Vol. 9 No. 3 September 24, 2002

REGULATORY CHANGES COMING AT ALL GOVERNMENT LEVELS

The fall of 2002 is bringing several major regulatory changes that are causing significant effects on all building industry and public works projects. They include:

- **Stream Impact Mitigation Costs**:

  An order-of-magnitude cost increase for the mitigation of impacts to streams – even intermittent and ephemeral streams;

- **Chesapeake Bay Preservation Ordinance Changes**:

  A two-fold, or more, increase in the area of RPAs (at least in Northern Virginia) with more uncertainty as to where the RPA is located without conducting significant studies;

  Public Hearings for RPA Exceptions – even for environmentally sensitive projects such as stream restoration;

- **Implementing Loudoun County's Revised General Plan**:

  In Loudoun County the ordinances that implement River and Stream Corridor Overlay Districts (RSCODs) and Conservation Design practices are being finalized. They will require much more intensive studies of natural and cultural resources early in the planning process.

- **DEQ Plans Larger Role in Wetlands Permitting**:

  The assumption of more wetlands permitting responsibility from the U.S. Army Corps of Engineers by the Virginia Department of Environmental Quality under a State Program General Permit (SPGP) – higher fees will result, but faster reviews are expected.

Stream Impact Mitigation Costs

Until recently, impacts to streams could be mitigated by providing out-of-kind compensation such as open water areas or created wetlands, when on-site or off-site stream restoration was not practicable. Thus, impacts to a 4-foot wide intermittent stream could be compensated for by purchasing 4 sf of open water for each lf of stream impact – typically costing $5.50/lf of stream impact in this example. In the last 4 months without any law, regulation or published policy change – several developers have been shocked by letters from

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DEQ saying "DEQ cannot accept out-of-kind mitigation for stream impacts; therefore we have obtained the appropriate in-lieu-fee contribution the Virginia Wetlands Trust Fund" – and a cost of $110/lf was provided – a twenty-fold cost increase in this instance. These costs are being determined by the Corps of Engineers, the trust fund is run by The Nature Conservancy.

Already, this has caused budget problems for private developers and public works projects.

On some sites, an inexpensive alternative is to preserve streams and their riparian buffers (25 to 100 ft typically) or restore impaired streams and protect them with a Restrictive Covenant. However, to protect your rights to do so, proffers must be carefully written. At least one project in Northern Virginia is stalled because a local park authority will not accept the proffered stream valley land if it has such protections!

By November 1, 2002 DEQ and the COE plan to publish a policy on this matter. At this time however, HBAV, NAIOP and VACRE have not examined this issue in detail due to budget issues and minimal expressions of concern from the industry. If you are concerned – contact your trade association and contribute to their environmental issues funds.

Chesapeake Bay Preservation Ordinance Changes

One of the Chesapeake Bay Local Assistance Board's last acts under Governor Gilmore was to amend the Chesapeake Bay Preservation Act on December 10, 2001, effective March 1, 2002. These new regulations require numerous changes to local ordinances and manuals by March 1, 2003. The two changes that will affect public works and building industry projects the most are:

1. The change of one RPA core component from streams depicted as a perennial stream on the USGS Quad Map to waterbodies with perennial flow as determined by "scientifically valid system"; and

2. The need for a public hearing for most RPA exceptions in lieu of administrative review.

March 1, 2003 is coming quickly – anyone buying land or laying out a land plan should be considering these new requirements.

At this time, it appears that in Northern Virginia only Fairfax County has begun the effort to develop a system of field indicators to determine stream flow character (perennial vs. intermittent vs. ephemeral) – a critical need since CBLAB adopted these regulations before developing such a system for the state. Fairfax County has also begun the task of mapping these new RPAs (and the County should be commended for taking the initiative to do so) – the preliminary result of this pilot study is shown below:

The average perennial stream's drainage area was ± 73 acres in this study, with a range of 20 to 135 acres.

