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New Regulations for Nontidal Wetlands

BY ROY HOAGLAND AND PATRICK O'HARE

During the 2000 session of the Virginia General Assembly, legislators in both the House of Delegates and the Senate engaged in vigorous debate over two companion bills patroned by Del. L. Preston Bryant (R-Lynchburg) and Sen. Mary Margaret Whipple (D-Arlington). These bills proposed to substantially expand the Virginia Water Protection Permit (VWPP) program's jurisdiction over impacts to nontidal wetlands. With ongoing litigation challenging the U.S. Army Corps of Engineers' Clean Water Act (Section 404) jurisdiction over nontidal wetlands, and the Corps' recent loss of jurisdiction over the wetland excavation practice known as "Tulloch ditching," the General Assembly, after much negotiation and compromise, adopted legislation which provided the State Water Control Board (the Board) and the Department of Environmental Quality (DEQ) with new and expansive authority to regulate nontidal wetland impacts.

The final legislation, now codified in Sections 62.1-44.3, 62.1-44.5, 62.1-44.15 (5a), 62.1-44.15(16), 62.1-44.15:5, and 62.1-44.29, granted to the Board and DEQ regulatory authority over all nontidal wetlands in the Commonwealth. It did this by specifically including "wetlands" in the definition of "state waters" (Section 62.1-44.3). In addition, the legislation established a standard of "no net loss of existing wetland acreage and functions" for the regulatory programs to be adopted by the Board and DEQ pursuant to the legislation.

Section 62.1-44.15:5.D of the VWPP statute, as amended by the new legislation, contains the most substantive changes to the VWPP program. The overarching concept framing this section is the requirement that if one is to impact wetland acreage or function, one must first obtain a permit to do so. Of particular importance in the section are the following provisions:

1) the imposition of an avoidance and minimization requirement for any permitted impact;

2) the creation of a no "significant impairment of state waters or fish and wildlife resources" standard for any permitted impact;

3) a requirement that compensation achieve a "no net loss of existing wetland acreage and function" for any permitted impact;

4) a requirement for consistency with, and deference to, any wetland boundary delineation approved by the Corps.

The section also establishes fixed time frames for permit decisions by the Board and DEQ and a mandate for issuance of streamlined general permits for several specified wetland impacts.

Other significant provisions include:

1) exemptions for "normal agricultural" and "normal silvicultural" activities that parallel exemptions under the federal wetlands permitting program as they existed as of January 1, 1997;

2) an exemption for "normal residential" lawn, gardening, and yard maintenance activities;

3) an authorization for the Board "to waive the requirement for a general permit, or deem an activity in compliance with a general permit, when it determines that an isolated wetland is of minimal ecological value."

In response to the adoption of the legislation, the Board and DEQ took several actions. The first action was to require, as of July 1, 2000, a permit for "Tulloch ditching" activities as well as any other excavation activities. The law defines "excavation" as "ditching, dredging, or mechanized movement of earth, soil or rock." The impact of this action was to not only require a permit for impacts due to excavation, but to also require compensatory mitigation to assure a no net loss of wetland acreage and functions for those impacts that are permitted.

The second action taken by the Board and DEQ was to amend the existing VWPP program regulations and promulgate new regulations that, together, require a VWPP for other impacts to nontidal wetlands. Consistent with the statute as amended by

the 2001 General Assembly, these regulations apply to impacts from linear transportation projects of the Virginia Department of Transportation as of August 1, 2001, and all other impacts as of October 1, 2001.

The regulatory changes can be found at 9 VAC 25-210-10 *et seq.*, 9 VAC 25-660-10 *et seq.*, 9 VAC 25-670-10 *et seq.*, 9 VAC 25-680-10 *et seq.*, and 9 VAC 25-690-10 *et seq.*

Some of the key elements of the regulations are as follows:

There is a requirement for reporting of all impacts. When an impact is greater than 1/10 of an acre, there is a requirement for compensatory mitigation sufficient to achieve a "no net loss" of the impacted wetland acreage and function. The form of compensatory mitigation may vary from the purchase of credits from a mitigation bank to on-site wetland construction or restoration.

