

February 15, 2007

Ms. Lesley Leonard, Regulatory Office  
US Army Corps of Engineers  
803 Front Street  
Norfolk, Virginia 23501-1096

Dear Ms. Leonard:

This letter is in reference to Norfolk District's Public Notices (December 15, 2006; and January 26, 2007) for the expansion of the State Programmatic General Permit for non-tidal wetland impacts above one acre and stream impacts above 2,000 linear feet. DEQ would also get authority for Historic Resource and Endangered Species coordination. I write this letter as a concerned citizen of Virginia and the United States and do not represent any governmental entity in this communication. For the reasons outlined below, I believe approval of this SPGP is contrary to the public interest, contrary to the interest of Virginia's aquatic resources, and contrary to the interest of Norfolk District.

Information exists in the public domain that the proposed SPGP was the subject of meetings between Norfolk District and DEQ prior to the issuance of the subject public notices and that results and conclusions regarding changes to the SPGP were negotiated and determined prior to getting public input. The public record and final decision documents should clearly state the time, place, and attendees at these meetings. If a conclusion or determination was made prior to receipt of public comments, I believe such would be a violation of the Administrative Procedure Act. If in fact a determination was made prior to the comment period, the decision would be tainted, notice of such should be granted to the public, and the process should be initiated again with different from the Corps involved in the decision process.

A DEQ clarification statement in mid February to the Virginia Association of Wetland Professionals indicates that DEQ has already determined the following: **"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 NWPs would remain suspended and (due to anticipated changes in the structure of the Corps NWPs) NWP 29 would also likely be suspended."** How would DEQ know this? It is not in the public notice and apparently resulted from some manner of negotiation prior to public notification of the proposal. If a conclusion or determination was made by the Corps and DEQ prior to receipt of public comments, I believe such would be a violation of the Administrative Procedure Act. If in fact a determination was made prior to the comment period, the decision would be tainted, notice of such should be granted to the public, and the process should be initiated again with different parties involved in the decision process.

#### **SPECIFIC COMMENTS:**

**1. To be a valid general permit, SPGP must be limited to activities of minimal environmental impact and it must comply with the 404 B (1) guidelines. The current and proposed SPGP do not and will not meet these standards.**

A. DEQ has no field staff, no field experience, and no vehicle fleet to support the field work required for avoidance and minimization. DEQ staff is too busy to accomplish field work. I believe the statistics DEQ has provided to the Corps show that a reduction in impacts took place, but DEQ likely did not negotiate or obtain the reduction. They merely record the initial requested impact and show the reduced impact after the Corps' staff met on site to reduce those impacts. It is not possible that DEQ

obtained the impact reductions when they rarely if ever visit the project sites. Therefore, the DEQ figures provided to the Corps cannot be relied upon for making a decision on SPGP. Accordingly, no evidence exists that wetland impacts will not increase once the Corps is removed from the process. Increasing the impacts by multiple permit actions (without avoidance) all over the state fails to meet the "minimal" standard required in this proposal. A clear inability on the part of DEQ to avoid and minimize impacts, regardless of DEQ's public statements, fails the 404 B 1 guideline test and the SPGP cannot legally be issued. The Corps in its documentation must demonstrate the impossible, that DEQ staff will be able to visit permit sites to meet these two standards. Without a vehicle fleet, no prima facie case for meeting the standard can be made and therefore consideration of approval of this proposal can only be an absurdity. Compounding the issue, with no field staff, and with no field experience, making any case for approval gets more difficult.

**2. The SPGP can be issued only if the State agency has a regulatory program in place that provides a similar level of review as the Corps program.** With the current status of DEQ, this cannot be legitimately contemplated.

A. DEQ's primary occupation is the paperwork involved in issuing permits. They have little or no resources to accomplish other tasks. This paperwork is a minor part of the program in place at the Corps. The Corps accomplishes delineations, pre-applications, enforcement, mitigation site reviews, mitigation monitoring compliance, mitigation site visits, and mitigation plan approvals. It would be an illegal use of appropriated funds for the Corps to spend its staff time to assist and augment DEQ's inability to manage the program.