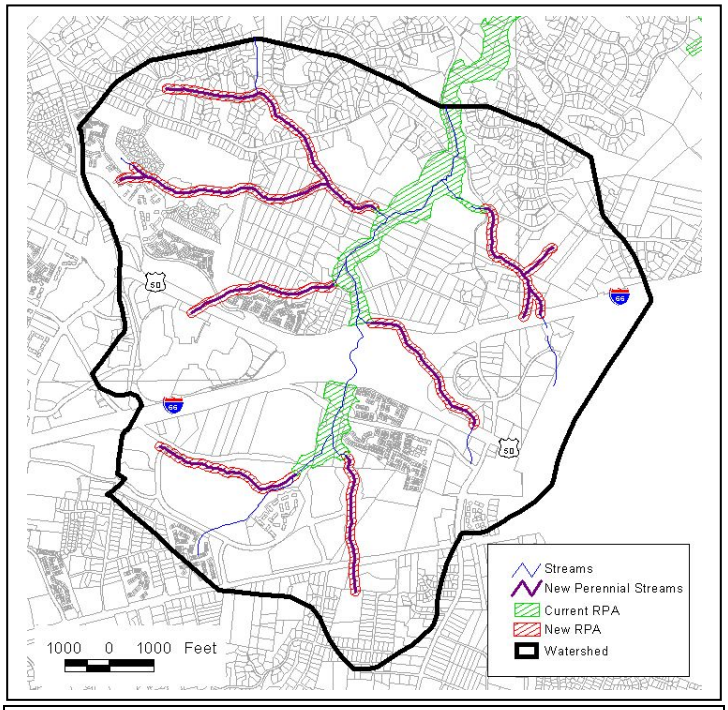
The lack of a standard, tested protocol of identifying perennial streams will lead to:

- More uncertainty in defining the developable land envelope early on in the land use approval process, and
- Easier legal challenges for project opponents.

Over the years, WSSI has been involved as experts in several legal challenges on this issue (including one just this spring and summer where a retail developer tried to stop a competitor's project). We expect many more unless this regulation is revised.

One solution to reduce this uncertainty would be the selection of statistically valid drainage areas by physiographic province for the "average" perennial stream and make a policy decision to protect streams with a drainage area that is greater than the selected cutoff area (just like floodplains are regulated). Affected parties (landowners and local regulators) may want to reexamine this situation as the cost (time, money and uncertainty) of compliance and review is now realized.

Preliminary Pilot Study Results*



Current RPA Streams	11,969 LF
New Perennial Stream	29,448 LF
Total Perennial Streams	41,417 LF
Current RPA	100.7 ac
Additional RPA	137.9 ac
Total RPA	238.6 ac
Watershed Area	2,816 ac

*Provided by Fairfax County DPWES.

Requiring Public Hearings for RPA Exceptions will add more time and cost to many projects – even to government efforts like those of Northern Virginia Soil and Water Conservation District (NVSWCD) to restore streams. This comes on top of efforts in some localities to add even more onerous interpretations than used for the last nine years for issues like:

- Stormwater outfalls in RPAs – which were exempt in all localities from 1993 to early 2002, but now require a Water Quality Impact Assessment (WQIA) in some; and
- The widening of older public roads that cross an RPA - which may now need a WQIA if staff feels that the original road was not designed to VDOT standards (Silverbrook Road's widening at the Lorton Prison is the first such case we have experienced), while previously they did not.

Implementing Loudoun County's Revised General Plan

If you own land, or plan to build in Loudoun County – make sure you stay up to date as Loudoun County implements its Zoning Ordinance Revision and Re-mapping Project (see www.co.loudoun.va.us).

The latest (7/22/02) Ordinance Draft contains much more specificity than the Revised Comprehensive Plan and differs in the natural resources area in many aspects from the April 2002 Report on Conservation Design by Clarion. Thus you must review the latest ordinances on line as they will continue to change.