The regulations contain a series of definitions. Key definitions include:

"Isolated wetland of minimal ecological value." This term is defined as those wetlands that lack a surface water connection, are less than 1/10 of an acre in size, are not located in a 100-year floodplain, are not designated by the Virginia Natural Heritage Program as a rare or state significant natural community, are not forested and do not provide habitat for a rare or endangered species. There is no permit requirement for impacts to an isolated wetland of minimal ecological value.

"Normal residential gardening, lawn and landscape maintenance." This definition deals with noncommercial residential activities only. The language defines such activities as "ongoing noncommercial residential activities conducted by or on behalf of an individual occupant." The definition provides a list of examples, such as mowing and mulching, and notes that "other appurtenant noncommercial activities, provided they do not result in a the conversion of a wetland to an upland or to

a different type of wetland, may be included." Normal residential gardening, lawn and landscape maintenance activities are exempted from permitting requirements.

"Perennial stream." The regulations establish a rebuttable presumption that a surface water body with a drainage area of 320 acres or more is a perennial (free-flowing year round) stream. Actual field data can be used to rebut this presumption.

"Single and complete project." This term, defined as "the total project proposed or accomplished by one person and which has independent utility," focuses on preventing the abuse of use of general permits through the process known as "stacking."

There are four general permits. The *first*, unlike the other three, is not activity specific, but covers any nontidal wetland impact up to 1/2 acre (including 125 linear feet of perennial stream impact and 1500 feet of nonperennial stream impact), regardless of the activity causing the impact. In an attempt to provide a steamlined process for these smaller impacts, the permit limits compensation to off-site compensation at a 2:1 ratio via use of a mitigation bank or an in-lieu fee fund.

The *second* general permit covers nontidal wetland impacts of up to one acre (including up to 500 linear feet of perennial stream and up to 1500 feet of nonperennial stream) that occur as a result of utility construction activities. It is important to note that the permit covers permanent impacts, only; there is no reporting or permitting requirement for temporary impacts, such as those caused by maintenance activities. Compensation ratios for acreage and function impacts are based on wetland type: 2:1 for impacts to forested wetlands, 1.5:1 for impacts to scrub/shrub wetlands, and 1:1 for impacts to emergent wetlands.

There is a *third* general permit for nontidal wetland impacts of up to two acres (including 500 linear feet of perennial stream and 1500 feet of nonperennial stream) that occur as a result of linear transportation activities. Compensation ratios for acreage and function impacts are the same as those under the utility general permit—they are based on wetland type: 2:1 for impacts to forested wetlands, 1.5:1 for impacts to scrub/shrub wetlands, and 1:1 for impacts to emergent wetlands.

The *fourth* general permit is for nontidal wetland impacts of up to two acres (including 500 linear feet of perennial

stream and 1500 feet of nonperennial stream) that occur as a result of development activities, such as residential, commercial, institutional, or recreational construction. Again, the compensatory mitigation requirements are the same as the utility and linear transportation general permits.

An individual permit governs any impact which exceeds the acreage provisions of a general permit. While an impact governed by a general permit is to be approved within 45 days of submission of a complete preconstruction application, an impact governed by an individual permit is subject to a longer approval process (120 days), and may include a public hearing.

The development of the new nontidal wetlands program does not end with the promulgation of these regulations. A key provision in the adopted legislation, which is reflected in the regulations, is the requirement that the Board and DEQ seek a State Programmatic General Permit (SPGP) from the Corps. An SPGP is a federally issued permit through which the Corps delegates to the Commonwealth primary responsibility for compliance with portions of the Clean Water Act's Section 404 wetland permitting requirements. The precise provisions of an SPGP are not predetermined but arise out of the Corps' assessment of a state's nontidal wetlands protection program. A primary goal in issuing an SPGP is to reduce duplication between state and federal permitting programs. Virginia's new VWPP

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regulations acknowledge the existing overlap between the state and federal wetlands programs and contain the following provision:

"Coverage under a nationwide or regional permit promulgated by the U.S. Army Corps of Engineers (USACE), and for which the board has issued § 401 certification existing as of the effective date of this chapter, shall constitute coverage under this VWP general permit unless a state programmatic general permit is approved for the covered activity."

Thus, in many instances, existing federal nationwide or regional permits will currently govern wetland impacts. The legislation requires the Board to seek a SPGP promptly, but no later than July 1, 2002. ♦