DEQ lacks the staff and especially the staff experience to operate alone. It is entirely mendacious to imply that with the turnover rates at DEQ, and resultant dearth of experience among DEQ staff, that a similar level of review could be obtained as from the experienced Corps staff. DEQ has very few employees with more than 3 years experience, with those being generally harried from excess workload and artificial deadlines, and it cannot begin to provide a similar level of review. An honest review demands denial.

B. DEQ cannot perform enforcement functions for permits or violations. They rely upon the Corps for all field investigations and supporting documentation to support an enforcement action. Since very few DEQ staff can identify wetlands, especially when under fill material, their ability to identify violations or perform enforcement actions is nil. This is compounded by the overworked DEQ staff's inability to escape the office, and therefore violations would never be discovered. This is a secondary impact that requires review.

C. DEQ cannot perform compliance functions. They rely upon the Corps for field investigations and supporting documentation to support an enforcement action for lack of compliance. They can obtain penalties, but they have no capacity to visit the sites they permitted. Corps staff rides by their permitted actions regularly when conducting field reviews for other sites. A bureaucratic nightmare is in the brew by proponents of this folly. Corps staff will not know what DEQ permits have been issued, and will be unable to determine if the activities they observe when in the field are permitted or not. Reporting the activities to DEQ will produce no remedy or result. Enforcement actions take huge amounts of time. DEQ staff have no time now, how could they ever begin to handle the enforcement of their own permits? To say so is ludicrous.

1. Without oversight and enforcement, the SPGP permit program will be ineffective and nothing more than a meaningless bureaucratic paper drill and a burden on society. No positive benefits will be conveyed.

D. DEQ cannot provide alternatives to applicants. They have no bank of experience within their workforce to make useful suggestions to work a permit through the process. Without on site review, their suggested alternatives will be a bureaucratic squandering of time.

E. DEQ's general permits are grossly inefficient and overly burdensome on the public. DEQ permits are loaded with multiple conditions and burdensome requirements that are positively out of touch with reality in the field. DEQ's own field offices are frustrated with the insanity visited upon them from the Central Office. These permits remove flexibility and cannot be modified by special conditions. The efficiency aspect of the Public Interest will be harmed by the proposed SPGP.

F. DEQ has not shown reasonable decision making judgment. DEQ's stream assessment and mitigation requirement methodology, called SICAM, placed the entire regulatory program at risk due to its unreasonable requirements. Road side ditches and insignificant wash outs required extremely expensive mitigation at a minimum 1:1 ratio. Politically connected individuals receive preferential treatment and common citizens get ravaged with requirements, not to better the process, but merely to attempt to make up for their inability to visit sites. DEQ staff seem to believe that anything on their web site is a rule. This also violates administrative procedures.

G. DEQ has un-necessarily burdensome and counterproductive permit application requirements. Due to the artificial deadlines and lack of staff, applications are rarely complete for DEQ on the first submittal. Consultants have submitted binders full of information only to be told the application is incomplete. (Contact Mr. Mike Rolband of WSSI for more info.) This serves no one, especially the public. The most common statement from DEQ is a request for more information.

H. DEQ lacks flexibility to make project specific decisions. It can only issue inflexible mandates and permit conditions. DEQ staff has indicated that DEQ gets no support from above when a state politician contacts the agency. Therefore, they feel they must have everything they do written in guidance or regulation, and loathe treading off of that narrow path. They cannot work problems on-site and cannot use innovation to resolve issues. Doing so is apparently too politically risky.

I. DEQ cannot place special conditions in its permits. This is a major limitation to the DEQ program. It kills flexibility and is a disservice to the public.

J. DEQ is too heavily influenced by politics. For the Transamerica site, alleged contacts to influential state politicians got the DEQ Program Director to the "Preferred Applicant's" site to conduct a delineation. The program director, having no delineation experience in the Coastal Plain, and having not delineated for years, missed ~38 acres of wetlands; a level of impacts close to requiring an EIS. Then DEQ issues a permit for over 140 acres of wetland impacts. The mitigation was allowed on a different watershed, which no other un-connected party could have received, and a 140 acre permit for residential development was granted with little review or critical analysis. Allegedly misleading information regarding the financial analysis was provided to justify not avoiding more impacts. DEQ was apparently made aware of this and did nothing with the information, choosing to accept it on face value even though they were given evidence to the contrary. A local Virginia Delegate (Terri Suit) received a permit with none of the normal DEQ requests for additional information, delays in considering an application complete, and with no mitigation required. No regular citizen in Virginia gets treatment as outlined above. This level of political influence is a gross disservice to the program and undermines all the work toward impartiality accomplished by the Corps in 25 years of regulation.