The two most significant elements of these changes related to natural resources are:

- River and Stream Corridor Overlay District (RSCOD)
- Conservation Design

To determine the developable envelope under these requirements will require considerably more upfront analysis of your site prior to commencing land planning efforts. These resources must be identified in an "Environmental and Cultural Resource Existing Conditions Plat" so you can determine with County staff the development envelope.

The definition of RSCOD* is:

A. General Rule – Protected Corridors along Streams and Rivers

1. Minimum Protected Corridor Width. Except for those waters listed under section 4-2005(B)(1) below, for all stream and river segments draining 100 acres or more and shown on the RSCOD Map, the Protected Corridor shall be greater of (1)(a) or (1)(b) below:

(a) The cumulative width of the following:

(i) The 100-year floodplain, and

(ii) Very steep slopes (greater than 25%) starting within 50 feet of the edge of the 100-year floodplain and extending no greater than 100 horizontal feet beyond the edge of the 100-year floodplain, and

(iii) A 50-foot Management Buffer measured from the edge of the 100-year floodplain in (a)(i) above or from the steep slope areas in (a)(ii) above.

OR

(b) A Minimum Stream Buffer measured as the area located within 100 feet of both sides of the stream or river, measured as a line

* As of the July 22, 2002 Draft.

extending perpendicularly from the stream bank of the active channel of the stream or river.

B. Protected Corridors along Scenic Rivers/Streams and Water Supply Reservoirs

1. Minimum Protected Corridor Width. For the following scenic rivers and streams and water supply reservoirs, the Protected Corridor shall be the greater of the Protected Corridor width required by Subsection 4-2005(A), "General Rule – Protected Corridors along Streams and Rivers," above, or the area located within three-hundred (300) feet from:

(a) The defined stream bank of the Potomac River;

(b) The defined stream bank of Bull Run;

(c) The stream bank of the active channel for any state scenic rivers, including but not limited to Goose Creek, Catoctin Creek; and

(d) The projected shoreline of any drinking water supply reservoir, as denoted on the RSCOD map.

The following graphic depicts the RSCOD Concept:

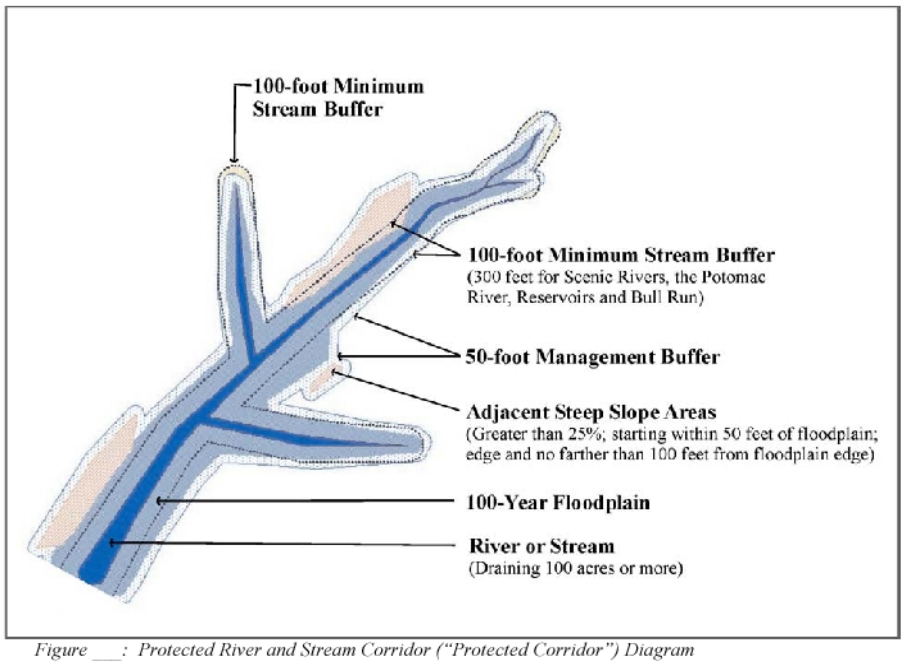


Figure ___: Protected River and Stream Corridor ("Protected Corridor") Diagram

Conservation Design

Virtually all projects in Loudoun County will need to be designed in accordance with Conservation Design principals. The first step is to define natural resource areas that must be protected (Primary Areas) and natural resources areas that should be protected, if possible (Secondary Areas).

