

February 28, 2006

Regulatory Branch

See Distribution

Thank you again for attending and participating in our December 8, 2005 State Program General Permit (SPGP) stakeholders' meeting.

Attached are the comments made at the meeting along with our responses. This letter and your issues and our responses have been posted on our web site at <http://www.nao.usace.army.mil/Regulatory/Regulatory.html>.

We will fully consider all of your comments and those received from the public as we develop proposed changes to the SPGP. Any proposed changes will be advertised by public notice and posted on our web site to provide you, government agencies, and the public with an opportunity to comment.

If you have any questions, you may call Bruce Williams of my staff at 757.201.7418 or email him at bruce.f.williams@usace.army.mil.

Sincerely,

J. Robert Hume, III
Chief, Regulatory Branch

Enclosure

Distribution List:

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Comments from the Third Annual SPGP Stakeholders' Meeting on December 8, 2005

1. More projects seem to be delayed due to the Section 106 process. What can be done to expedite this portion of the review?

Corps' Response: As you know, the Corps' historic resources regulations and the Advisory Council on Historic Preservation Regulations (used by State Historic Preservation Officers) differ on how undertaking and potential area of effect are defined. These differences can affect the review process. These are national differences that cannot be resolved locally, but are under review through discussions between Corps headquarters and ACHP. In the meantime, we suggest that you consider the following suggestions contained in our public notice of August 25, 2005 jointly published with VDHR. Also, we have recently initiated a monthly meeting with VDHR to address the more challenging pending projects.

2. How does the Corps distinguish between ditches and streams especially when it comes to any required mitigation?

Corps Response: Our first responsibility is to determine whether a ditch is a waters of the United States. Review of historical data often indicates that many so-called ditches are actually streams that were modified to convey agricultural or urban runoff. For those ditches that we determine are not waters of the United States, no permit to fill them is required and hence no mitigation is required. For those ditches that we determine are jurisdictional, the issue of mitigation is a permit decision. In making that decision, we consider function, position in the landscape, and connectivity to other waters. We are very cognizant of the cost of stream mitigation and will only require it when we believe it is necessary to compensate for the loss of stream bed. We are unlikely to require stream mitigation for impacts to ditches that were previously excavated in wetlands not manipulated streams.

3. There have been occasions when the Corps has wanted to see the use of a con-span in lieu of fill and a culvert for a road crossing to minimize impacts. In several instances applicants have been required by VDOT to install riprap under the con-span. This negates the environmental benefits of the con-span and requires us to obtain a permit modification from the Corps.

Corps' Response: We have initiated discussions with VDOT to determine their rationale for this requirement and see if we can reach some accommodation that satisfies both our objectives. We will advise the public of the outcome.

4. There seems to be a different philosophy between DEQ and the Corps over property eligible for preservation. DEQ's position is that if you avoid impacts you don't receive mitigation credit for the preservation while the Corps will give the applicant credit (at a high ratio) if a deed restriction is placed on the property. The two agencies need to discuss this and develop some threat criteria so that their positions are consistent.

Corps' Response: The Corps will continue to encourage the use of deed restrictions when we believe that a wetland or stream is under developmental pressure. We also recognize this as part of the mitigation package and give credit for it. The Corps has discussed this issue with DEQ management and they will advise the public of their position in the near future.

5. Where you have an old farm pond and site development entails retrofitting the pond to a stormwater management facility, how do DEQ and the Corps look at mitigation?

Corps' Response: If the modification to the farm pond does not expand the footprint of either the dam or the area backflooded, then the Corps will not require mitigation since the impacts occurred when the farm pond was constructed. However, if the retrofit results in expansion of the footprint of the dam or the backflooding of additional waters/wetlands, then mitigation may be required. This will be a case-by-case determination. DEQ's September 27, 2004 on the subject is enclosed.

6. Can the Corps copy consultants on their emails to DEQ on Category A and B development projects?

Corps' Response: The Corps project managers have been advised to do so.

7. How are performance bonds and other financial assurances being used by the Corps and DEQ?

Corps' Response: The Corps has the authority under our regulations to require performance bonds and other forms of financial assurances. Our mitigation banking template requires the use of an escrow for the advance credits released once the banking instrument has been signed and the final mitigation plan approved. Recently, we have been more closely scrutinizing applications involving on-site and off-site project-specific mitigation and are routinely requiring financial assurances. DEQ does not have the authority to require performance bonds or other forms of financial assurance.

8. What is the status of stream mitigation performance criteria?

Corps' Response: The Corps and DEQ are working together to develop joint stream mitigation performance criteria. Part of this review will include seeking public comment on the draft criteria through issuance of a public notice.

9. What is the status of the Corps' SAAM and the DEQ SICAM?

Corps' Response: Please refer to the Corps/DEQ public notice dated December 29, 2005 and posted on the Corps' web site.

10. The SPGP annual report is lacking sufficient analysis and if the impact thresholds are lowered, projects will be redesigned to reduce impacts and the number of individual

permits. The commenter also believes more information is needed on the trends comparing the number of SPGPs and IPs over the past three years.

Corps' Response: The report format has been modified each year to address comments made on the previous report. The next report will include additional analysis looking at trends from previous years. The view that lowering the impact thresholds will encourage applicants to reduce their impacts to the SPGP level is not new. Projects (whether IPs, SPGP, or NWP) undergo similar scrutiny. The difference is how long that review takes and the documentation required. We believe lowering the thresholds will result in more individual permits. They take longer to process and divert our staff's attention from preapplication consultation to preparing lengthy paperwork. We do not believe lowering the impact thresholds is necessarily more protective of the aquatic environment.

11. Consideration should be given to issuing the annual reports so that a full calendar year of data is included in each report.

Corps' Response: We concur and will make the change so that next annual report will cover 2006 and will be published in early 2007.