



February 6, 2001

## **THE GOOD NEWS ISN'T THAT GOOD – AND THERE IS BAD NEWS**

### **VPDES ALERT FOR CONSTRUCTION SITES**

The Environmental Protection Agency (EPA) and the Department of Environmental Quality (DEQ) are in the midst of making surprise inspections of construction sites in Northern Virginia to determine if they comply with the Virginia Pollutant Discharge Elimination System (VPDES). Every construction site greater than 5 acres (soon to be 1 acre) must have a VPDES permit and a stormwater pollution prevention plan (SWPPP). A SWPPP has some items not on a typical county plan. **This permit also requires records of inspections, maintenance activities and reporting of discharges to DEQ.**

If you are not in compliance – contact your civil engineer to have a SWPPP prepared and get your VPDES Permit from DEQ immediately. The penalties can be severe – starting at \$27,500.00/rainfall event that produces runoff.....

Applications for VPDES Permits are available from:

Virginia Department of Environmental Quality  
13901 Crown Court  
Woodbridge, Virginia 22193  
Attention: Ms. Sue Heddings  
Phone: (703) 583-3847  
Fax: (703) 583-3841

Since EPA has expressed dissatisfaction with the SWPPP's (which simply were the locally approved site/subdivision plans) that they saw last week, Wetland Studies and Solutions, Inc. is developing a prototype for site engineers to use as an outline. Since the majority of a SWPPP is Erosion and Sediment Controls and Stormwater Management Controls – the SWPPP should be prepared by your civil/site engineer and incorporate these elements by reference to minimize costs. If you'd like a copy of WSSI's prototype, e-mail Frank Graziano at [fgraziano@wetlandstudies.com](mailto:fgraziano@wetlandstudies.com).

### **WETLANDS PERMIT IN JEOPARDY FOR HUNDREDS OF SITES**

Since last June, any project in Virginia that impacts more than 0.5 acre or 300 lf of stream cannot use a Nationwide Permit (NWP). Thus most large scale projects must use an Individual Permit, also known as a Standard Permit. For most of these projects, the U.S. Army Corps of Engineers

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approved the project under the Norfolk District's Abbreviated Standard Permit, ASP-18. Hundreds of projects are underway using ASP-18. All of them are **IN JEOPARDY BY A LAWSUIT FILED AGAINST THE U.S. ARMY CORPS OF ENGINEERS (COE)**, not just the four projects described by the Washington Post on January 26, 2001 (article enclosed).

This appears to be another prong of the attack on so-called "urban sprawl". Environmental Groups are filing lawsuits against federal agencies that grant permits or dollars to developments or businesses in suburban Washington. Friends of the Earth and the Forest Conservation Council have ongoing programs to address perceived urban sprawl, with an emphasis in suburban Washington, D.C. They are alleging that federal approvals, such as ASP-18, induce sprawl without properly assessing that environmental consequence under the National Environmental Policy Act (NEPA). In October, the same groups sued the U.S. Small Business Administration under NEPA. They are seeking to stop all loans over \$300,000 to business in counties around D.C., claiming that these loans promote "sprawl" development in the suburbs, thereby requiring the preparation of environmental assessments or impact statements.

The ASP-18 lawsuit is based on a claim that "abbreviated standard" wetlands permits issued for projects in Virginia are illegal because they "induce sprawl," thereby violating NEPA as well as the Clean Water Act (CWA). Most Corps wetlands authorizations for projects too large to use nationwide permits in Virginia follow the abbreviated procedure. Environmentalists are seeking a court order enjoining all ground disturbing work authorized by this wetlands permit until the Corps "complies" with NEPA and CWA. The relief requested could result in preparation of a "programmatic" Environmental Impact Statement (EIS) on all permit activity or expanded NEPA analysis on individual projects. In short, environmental groups are now using NEPA, and the federal courts, as a way to try to halt what they label as suburban "sprawl" development.

### **What should you do?**

First – see if any of your projects utilize an ASP-18. If they do, and the impacts are not complete – contact your legal counsel to:

- Consider possible participation in the litigation as either Amicus Curiae or Interveners
- Fund NAIOP, HBAV and NVBIA's efforts in this lawsuit defense.

### **THE NEWS THAT DOESN'T MEAN MUCH IN VIRGINIA DESPITE THE HYPE:**

- **Supreme Court Strikes Down "Migratory Bird Rule"**
- **Bush Postpones Effective Date of Tulloch ("Excavation") Rule Clarification**

Many law firms have sent out excellent summaries of the effect of the Supreme Court's "SWANCC" decision striking down the Migratory Bird Rule and limiting the ability of the Federal Government to regulate isolated intrastate wetlands and waters. Similar analyses of the Tulloch ("Excavation") Rule clarification and subsequent executive order by President Bush

delaying its implementation are circulating – generating many "hopeful" calls that certain projects no longer need permits.

The bottom line in Virginia is:

- Isolated intrastate wetlands and waters have not been regulated by the Feds for a couple of years in Virginia due to the *Wilson* Decision, so SWANCC didn't change much here. But the Virginia Department of Environmental Quality (VDEQ) will regulate such areas when regulations are finalized later this year (August – October, 2001 Timeframe), so you will need a state permit to impact these areas.
- Excavation of wetlands (i.e., Tulloch ditching) has been regulated by VDEQ since July 1, 2000; so "Tulloch" rule changes are moot in Virginia.