K. It will take a disingenuous game of twister to imply with any hint of credibility that the DEQ "program" provides a similar level of review and service that the Corps program provides. Accordingly,



the Corps has no legitimate or legal avenue to approve the SPGP request. Consideration of the Corps' workload would be improper, as it is not a public interest factor pertinent to this decision.

**3. The Corps' stated intent is to make the permitting program faster, better, and cheaper.** SPGP will make it slower, more bureaucratic, less beneficial to the environment, and more expensive for the state and applicants.

**A. Faster:** The Corps program has evolved over 25 years to become as efficient as practicable. The embodiment of this evolution is reflected in the Corps' nationwide permits. They are the fastest, cheapest, and most efficient permit vehicle in the Country, while still protecting the resource. DEQ requires ~18 page permits, at great expense of time for its staff and for applicants, for minor impacts and any time there is a REDUCTION in impacts. It can be assumed that few if any applicants read 18 page permits, rendering them useless in the practical world. In addition, DEQ has no experience, relationships, or process for Historic or Endangered coordination. SPGP will not result in faster permit actions. If it does, it will be at the expense of details and required coordination, for which the Corps will be held responsible.

**B. Better:** It is inherently impossible that the turnover and resulting lack of experience at DEQ could in any way make things better for the 404 permit program. There is broad agreement in the general public that DEQ's migration into the 404 program has made things worse. Frustration across the board is higher, costs are higher, time spent in disagreements over petty differences has become colossal, and nothing productive has come of DEQ's intrusion into something it cannot handle. DEQ's rules are rigid and enormous volumes of time and resources are spent trying to get others to bend to DEQ's will. This is to provide political cover for the staff or merely DEQ's quest to exercise control. SPGP will in no way be BETTER than the Corps nationwide permit program. The Corps had an efficient program, the Nationwide Permits, prior to DEQ involvement.

DEQ has repeatedly made mitigation decisions that favor politics over the resource. They grant preference to mitigation banks in all cases, even if other programs or options can provide more and better mitigation. They advocated ratios for banks that no other party is entitled to, and which disserve the aquatic resource (New Kent Environmental Bank; Urban Credit in SICAM).

**C. Cheaper:** There is nothing cheaper about DEQ involvement.

1. At the late 2006 DEQ public hearing on 404 program assumption at the Tidewater Office of DEQ in Virginia Beach, a local consultant stood up and advised the DEQ that he regularly needs to bill landowners three times the normal fee if he has to have any dealings with DEQ (you may refer to several records of this meeting). He asked for a show of hands from the other consultants in the room if they have to do the same, and most, if not all, hands went up.

2. DEQ, through its SICAM stream methodology caused cost increases in stream mitigation to levels unheard of prior to its origination (DEQ director now claims she does not support the ratios embodied in the SICAM). Ditches along roads were classified as "streams" and were subjected to \$400-\$500 per foot in mitigation costs.

3. Applications have become much more expensive. Since DEQ cannot visit sites, they attempt to have everything written into applications. Since DEQ applications are routinely determined incomplete, consultants attempt to include volumes of information, much of it unread and unnecessary.

4. The same goes for monitoring reports for mitigation projects. Since DEQ does not go to sites, they require multiple pictures to attempt to circumvent the site visit process. Early successional restoration all looks the same, weeds; and multiple pictures at great expense go into DEQ files with no benefit except the swell the records section of a state agency. More comical is an

assumption that the level of experience of the staff would allow for any reasonable interpretation of the photographs. Further, it is most likely that DEQ never has time to read any monitoring reports.

