

**MEMORANDUM OF UNDERSTANDING BETWEEN THE VIRGINIA
DEPARTMENT OF ENVIRONMENTAL QUALITY AND THE
NORFOLK DISTRICT, CORPS OF ENGINEERS CONCERNING
OPERATION OF THE VIRGINIA NONTIDAL WETLANDS
PROGRAM**

In 2000, the Commonwealth of Virginia enacted legislation to establish a State Nontidal Wetlands Program. This program requires project proponents to obtain permits from the State Water Control Board (Board) for excavation in nontidal wetlands, and after October 1, 2001, for new activities wetlands that drain or otherwise significantly alter or degrade existing wetland acreage or function, for filling or dumping, and or permanent flooding or impounding. The legislation requires the Board to seek by July 1, 2002 from the U.S. Army Corps of Engineers (Corps) the issuance of a Section 404 of Clean Water Act State Programmatic General Permit (SPGP).

The Department of Environmental Quality (DEQ)¹ and Corps wetland managers and staff have met several times to discuss ways to minimize duplication and explore division of labor opportunities. As a result of these meetings, and pursuant to each agency's statutory mandates and regulatory requirements, the following agreements were reached:

1. Delineation of wetlands & waters: In accordance with Virginia Code Section 62.1-44.15:5 D5, the Board shall utilize wetland delineations confirmed by the Corps pursuant to the Corps' 1987 Wetland Delineation Manual and any subsequently issued guidance to determine wetland boundaries.

Corps confirmed wetland delineations will show the location of areas (including isolated wetlands) that meet all 3 wetland criteria as specified in the Corps' 1987 Wetland Delineation Manual and any subsequently issued guidance pertaining to wetland delineations.

¹ The DEQ serves as staff to the State Water Control Board.

The DEQ will also accept and use the Corps' delineations for all waters of the U.S., other than wetlands including isolated waters. A statement will be included in all Corps' jurisdictional determinations and wetland delineation confirmations that any proposed work in waters, including wetland areas, may require a permit from DEQ, even if these areas are not considered jurisdictional by the Corps (i.e. isolated waters).

Requests submitted to DEQ for delineation confirmation shall be referred to the Corps for action.

Project proponents, when submitting an application, will send a copy of the Corps' confirmed delineation to the DEQ and the locality.

2. Preapplication Consultations: The Corps will continue to serve as the lead on preapplication consultations, which are often conducted at the same time as field confirmation of delineations. However, the Corps will advise the DEQ of the proposed projects generally meeting the following criteria and invite them to participate in preapplication consultation (via email to the DEQ Virginia Water Protection Permit (VWPP) Manager in each Regional Office):

- a. Projects causing the loss of more than 1 acre of non-tidal wetlands or open waters or more than 2,000 linear feet of steam bed;
- b. Water withdrawal projects;
- c. Projects involving preparation of an Environmental Impact Statement, and
- d. Projects of special interest or circumstances (e.g., large-scale dredging and filling associated with port development, re-channelization or dredging of water ways for non-navigational purposes and regional stormwater management facilities).

These criteria are only guidelines. Any project that either the Corps or DEQ believes warrants a preapplication consultation should be considered as eligible for coordination between the two agencies.

The Corps' Preapplication Request Form will be automated and used by both the Corps and DEQ to record requests for preapplication consultations. If DEQ receives a request for a preapplication consultation, they will complete the form and email it to Bruce Williams at bruce.f.williams@usace.army.mil for assignment in the District Office or to the appropriate Corps field office.

In correspondence to an applicant/project proponent resulting from a preapplication consultation, the Corps will provide the following information:

- a) A confirmation of a wetland/waters delineation;
- b) Preliminary federal and state permitting information (i.e. the proposed project may qualify for certain Regional, or General permits, or may require an individual permit; a DEQ permit is needed; the activity is covered by a NWP that has been certified by DEQ, etc.);
- c) Identify measures that could be taken to avoid or minimize impacts to waters and wetlands and to compensate for unavoidable losses.
- d) A statement to the effect that if the project proponent chooses to seek authorization for this project, it is strongly recommended that a copy of this letter be provided to the permitting agency(ies) in support of the application.

On request, the Corps will forward copies of entire or relevant portions of preapplication project files to DEQ in support of specific applications for state authorization to conduct work in waters or wetlands. Forwarded information may include but is not limited to confirmed delineations, maps, photographs, etc.

3. Use of the Virginia Wetlands Restoration Trust Fund:

The use of in-lieu fee programs is allowed by both the Corps and DEQ to satisfy compensatory mitigation requirements under certain circumstances. At present, the only such fund in Virginia is the Virginia Wetland Restoration Trust Fund (Fund). The Corps has a Memorandum of Understanding (MOU) with the Virginia Chapter of The Nature Conservancy establishing the Fund. Instead of constructing their own compensatory mitigation projects, applicants can pay money into the Fund as mitigation required for wetland, stream, or waters impacts. The Fund then uses the money to accomplish mitigation projects. All expenditures of Fund monies by The

Nature Conservancy require approval from the Corps per the MOU. The goal of the Fund is to (a) establish an additional mechanism to compensate for impacts to wetlands and/or waters in Virginia; (b) provide greater flexibility to permit applicants; and (c) restore, enhance, and preserve as many acres of wetlands and linear feet of streams as possible with the funds available.

a. **In Lieu Fee Program Operation:** The mitigation fee amount that applicants pay into the Fund is determined by the Corps and documented with a mitigation cost estimate sheet.