Primary Conservation Areas include:

(a) Mountainside Development Overlay District (MDOD);

(b) Limestone Overlay District (LOD);

(c) River and Stream Corridor Overly District (RSCOD);

(d) Steep Slope Standards; and

(e) Areas required to be protected by applicable federal and state laws and regulations.

These areas count 100% toward open space requirements, and shall be protected if the area exceeds that requirement. Part (e) is of concern to many – this could be interpreted to imply most all wetlands and other Waters of the U.S. (WOUS) that are regulated by the COE and DEQ are Primary Conservation Areas. This leaves open the question: "If you obtain a DEQ and/or COE permit to impact such areas, are these impact areas then excluded from the Primary Conservation Area?" If not, the networks of small intermittent and ephemeral streams often found in Loudoun County could become the most restrictive element in the new ordinances for every medium to high density residential, commercial and industrial development.

Secondary Conservation Areas are comprised of the following resources:

(a) Prime agricultural lands (in rural and transitional zoning districts only; not applicable in suburban and mixed use district zones or in the Joint Land Management Areas set forth in Sections 2-1000 and 2-1001);

(b) Hydric soils;

(c) Forest, indigenous vegetation, and meadows;

(d) Wildlife habitats (including associated wetlands);

(e) Perennial and intermittent streams not within RSOCD;

(f) Historic structures 50 years or older, historic or cultural features, and archaeological resources;

(g) Scenic corridors and views; and

(h) Planned greenways and trails.

The applicant shall delineate open space on the basis of the minimum percent open space set aside required for each zoning district. The total open space set aside will be comprised of the sum of primary and secondary conservation areas and additional open space needed to satisfy the minimum zoning district open space set aside requirements. If the primary conservation

area exceeds the underlying zoning district open space set aside requirement, then no additional land shall be required to be set aside to preserve secondary conservation areas. However, primary conservation areas shall be protected notwithstanding the open space set aside requirement.

DEQ Plans Larger Pole in Wetlands Permitting

Tentatively, on November 1, 2002, the U.S. Army Corps of Engineers (COE) will increase DEQ's role in the wetlands permitting process with the implementation of a State Program General Permit (SPGP). Unless Federal Regulatory Agencies (COE, EPA and USFWS) object on a specific project, DEQ will handle permitting for projects that impact less than 1 acre of Waters of the U.S. (WOUS), including wetlands, as long as total streambed impacts are less than 2,000 lf.

To prepare for this, DEQ has increased its staff in NOVA from 2 to 6 in the past year – primarily funded by fee increases:

	Fee Schedule	
Permit Type	**New**	**Old**
GP< 0.5 ac	$600.00	N/A
GP> 0.50 cc	$1,200.00	N/A
VWP category III	$2,400.00	$800.00
VWP category II	$6,300.00	$2,100.00
VWP category I	$9,000.00	$3,000.00

By sharing workload with COE staff the result should be a faster permitting process once the program's "bugs" are straightened out.

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For Further Information:

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About WSSI:

Wetland Studies and Solutions, Inc. (WSSI) was founded by Michael S. Rolband in 1991. Since the company's inception, it has provided wetlands, water and natural resources consulting on 66,000+ acres comprising over 1,200 sites in Virginia, Washington, D.C. and Maryland, and has restored over 800 acres of wetlands and 17,000 linear feet of streams in three wetlands banks and 85 stream and wetlands mitigation projects. WSSI's team of thirty-five engineers, scientists, technicians, GIS/survey specialists and administrative staff takes a holistic approach to environmental issues associated with real estate development and public works projects, integrating the practical constraints of economics and land plan requirements with the need to satisfy local, state, and federal regulatory requirements. For more information about WSSI, visit our web site at http://www.wetlandstudies.com.

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