



ASWM ~ Dedicated to the protection and restoration of the Nation's wetlands



# WETLAND NEWS

Vol. 21 No. 5

December 2011

*Association News - Jeanne Christie, Executive Director*

## *Board of Directors*

- David Davis, Chair
- Alan Quackenbush, Vice Chair
- Cherie Hagen, Secretary/Treasurer
- Richard Gitar
- Maryann McGraw
- Amy Lounds
- Collis Adams
- Erik Stockdale



- Jeanne Christie, Executive Director
- Jon Kusler, Esq. PhD., Assoc. Director
- Peg Bostwick, Sr. Policy Analyst



## *Inside this issue:*

- Association News
- 401 Certification Best Practices
- New State Legislator Webpage
- Advice From a Wetland
- Welcome New Members



The holidays are a time for celebration and reflection. Perhaps because of this, this is also a time of year that inspires a rush of storytelling. I'm not talking about all of the sentimental Christmas tales on TV. Whether it's over Christmas dinner, a holiday office party or in the corner of a rowdy bar, this is the time of year that people tell stories. Stories are powerful. They define us. So while I listen to the stories others tell, I also listen to the ones I tell.



*continued on next page*

## *401 Certification: Best Practices in Dredge & Fill Permit Programs - Highlights from Report*

In April 2010, the U.S. Environmental Protection Agency (EPA) issued an interim version of the handbook, Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes. To further support this approach, the Association (ASWM) embarked on a project to identify best practices among 401 Certification programs.

*Continued on pg. 4*

## *New State Legislator Webpage*

ASWM has created a new webpage to help State legislators and their staff better understand wetland issues. State legislators may be faced with a range of questions about wetlands – what are they, how are they being protected for fish and wildlife, what is their role in flood management? Public concerns are also likely to focus on the manner in which wetlands on private property are regulated – by state, federal, or local government.

*Continued on pg. 7*

*Association News continued from p. 1*

Jeanne Christie photos



Oddly, the one I hear myself sharing most frequently this year is the story of our dog Massey, who we discovered alone and desperately injured 15 years ago. We don't know what her life was like before we found her on a frozen mountainside. But I've always suspected she was a Christmas puppy who did not fit into her new family and was ultimately abandoned. She's been a treasured member of our family ever since. She has skirted death a half dozen times from various illnesses and injuries, but continues to thrive. I think the reason that I am telling stories about Massey's remarkable life this Christmas is that I realize that she may not be here next year. She's getting old. And I've always believed it's important to celebrate the joys life brings when they are here in the present, whether it's an old dog or another Christmas, the closeness of family or the kindness of friends. So please join with me in giving thanks for what is good in our life this holiday season.

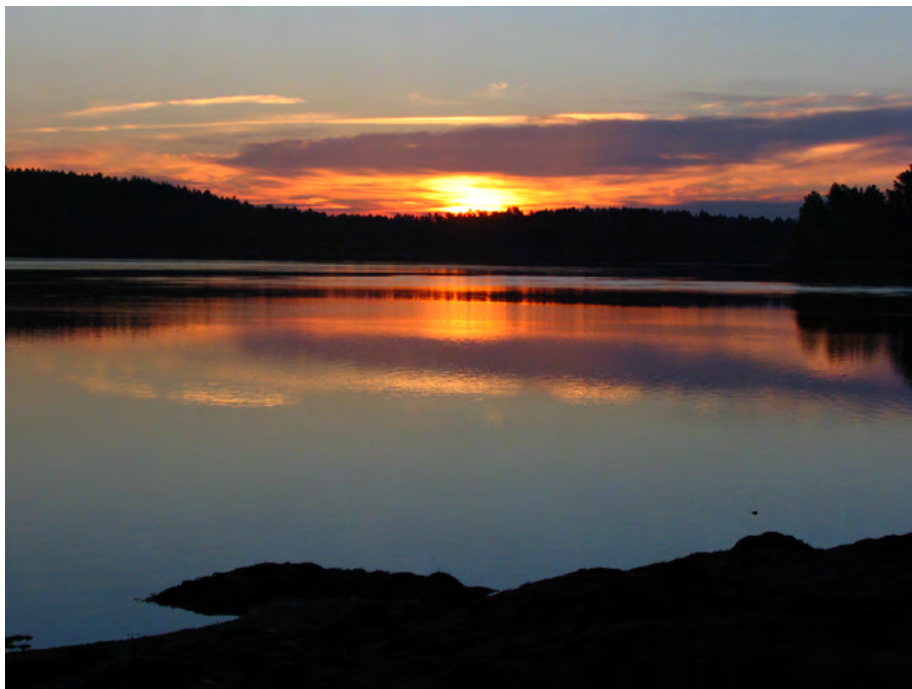
"The past is history, the future is a mystery, but today is a gift  
—that's why they call it 'the present'"