5. DEQ will require permit fees for the actions contemplated under SPGP. For DEQ General Permits from 1/10 acre to 1/2 acre of Surface Water Impacts (Wetlands, Streams, and/or Open Water), DEQ will charge each citizen and landowner \$600. For DEQ General Permits from 1/2 acre to one acre of Surface Water Impacts (Wetlands, Streams, and/or Open Water), DEQ will charge each citizen and landowner \$1200.

6. Corps Nationwide permit verifications **are free of charge**.

#### **4. CORPS' INTENT FOR A COMPREHENSIVE, INTEGRATED, AND INTERDEPENDENT PROGRAM BETWEEN THE CORPS AND DEQ.**

A. The Corps developed an initiative several years ago to try to do this exact thing. Bruce Williams initiated meetings with DEQ to streamline and join together to do better work and to accomplish more enforcement and compliance. (Mr. Williams 406-4833). The primary impediment to this goal was DEQ. DEQ rules are so rigid that they often cannot coordinate with the Corps. Their staffing problems do not allow for them to divide duties with the Corps. They suffer mightily from not having legal support available, often leading to actions that are illegal or ill advised. Intentionally, their management has shown extreme reluctance to give up any of DEQ's control, even if for the good of the program. Their quest for control of the program makes them difficult to work with. Their manager's often and public criticism of the Corps and its employees impedes relations (documentation is available upon request).

B. This attempted marriage between the Corps and DEQ would be an excellent Business Policy case study of a merger that should never be attempted. Culturally and structurally, the agencies are very different. Corps encourages creative thought, DEQ discourages it (this is part of their turnover problem). The DEQ alone created the duplication they now decry. It is not the Corps' responsibility to save them now from the dual regulatory calamity that resulted solely from DEQ's own actions.

#### **5. Negative Consequences for the Public Interest from SPGP approval:**

A. **404 Program Assumption:** The requested SPGP is a thinly veiled padding of DEQ's resume for assumption. Right now, DEQ could not gain approval due to their extensive and systemic problems. However, if the Corps gives them another year to solve problems, they will be better suited to pursue assumption. Let no one be deluded, DEQ plans to pursue assumption, no matter what the Corps does. Granting the SPGP will not pacify this quest and the Corps would be illegitimate to consider SPGP for this purpose. Several sales pitches for assumption are listed on the upcoming VMI Environment Virginia agenda. If the Corps grants SPGP, it increases the likelihood that DEQ will assume the Corps 404 program and also increases the likelihood of experienced staff losses at the Corps. Few to no Corps staff are likely to transfer to DEQ.

B. **Virginia Aquatic Resources Trust Fund:** The Trust Fund is one of the most innovative, effective, and efficient mitigation vehicles in the country, and was initiated and built by Norfolk District. If SPGP goes through, 95% of all permit actions that contribute to the Trust Fund will come solely from DEQ. 5% of the actions would result from Corps and DEQ individual permits. DEQ, through SPGP, will gain a highly valid argument that they should be in control of the Trust Fund instead of the Norfolk District. This would prove disastrous for the Trust Fund and aquatic resources. The state surely is licking chops over the revenues in the Trust Fund as a way to augment Virginia's paltry level of conservation funding and to meet the impossible goals set by the Governor (impossible due to funding issues).

## **6. ALTERNATIVES:**

A. DEQ staff likely lacks interest in taking on more workload. Most of them are terribly overworked and were not consulted or advised of the decision to take on more work. The most they could handle is to keep the SPGP Category A's and B's and take on the Historic and Endangered Coordination. I think DEQ management (with its history for taking on more than its staff can handle) has no concept of the time involved in these consultations.

B. The Corps must reinstate its nationwide permits, regardless of what DEQ does, and regardless of the decision on SPGP. This better serves the public and allows the public a choice of what permit they want to pursue. This will be faster, better, and cheaper and the public marketplace will determine which agency is more efficient and legitimate. Choice should be preferred over SPGP alone.

C. To truly make things more efficient, if SPGP is granted DEQ must agree to get out of all other permits and all mitigation discussions and decisions. They rarely add any value to either and should focus on the part of the pie they can handle.

Thank you for the opportunity to comment. Please try to do the legal, ethical, and right thing.

