through increased inspections and attention to permit conditions. The agency anticipates reporting more projects for enforcement action, revising the penalty policy, and issuing substantially higher penalties. Also, action will be taken to ensure that temporary disturbances are restored as required.

The Virginia DEQ will enhance its permit compliance program under a three-year EPA grant, and it has set the following goals and initiatives:

#### Goals

- Improve tracking of issued permits
- Provide more efficient mitigation for impacts to jurisdiction areas to ensure "no net loss" of aquatic functions and values
- Provide regular and more accurate reporting of status and trends of wetlands and streams in Virginia
- Identify and regulate more un-permitted activities through enforcement actions
- Gather data to improve the Virginia Water Protection permitting process

#### Initiatives

- Add more staff and training for compliance inspections
- Develop a compliance database to track projects
- Report auditing
- Coordinate public education through meetings, manuals and guidance
- Aerial and/or Geographical Information System (GIS) surveillance of permitted and un-permitted activities
- More frequent and scheduled site inspections, and reporting to evaluate permitted and avoided wetlands and streams, onsite buffers, and indirect fill in state waters

## Improving Permitting Processes

The Department of Environmental Quality and the Norfolk District Army Corps of Engineers have been evaluating options for improving the certainty, timeliness and consistency of state and federal wetlands permitting processes.

One option Virginia has been evaluating with stakeholders, U.S. EPA, and the Norfolk District, is to evaluate state assumption of the 404 permitting program. At this time, no decision has been made on whether or not Virginia should pursue program assumption.

The agencies have also been working on other options to improve implementation of current programs. As part of these efforts, the Norfolk District recently published DEQ's proposed modifications to the State Programmatic General Permit (SPGP).

Under the current SPGP, projects that fit within the thresholds are screened by the Norfolk District for potential impact to historic resources, or threatened or endangered species. If there are such impacts, the district must coordinate with the Virginia Department of Historic Resources or the U.S. Fish and Wildlife Service, respectively, to satisfy federal law and determine if the applicant would need permits from the Norfolk District in addition to DEQ.

Under the proposed changes, and upon eventual completion of approved programmatic agreements with VDHR and USFWS, DEQ would conduct this screening. Another change would be the elimination of subcategories within the SPGP, such that DEQ would be the agency responsible for review of project impacts and avoidance, minimization and compensation.

Since the majority of projects do not involve impacts to historic resources or to threatened and endangered species, the Norfolk District would not be involved except for the initial wetland delineation and confirmation. DEQ is in the process of hiring a historic and cultural resources expert to handle the evaluations of impacts to historic resources.

There will be no change to the type or size of projects eligible for the SPGP.

The Norfolk District suspended use of Corps nationwide permits 14 and 39 in non-tidal waters and wetlands when the SPGP was originally issued. If the SPGP modification is approved as proposed, these two NWP's would remain suspended and, due to anticipated changes in the structure of the Corps NWP's, NWP 29 would also likely be suspended. The other nationwides are not affected by these proposed changes.

The deadline for submitting comments was Feb. 15, 2007. For the full text of the proposal and additional information, visit [www.nao.usace.army.mil/technical%20services/Regulatory%20branch/PN/SPGPChanges/SPGP\\_Mod\\_PN\\_2006.pdf](http://www.nao.usace.army.mil/technical%20services/Regulatory%20branch/PN/SPGPChanges/SPGP_Mod_PN_2006.pdf)



---

“Under the current SPGP, projects that fit within the thresholds are screened by the Norfolk District for potential impact to historic resources, or threatened or endangered species. If there are such impacts, the district must coordinate with the Virginia Department of Historic Resources or the U.S. Fish and Wildlife Service, respectively, to satisfy federal law and determine if the applicant would need permits from the Norfolk District in addition to DEQ.”

---

## Tulloch (II) Rule Invalidated

The definition of “discharge of dredged material” in the world of wetland regulation has been hotly debated, and often changed. At the end of January, the U.S. District Court for the District of Columbia struck down the Corps and EPA’s most recent attempt to draft a definition that falls within requirements of the Clean Water Act.

From 1986—1993, the Corps of Engineers defined the discharge of dredge material as “any addition of dredge material into waters of the United States,” but excluded “de minimis incidental soil movement occurring during normal dredging operations.”



In 1993, the Corps deleted the de minimis exemption as a part of a settlement in *North Carolina Wildlife Federation v. Tulloch*, and changed the definition to be “any addition of dredged material into, including redeposit of dredge material within, the waters of the United States.” The revised rule was widely known as the Tulloch Rule and prevented, or severely hampered, the practice of ditching in wetlands for purposes of changing the wetland hydrology of an area.

Various groups challenged the Tulloch Rule, and the Court of Appeals for the D.C. Circuit invalidated it in 1998. In 2000, the Corps and EPA proposed a new rule (the Tulloch II Rule) in which the discharge of dredged material was presumed to result from any type of mechanical

dredging or excavation. The presumption could be rebutted if it could be shown that the discharge was only of incidental fallback.

The National Association of Home Builders challenged this second definition and in *National Association of Home Builders v. Corps of Engineers*, decided on Jan. 30, 2007, the court again invalidated the agencies’ definition. The court noted that the agencies did exactly what they were warned not to do in that the Tulloch II Rule was “inconsistent with an objective and good faith reading” of the prior decisions in the case.

While the amount of fallback was immaterial (the court held that the agencies should define “incidental fallback” in terms of (1) the time that the material was held before it was dropped to the earth, and (2) the distance between where the material was picked up and where it was dropped.

The Corps and EPA now have three options: (1) appealing the District Court’s decision; (2) rewriting the rule a third time; or (3) asking Congress to amend Section 404 of the Clean Water Act to correct the problem. In the meantime, the invalidation of the Tulloch II Rule does not provide a blanket approval to excavate without regulation.

Some activities still fall within the purview of Section 404 of the Clean Water Act (e.g., side casting, etc.). In addition, the Virginia Water Protection permitting program expressly regulates excavation activities, and property owners may not excavate in a wetland without obtaining a Virginia Water Protection permit.

<sup>1</sup> Final Rule of Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206, 41, 232 (Nov. 13 1986).

<sup>2</sup> Civ. No. C90-713-CIV-5-BO (E.D.N.C. 1006).

<sup>3</sup> Clean Water Act Regulatory Programs, 58 Fed. Reg. 45,008, 45,035 (Aug. 25, 1993).

<sup>4</sup> 2007 WL 259944 (D.C. Jan. 30, 2007).

<sup>5</sup> Id. at \*3.

The Wetlands Update is a periodic publication of the Virginia Association of Wetland Professionals and is delivered free to VAWP members. To join (or to correct your address), send your name, address, e-mail address and daytime telephone number to: **VAWP, P.O. Box 455, Gloucester VA 23062.**