**OPPORTUNITIES TO PARTICIPATE IN ASWM ACTIVITIES IN 2012**

We are delighted you are a member of the Association of State Wetland Managers and we'd like to highlight a couple of opportunities to learn more about two important areas of wetland science and policy.

**BECOME A MEMBER OF THE NATURAL FLOODPLAIN FUNCTION ALLIANCE**

The Natural Floodplain Function Alliance is an affiliation of federal agencies, professionals and nonprofit organizations and individuals who work together to promote, protect and enhance natural floodplain resources. These include wetlands. Alliance members hold conference calls, webinars and workshops and share information about proposed changes in natural hazard policies and floodplain-related science. For more information visit: <http://aswm.org/watersheds/-natural-floodplain-function-alliance> If you are interested in joining the alliance, please e-mail [jeanne.christie@aswm.org](mailto:jeanne.christie@aswm.org)

*continued*

*Association News, continued from p. 2*

## BECOME A MEMBER OF THE NATIONAL WETLAND MAPPING CONSORTIUM

You are invited to join the Wetland Mapping Consortium (WMC), an interdisciplinary group of wetland scientists and managers interested in mapping and monitoring wetlands with remotely sensed imagery and using the resultant products for improved management of wetland resources. The Wetland Mapping Consortium has monthly webinars on a variety of topics. For more information and to join, please go to: <http://clie.cses.vt.edu/WMC/>



## WHAT'S ON THE HORIZON?

It seems that every year begins with the potential for changes on the national level that could dramatically affect our collective ability to conserve the nation's wetlands. 2012 is no exception.

**2012 Farm Bill.** The last Farm Bill was passed in 2008 and is due to expire in September of 2012. Congress plans to begin farm bill deliberations early in 2012. However, there has already been considerable discussion about some possible changes in the next Farm Bill. The Conservation Title, which includes important programs such as the Wetlands Reserve Program, the Wildlife Habitat Incentives Program, and the Conservation Reserve Program, is one area of the bill where changes are being considered. Also, there has been a lot of discussion about making major changes to the commodity programs and other price supports, which may in turn significantly reduce the effectiveness of the Swampbuster program. For related news, visit the AgNews page: <http://www.aswm.org/news/ag-news>

**Clean Water Act jurisdiction guidance and rulemaking.** Over the past couple of months the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps) have continued work on developing a proposed rule to clarify Clean Water Act jurisdiction by entering into formal consultation with state and local elected officials pursuant to the requirements of Executive Order 13132 - Federalism. <http://www.govexec.com/pdfs/111908rb1.pdf>

In addition, the U.S. Environmental Protection Agency's rulemaking webpages (called DaRRT) have been updated and the date for publication of a proposed rule in the Federal Register has been moved from January to March of 2012. <http://yosemite.epa.gov/opei/RuleGate.nsf/byRIN/2040-AF30?opendocument> The review and evaluation process that takes place before a proposed rule is published in the Federal Register does not follow a predictable timeline, so the March publication date for a proposed rule is not a certainty. If published, a proposed rule on clarifying Clean Water Act jurisdiction is likely to result in hundreds of thousands of comment letters that will provide the agencies with a substantial amount of information on the appropriate extent of Waters of the U.S. and Clean Water Act protections. There is also likely to be considerable disagreement among the comments on where jurisdiction should end.

**New Nationwide permits.** Last February the U.S. Army Corps of Engineers proposed a revised set of nationwide permits for the Clean Water Act Section 404 dredge and fill permitting program. Nationwide permits expire every 5 years. They are designed to expedite permitting on tens of thousands of small actions that impact wetlands and other aquatic resources each year. The current set of nationwide permits is due to expire March 18, 2012. The Corps is expected to issue a final rule for the new nationwide permits shortly so that states and tribes will be able to complete 401 certification and coastal zone consistency reviews of the new nationwide permits prior to March 18 when the new nationwides will go into effect. The proposed nationwides are very similar to those already in place. However there were a couple of significant changes included in the proposal: 1) modification or elimination of nationwide 21 for surface coal mining and 2) the possible addition of two new permits to authorize pilot projects for land-based and water-based renewable energy generation facilities.