Dale Culp  
4040 Woodland Drive  
Chesapeake, Virginia 23321

October 6, 2006

The Honorable Timothy M. Kaine  
Office of the Governor  
Commonwealth of Virginia  
Patrick Henry Building, 3<sup>rd</sup> Floor  
1111 East Broad Street  
Richmond, Virginia 23219

Dear Governor Kaine:

I support many of the initiatives you have pursued during your first year in office. These initiatives are critical if Virginia is to maintain economic prosperity, a healthy environment, and a high quality of life.

However, I must express disappointment in one area. I understand you support Virginia assuming administration of Section 404 of the Clean Water Act (Section 404). Section 404 requires permits from the Army Corps of Engineers for discharges of dredged and/or fill material in waters of the United States, including wetlands. I believe Virginia's assumption of Section 404 will not serve the taxpayers of Virginia, the regulated public, or adequately protect Virginia's waters and wetlands. Let me outline why I believe this to be the case.

I am a Virginia native (born in Norfolk and raised in Virginia Beach). I have recently retired from the Norfolk District, Corps of Engineers after 32 years in its regulatory program and now am a small business owner. In 2000, Virginia enacted a Nontidal Wetlands Law. The law with the exception of regulating activities in isolated waters and excavation in nontidal wetlands duplicates the Section 404 permit requirements. I urge you to abandon your support of assumption of Section 404 for the following reasons:

1. DEQ has a critical staff retention problem. Over the past four years, DEQ has experienced over 50% staff turnover. This turnover rate does allow DEQ to maintain a staff with sufficient



institutional knowledge and training to effectively administer their program or serve the regulated public. While DEQ has a plan to address this issue, it will take years to determine if this plan will be successful. In contrast, the Corps' Norfolk District has experienced a turnover rate during the same period of less than 10% and has a well-trained staff and has effectively administered the Section 404 program.

2. DEQ's staff has indicated during public meetings that they can assume the program by doubling their staff and the budget. The table below outlines the staffing and workload in 2005 for both DEQ and the Norfolk District.

	DEQ	Corps
Project Managers	30	41
Workload in 2005	657 permits	1,835 permits, 1,781 field jurisdictional determinations <u>1,816 preapps</u> 5,432 total actions*

\*This is over 8 times DEQ's workload not including 487 enforcement & compliance reviews

Clearly, DEQ will need to increase their budget and staff a minimum of five times current levels. If your request for assumption is approved by EPA, Virginia taxpayers will have the added burden of supporting a much more costly program. To make matters worse, the DEQ staff has stated during public meeting presentations that there is confusion over pre-application consultations and delineation responsibilities. This is simply untrue as the Norfolk District performs these duties per a five-year old agreement with DEQ. Misleading statements like these by the DEQ staff are unprofessional and unethical.

3. Since the inception of Virginia's nontidal wetland program, applicants have attempted whenever and wherever possible to avoid the need for a permit from DEQ. This is due to DEQ's high



staff turnover, training issues, and rigid regulations. The problems with DEQ's regulations are listed in the enclosure. This list was prepared by DEQ's staff so there should no debate over whether these problems exist.

In closing, DEQ has a host of problems and challenges it needs to address in the administration of its existing program. Virginia's taxpayers should not have to pay for a program already effectively administered by the federal government. I urge you to abandon pursuit of assumption of Section 404 as neither the regulated public nor Virginia's waters and wetlands would benefit.

By copy of this letter, I am advising other interested stakeholders and encouraged them to contact you and their elected representatives. If you or your staff or any of the individuals and organization copied on this letter need any additional information or have any questions, please do not hesitate to call me at 757.460.2889 or email me at [bwilliams175@cox.net](mailto:bwilliams175@cox.net). Thank you for your consideration of my request.

Sincerely,

Bruce F. Williams, CSA, PFP

Copy Furnished (w/ Enclosure):

Lieutenant Governor Bill Bolling  
Attorney General Robert McDonnell  
Delegate John A. Cosgrove  
Delegate M. Kirkland Cox  
Delegate Harvey B. Morgan  
Delegate Beverly J. Sherwood  
Delegate R. Lee, Ware, Jr.  
Delegate Thomas C. Wright, Jr.