b. **Procedures:** The Corps will continue to provide these cost estimate sheets to the applicant and DEQ and DEQ agrees to use the estimates generated by the Corps. DEQ agrees to allow applicants the option of using the Fund under general permit WP1 to satisfy their mitigation requirements. For other general permits and individual water protection permits, the Fund is only acceptable as compensatory mitigation once the applicant has demonstrated that on-site restoration or creation is not practicable or ecologically preferable. Cost estimates generated by the Corps are generally priced some level above the lowest priced mitigation bank in the area of impacts.

c. **Fee Estimates:** To obtain a mitigation cost estimate, DEQ staff will send an email to the Corps Fund Manager gregory.d.culpepper@nao02.usace.army.mil with the following information: DEQ Project Manager's name, Project Number, Applicant or Project name, locality of project, primary and major waterway of project, HUC code, type and acreage or square footage of impacts, and location where mitigation is preferred. Note that the fee estimate cannot be finalized until later in the permit review process, because the impacts may be changed as part of that process. Therefore, DEQ agrees to consider an application complete when DEQ receives notification from the Corps Fund Manager that the Fund will accept a donation for a particular project, along with a general statement of how the amount of the contribution will be calculated. The actual cost of the contribution will be submitted to DEQ during the permit review process but prior to issuance of a permit (45 days for a General Permit and 120 days for an individual permit).

d. **In Lieu Fee/Applicant Fee Coordination:** DEQ will not state fee amounts to applicants until an estimate sheet has been received from the Corps. DEQ will not deviate from the estimates provided by the Corps unless it has re-coordinated with the Corps and received a revised estimate sheet. When conditioning its permits for use of in-lieu fee, DEQ will use wording provided by the Corps and will provide applicants with a copy of the estimate sheet.

e. **Tracking of Contributions:** For any permit which DEQ issues alone, DEQ will notify the Corps each time a permit is conditioned upon the use of the Fund by sending an email to the Corps Fund Manager at the email address shown in section 3.c above. The Corps will notify DEQ by email when funds are received.

f. **DEQ Role:** The Corps will fully coordinate all proposed Fund mitigation projects with the DEQ VWPP Program Manager and fully consider all DEQ comments regarding each proposal. The Corps will provide DEQ with any requested information for its annual reports to the Board. DEQ may provide general comments to the Corps regarding fund operation in addition to their comments on specific mitigation proposals. The Corps will email a mitigation proposal for a pending Fund site to the VWPP Program who will respond within 10 days with comments. The Corps will coordinate early in the site review process when time and site specifics allow. The Corps retains final decision authority for expenditures from the Fund. State conservation agencies such as the Virginia Department of Game and Inland Fisheries (DGIF) or the Virginia Department of Conservation and Recreation (DCR) are encouraged to submit potential mitigation sites for expenditure of Trust Fund monies and/or to partner with the Fund on mitigation projects.

g. **Other In-Lieu Fee Programs:** In the future, should another in-lieu fee program be proposed, the Corps and DEQ will coordinate its review and use.

4. Enforcement: DEQ and Corps staff will use Initial Complaint Report Forms to record reported or discovered unauthorized activities. If DEQ discovers or is advised of an unauthorized activity, it will complete the form and email it to either Bruce Williams in the District Office at

bruce.f.williams@usace.army.mil or to the appropriate Corps field office.

The Corps will assign the project to a project manager who will determine the extent of impacts to adjacent and isolated nontidal waters and wetlands.

With respect to alleged unauthorized activities, if the scope is limited to the filling of isolated waters or wetlands or excavation of nontidal wetlands, the report will be sent to DEQ and they will investigate it. If the alleged unauthorized activities involve excavation in nontidal wetlands and sidestepping of the excavated material into waters or nontidal wetlands, both DEQ and the Corps will have the option to pursue the appropriate course of action and will coordinate. The Corps will provide DEQ with a copy of all site investigation reports, cease and desist letters and DEQ will provide the Corps with a copy of any correspondence or directives they issue.

5. Compliance: DEQ will take the lead on conducting compliance reviews for projects authorized under the SPGP (e.g., residential, commercial, and institutional developments causing the loss of less than ½ acre of nontidal wetlands or no more than 300 linear feet of stream bed and transportation projects causing the loss of less than 1/3 acre of waters or wetlands).

For those projects where both DEQ and the Corps are involved in the review, DEQ and the Corps will develop a process to perform compliance reviews and insure that duplication is avoided. The attached Permit Compliance Review Form will be used to insure that DEQ and the Corps are consistently capturing the proper information.

6. DEQ/Corps Recommendations for Mitigation Performance

Standards: The Corps and the DEQ have worked together to develop a standard set of mitigation performance standards. This will improve the quality of the science being applied in the permit review and eliminate the need for applicants to adhere to different mitigation requirements.

7. Training: The Corps and DEQ will work together to identify, promote, and implement opportunities for joint training. Such training should include educating their respective staffs on relevant aspects of the other agency's programs including both technical and procedural issues.

This will help improve communication between the two agencies, reduce duplication of effort, and improve regulatory efficiency.

8. Dispute Resolution Procedures: Lines of communication between the Corps and DEQ must remain open. Corps and DEQ will attempt to resolve outstanding differences at the staff level. If staff efforts are unsuccessful, then the immediate supervisors should attempt to find a resolution. If this is not successful, then the Corps' Regulatory Branch Chief and DEQ's Manager of the Water Protection Permit Program should attempt to find a resolution.

9. Not a Binding Contract: The purpose of this Memorandum of Understanding is to foster coordination between the Corps and DEQ. This Memorandum of Understanding is not a binding contract and its provisions shall neither be enforceable against any signatory party nor bestow any benefit upon any other persons or entities and shall give rise to no legal right in such other persons or entities.

Robert G. Burnley
Director
Virginia Department
Of Environmental
Quality

Date

David L. Hansen
Colonel, U. S. Army
District Engineer

Date