In the long term, the SWANCC decision may have an effect. While this court decision clearly applies to isolated intrastate waters which are not adjacent to other regulated waters or wetlands – it could also be integrated to help, in other lawsuits, limit the extent of jurisdiction in other areas. Specifically, there is some thought that it could be used to limit the Corp's jurisdiction over ephemeral streams, and perhaps even intermittent streams if that waterbody is not "navigable" at times. When this aspect will be challenged in court is not known – so consult your legal counsel before working in those areas without a permit; and remember that regardless of the federal decision, VDEQ is likely to still regulate such areas.

### **FOR FURTHER INFORMATION**

E-mail or call Wetland Studies and Solutions, Inc.:

Michael Rolband: [mrolband@wetlandstudies.com](mailto:mrolband@wetlandstudies.com), (703) 631-5800, ext. 103

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or call your WSSI Project Engineer, Scientist or GIS Specialist.

Enclosure: Washington Post Article

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Wetland Studies and Solutions, Inc. is a team of 30 engineers, scientists, GIS/Survey Specialists and administrative staff focusing on wetlands, water quality and floodplain study issues. Our work is focused in Northern Virginia, where we have worked on over 53,000 acres of sites since our founding in 1991; though we travel as far away as the Everglades for large complex assignments. For additional information, please visit WSSI at [www.wetlandstudies.com](http://www.wetlandstudies.com).

The Washington Post

# METRO

SATURDAY, JANUARY 27, 2001

**B**  
Virginia Edition

## Suit Fights Plans To Build in Va.

### Engineers Corps Allegedly Skipped Environment Studies

By MICHAEL LARIS  
Washington Post Staff Writer

When the Army Corps of Engineers gave WorldCom Inc. permission to fill more than five acres of Loudoun County wetlands to build its Internet division, the agency failed to do required environmental studies, according to a lawsuit filed by two environmental groups this week in U.S. District Court in Washington.

The suit cites the WorldCom project and three other developments in Loudoun and Prince William counties as examples of a pattern of corps decisions that has helped turn thousands of acres of open land into subdivisions and strip malls without gauging the overall impact to the environment.

The projects authorized by the Army Corps lead directly to the destruction of rivers, streams, bogs and wetlands in the greater Washington area and lead indirectly to additional sprawl in the region, claims the suit, which was brought by Friends of the Earth and the Forest Conservation Council.

The Army Corps is charged under the Clean Water Act with protecting waterways and wetlands from development. Its Norfolk District, which covers Virginia, used an abbreviated permit process when it approved the projects and found that "no adverse impacts are anticipated," according to the suit.

Under U.S. environmental law, the corps should have done extensive studies and not relied on the abbreviated process, the suit says. The corps tried to circumvent the law "by publishing this meaningless four-page checklist, when in fact the law requires rigorous

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## Suit Targets Plans to Build in Virginia

ENGINEERS CORPS, From B1

scientific analysis," said John Talbot, chief of the Forest Conservation Council.

The suit seeks to halt all Virginia projects allowed under the so-called Abbreviated Standard Permit process until individual environmental studies are done. It also seeks to compel the corps to study overall environmental impacts and plan for offsetting them.

Bruce F. Williams, chief of the corps' Northern Virginia regulatory section, said that while "there is no individual assessment prepared" on the environmental impacts of hundreds of Abbreviated Standard Permit projects each year in Virginia, the abbreviated permits being challenged in the lawsuit go through rigorous vetting by the corps and federal and state environmental agencies.

"[Agencies] are not bashful. They'll let us know when there's a problem, believe me," he said. The abbreviated permits are in-

tended to eliminate delays and paperwork for projects that "have minimal environmental consequences," according to the corps. The corps has come under increasing pressure in recent months to consider the collective impact of its actions.

In August, a U.S. District judge required the corps to study the environmental effects of building casinos in Mississippi, blocked three permits and criticized the corps for failing to analyze "the growth-inducing effects of the casino projects."

Williams said he has not seen an effective method of gauging cumulative effects.

"The most effective way we've found" to reduce overall impacts is "to minimize it on a case-by-case basis," Williams said.

The four developments named in the suit are WorldCom, Lansdowne, Belmont Plantation and Virginia Gateway.

Michael Rolband, president of Wetland Studies and Solutions to sprawl.

Inc., did the environmental engineering work on the WorldCom project. Construction will affect 5.2 acres of wetlands but will be compensated with the creation of 6.5 acres of wetlands elsewhere, he said.

There's no environmental basis for the suit, Rolband said. "My hunch is [the corps is] not doing what these people want, which is to deny permits."

Magi Shapiro, who resigned from the corps' Norfolk District in 1996 and is now on the board of an advocacy group called Public Employees for Environmental Responsibility, said an abbreviated permit is "like a quickie marriage."

"A big case could be slipped through... if nobody was there to hold them accountable," Shapiro said.

The lawsuit comes three months after the two environmental groups sued the Small Business Administration, claiming that loans made in the Washington area contributed