**401 CERTIFICATION CASE STUDIES**

Over the course of 2010-2011, ASWM staff gathered information to complete case studies of 401 Certification programs in 11 states. These states were Delaware, Idaho, Georgia, Kentucky, Louisiana, Missouri, North Carolina, South Carolina, Tennessee, Texas and Wisconsin. The purpose of this project was to strengthen and improve state Section 401 programs. ASWM interviewed state 401 certification staff in 2010 and the summaries were finalized in 2011. We thank states for their contributions to these summaries. Each summary includes information that falls into the following sections:

- 401 Certification Case Study Outline
- Definition of Waters of the State
- Permits 401 Program is Applied to
- States 401 Certification Standards (water quality and others)
- 401 Certification Implementation
- Coordination of Programs
- Application of 401 Certification to wetlands declared nonjurisdictional due to SWANCC
- Description of Types of Conditions (including BMPs)
- Mitigation Policies and Requirements
- Monitoring and Enforcement Approaches
- Staffing
- Tracking Techniques/Databases
- Program Fees
- Important Court Cases



For example, here is a snapshot of Delaware's 401 Certification program:

The Delaware Department of Natural Resources and Environmental Control (DNREC) is responsible for a broad state wetland program, utilizing 401 water quality certification in coordination with state regulation of subaqueous lands, tidal wetlands, and authorities under the Coastal Zone Management program. The Corps of Engineers reviews all dredge and fill permit applications (Section 10/Section 404), while the state typically comments on projects that require other state authorization for consistency. State water quality standards incorporate language that is similar to the 404(b)(1) Guidelines, and recognize a "fishable/swimmable" standard. Delaware's definition of Waters of the State includes all wetlands: "Waters of the state" means all the tidal waters under the jurisdiction of the state where the lunar tide regularly ebbs and flows and all intrastate non-tidal waters except for non-tidal waters contained in aquaculture facilities registered with the Department of Agriculture.



Delaware certifies 404 permits and Section 10 permits. They recognize the ability to certify FERC licenses and NPDES permits though this has not been done in the state. Delaware utilizes their general water quality standards to create conditions for wetlands. The regulatory document for the State of Delaware Surface Water Quality Standards is the main reference document used in their 401 certification review. Equally important is Chapter 5 of the Water Pollution Control regulations which governs 401 review. They do have some numeric standards in addition to narrative standards, many of which relate to dredging regarding standards for factors such as sediment and discharge from disposal. Delaware's Surface Water Quality Standards can be found here: <http://www.dnrec.state.de.us/DNREC2000/Divisions/Water/WaterQuality/WQStandard.pdf>

*continued on next page*

The case studies for the 11 states in this project are available on the ASWM website at: <http://aswm.org/wetland-programs/401-certification/1496-401-certification-case-studies>

#### **401 CERTIFICATION BEST PRACTICES IN DREDGE & FILL PERMITTING PROGRAMS**

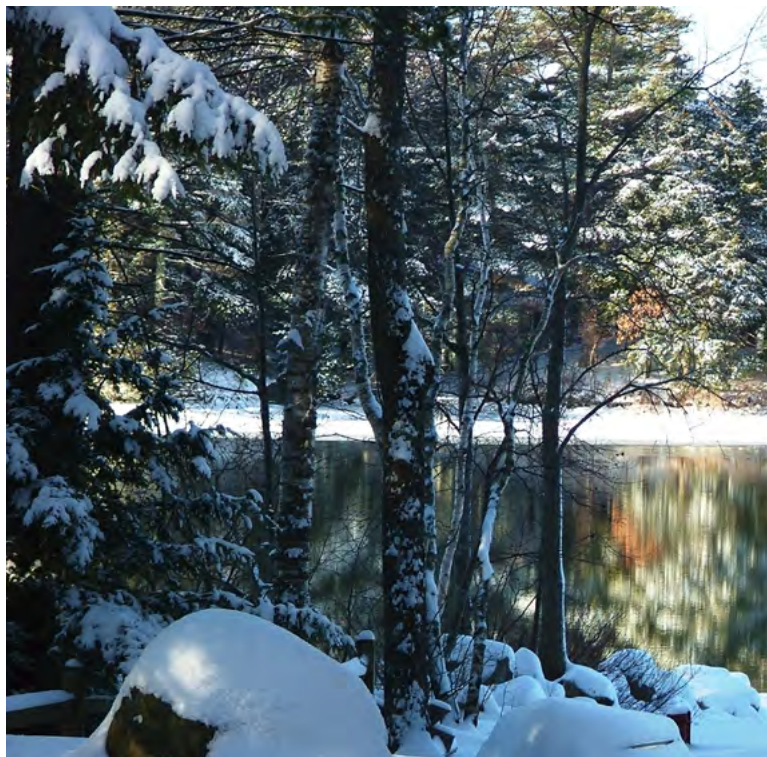
In addition to the case-studies, ASWM prepared a report on the best practices of 401 Certification programs. The report gives an overview of why the 401 Certification programs are important and how states and tribes use and apply 401 Certification in their wetland permitting programs. The report also explores the advantages and limitations of 401 Certification programs. The following are highlights from the report.

Section 401 of the Clean Water Act provides states with the authority to ensure that federal agencies will not issue permits that violate the water quality standards, or other applicable authorities, of a state or tribe through a process known as water quality certification. The importance of 401 certification in assuring states continued control over their aquatic resources has been well established. In today's economic climate – where state and federal regulatory staff limitations and reductions collide with public demand for ever greater regulatory efficiency – Section 401 can also be a useful tool in integrating state and federal programs, reducing overlap in a more holistic approach to resource management.

#### **THE VALUE OF 401 CERTIFICATION FOR STATE AND TRIBAL DREDGE & FILL PERMITTING PROGRAMS**

The Clean Water Act allows states and tribes a great deal of discretion in development of 401 certification procedures. A given state may contribute more or less staff effort, and take on more or less responsibility for the final permitting or licensing decision, depending upon multiple factors. These include but are not limited to the scope of state or tribal water quality regulations, state concerns with water issues and other resource management priorities, rates of wetland loss, land use policies, number of staff available, and public support.

**ADVANTAGES OF 401 CERTIFICATION PROGRAMS** – Part of ASWM's assessment of the 11 representative 401 Certification programs examined the clear advantages of the program. These are a few examples of advantages.



**Availability.** The provisions of Section 401 are available to all states and approved tribes without the need for additional state legislation. Any state can take advantage of this opportunity to review federal regulatory actions to the extent that the state desires. There is a generous time limit for state response and federal agencies cannot ignore comments that are submitted by a state, including denial of water quality certification. Since 401 Certification is based on a state's existing water quality standards, additional legislation or regulations may not be required—at least in the early stages of developing a program.

**Flexibility.** While the Clean Water Act makes water quality certification authority available to every state, it offers broad discretion in how the state operates the program. States and tribes are free to work with the Corps to develop

*continued on next page*

procedures for sharing information in permit applications, carrying out technical review of the application, integrating specific state interests – including related state regulatory programs (e.g. floodplain management, soil erosion control, special geographic areas), defining integrated decisions in permit documents, and carrying out compliance and enforcement.

**Avoidance of duplication.** Both the states and the federal agencies clearly benefit when project review is a shared – rather than duplicated – responsibility. More advanced programs go so far as to reach an understanding of what federal criteria will be the focus of each agency; for example, North Carolina and some other states rely on the Corps to evaluate a project under the 404(b)(1) guidelines. In return, the Corps may rely on state information to address issues such as indirect effects of stormwater on aquatic ecosystems and cumulative impacts to wetlands and streams.

#### LIMITATIONS OF 401 CERTIFICATION PROGRAMS --

ASWM's assessment also looked at potential limitations of Section 401 Certification. Here are a few examples of limitations.



The Corps may shift the burden of resolving permit issues or enforcing permits to the state or tribe in the event of state denial or conditional certification. Corps staff may issue a provisional permit that authorized the activity provided that the state provides water quality certification. Provisional permits are issued routinely in some well-established and coordinated programs, but if the state disagrees with federal findings, or believes that additional requirements must be attached to the permit, they may bear the regulatory burden of these actions.

State responses to a request for 401 certification must be based on state water quality standards, or other appropriate requirements of state law. In some instances, a state may have concerns that exceed its established regulations; for example, Texas notes that the lack of zoning in their state can limit their ability to address floodplain issues and to coordinate with FEMA. Some states have 401 regulations that limit the state authorities that can be considered in a 401 certification decision.

Individual state and tribal 401 certification programs form an essential link between the Section 404 program, state water quality standards and the other portions of the Clean Water Act. They have enormous potential to improve permitting by ensuring protection of water resources consistent with the goals of state and federal law while simultaneously streamlining permit decisions. A number of states and tribes have benefited from using this program effectively. For others, it has potential that has not been fully explored. Many states are looking carefully at all programs to identify areas where reductions in spending can be used to address budget shortfalls. It is important for states to fully evaluate the effectiveness of 401 programs, and the permitting delays and increased costs that may result from alterations to these programs. For more information about the Section 401 program visit: <http://aswm.org/wetland-programs/401-certification>



**NEW WEBPAGE FOR STATE LEGISLATORS**, continued from p. 1

For State legislators, development of policies that balance the protection of wetland resources and their public benefits with the needs of landowners, transportation planners, and other development interests can be challenging.

The information on ASWM's website--on the "I am a Legislator" webpage--has been compiled specifically to assist State legislators and their staff in understanding some of the most common public questions and policy issues related to wetlands. The short articles (similar to fact sheets) provided include basic information about wetlands and their importance, summarize how various states manage these resources and identify additional resources and reports that provide more detailed information. Information regarding current wetland issues provides a brief introduction to the question at hand, as well as links to more in-depth sources of information either on our website or elsewhere.

Visit: <http://aswm.org/iam/legislator>

ASWM is committed to the effective exchange of information among scientists, wetland managers and policy-makers. If you have a question or if you would like us to address a particular issue, please let us know by contacting us at [legislators@aswm.org](mailto:legislators@aswm.org). The Association of State Wetland Managers would like to thank the Orchard Foundation for its generous support in making these webpages possible.

## *Advice from a Wetland*

10. *Stay connected. Don't become isolated.*
9. *Hydrate occasionally.*
8. *Don't let yourself be categorized as "typical."*
7. *Don't assume.*
6. *Rely on Best Professional Judgment to avoid degradation.*
5. *Be adaptable to change.*
4. *Exotic things are okay in small amounts but they shouldn't overrun your natural tendencies.*
3. *Don't get mired down in muck.*
2. *If you do get bogged down, be evergreen.*
1. *Pool your resources for your "Big Night."*

--Special thanks to Rebecca Dils and the Wetland Strategies & State Programs Branch, EPA

# ASWM Welcomes New Members!

William Allen, The Conservation Fund  
 Karla Beatty, Oklahoma Conservation Commission  
 Nicholas Coffey, Coffey Geoscience  
 Aleta Daniels  
 Stacey Day, Oklahoma Conservation Commission  
 Will Donaldson, Resource Environmental Solutions, LLC  
 Charles DuCharme, Missouri Department of Natural Resources  
 Daniel Dvoretz, Oklahoma State University  
 Tom Estabrooks, Minnesota Pollution Control Agency  
 Joseph Hankins, The Conservation Fund  
 Stacy Hansen, Oklahoma Conservation Commission  
 Valerie Hentges, Missouri Department of Natural Resources  
 Colin Mann, CH2M HILL  
 Tom Moorman, Ducks Unlimited, Inc.  
 Stephanie Murray, CH2M HILL  
 Robert Ray, Montana Department of Environmental Quality  
 Jeff Ryan, Montana Department of Environmental Quality  
 Frankie Savoy, Resource Environmental Solutions, LLC  
 Michelle Townsley, Peoria Tribe of Indians of Oklahoma  
 Matt Vitello, Missouri Department of Natural Resources  
 Maggie Vuturo Bosiljevac, CH2M HILL  
 Corey Wilcox, CH2M HILL



## *Many Thanks to Our Members & Donors*

Thank you for renewing your membership and  
 for your continued support of ASWM.

If you would like to make a tax-deductible end-of-year  
 donation, visit: <http://www.aswm.org/donate-to-aswm>

### Wetland News Staff

Jeanne Christie,  
 Assistant Editor, Photos

Sharon Weaver,  
 Web Lay-out, Design

Laura Burchill,  
 Proof-reader

Leah Stetson,  
 Editor, Design



*Look closely: our  
 snowflakes are  
 made from different  
 wetland plants' leaf  
 patterns!*