

Understanding Federal, State and Local Dredge & Fill Permitting Programs

By Leah Stetson, ASWM



Jeanne Christie photo

ASWM has received numerous requests for information pertaining to wetland permits from citizens. *How do I find out if the wetland being filled in my area is legal? Who do I contact in my town/state/district? How do I obtain a permit? How do I contest one? What happens to violators? Where may I learn more about wetland permits?*

Several state, county and regional wetland programs have innovated new, creative ways to educate citizens—both violators and non-violators alike—about wetlands' critical ecological and economic value to people and communities. Rather

than put the emphasis of wetland law enforcement on the costly repercussions, such as fines and penalties, workshops and training opportunities reinforce the basic, positive principles behind environmental policies and encourage citizens to be proactive. Workshops pair violators with concerned citizens, who often play a mentor role to those who might need to see that the regulatory staff are not the only people concerned about wetlands.

The U.S. Army Corps of Engineers (Corps) has broad responsibilities with respect to water development projects including implementation of the Clean Water Act's Section 404 program. The Corps is divided into eight regional districts and 38 districts, which are determined by watersheds, not state lines. For a map showing the outlines of the 38 Corps districts, go to: <http://www.mvs.usace.army.mil/permits/HQmap.htm> Please note, however, that some of these districts do link to webpages for the district-specific information, while others do not link to the most recent district websites. For a link to the current and most up-to-date district websites, that include information on how to obtain permits under Section 404, as well as other permitting-related information, visit: <http://www.usace.army.mil/cw/cecwo/reg/district.htm> Each of the districts' listings will link to district-specific information, including but not limited to wetland delineations, how to report a violation, who to contact and how to apply for a permit if one is required.

Many activities that might impede navigation on traditionally navigable waters require a Section 10 permit from the Corps, pursuant to the Rivers & Harbors Act of 1899, which is still in effect today. The permit process for Section 10 permits is the same as for Section 404 of the Clean Water Act, otherwise known as the Section 404 Dredge & Fill Program. Section 404 only applies when the federal government has jurisdiction, meaning authority, over both the property proposed for development and the activity that the applicant intends to do on the property. The following is a checklist adapted from *Wetlands Law & Policy: Understanding Section 404's* Chapter 1, Federal Wetlands Regulation, *An Overview*, written by Kim Diana Connolly and Douglas R. Williams, please visit:

http://www.aswm.org/member/wetlandnews/april_2007/checklist_for_sec_404_permits.pdf

How State Wetland Programs Deal with Violators

Twenty states have their own independent permitting authority, in which case the applicant must comply with both state and federal regulations and obtain a joint permit or a permit from each. The processes for complying with state and federal permits vary from state to state. States with independent permitting authority can also issue general programmatic permits and coordinate with the Corps. The other thirty states, as part of the federal 404 program, may condition 404 federal permits under Section 401 of the Clean Water Act. This means that the applicant usually does not acquire a permit until s/he complies with both the state and federal conditions. For example, some states have water quality standards and a state may condition a permit to adhere to those standards, in addition to whatever the Corps may require in terms of mitigation or other conditions.

Among the ways that state wetland programs deal with violators, two approaches have become more commonly employed recently. The first area is wetland training and education using workshops aimed at teaching an audience about wetland ecosystems and the permitting process. Secondly the advancement of technology and GIS mapping has provided new tools for identifying violations.



Wetland Training / Education

Workshops and training can be tailored to regional regulatory permits, state or federal, local or even personalized for the individual violator or permit applicant. National Association of Counties' (NACo) Wetlands Training Program, for example, is geared for counties. To learn more about NACo, go to:

http://www.naco.org/Template.cfm?Section=New_Technical_Assistance&Template=/TaggedPage/TaggedPageDisplay.cfm&TPLID=62&ContentID=14013

Anyone want to buy an excavator for dirt cheap? On Ebey Island just north of the State Route 2 tressle across the Snohomish estuary near Everett, WA. No, those are not discarded soil maps floating in the water; they are absorbant pads to help soak up fuel. The operator was clearing a Category 1 forested wetland to establish a tree farm. *Photo by Paul Anderson, Ecology wetland specialist, taken on 4-23-07.* Submitted by Erik Stockdale

Some states have developed programs that serve to educate the public about wetland permits. While each Corps district has its own set of procedures for dealing with violations, e.g. internal forms as well as guidelines for a citizen to submit an inquiry about a prospective violation s/he observed, some state wetland programs have initiated educational programs with training workshops for violators and non-violators alike.

ASWM has identified a few examples of these programs to highlight the educational approach to Sec. 404 and state water / wetland law enforcement; some examples are Project POWER, originally developed by the New York State Department

of Environmental Protection in 1994; Norfolk (VA) Wetlands Board's public seminar; MassDEP's adaptation of Project POWER at the New England Aquarium; and San Diego Regional Water Quality Control Board's wetlands workshop in California. Often the training fulfills two purposes for violators: 1) reduces the fine charged for the committed violation and 2) clarifies certain environmental laws that the participant may have failed to comply with, may have misunderstood, or not have known about them. Another benefit to the training workshops is part of a psychological or social response; concerned citizens demonstrate their interest in protecting wetlands when workshop participants, who may also be violators, ask, "who cares about wetlands?"

Project POWER: Protecting our Wetlands with Educators and Regulators



Problem with
stormwater detention
Jeanne Christie photo

Combines the talents and resources of aquaria and regulatory agencies

Current director(s): Dr. Merryl Kafka, New York Aquarium
Founded by James Gilmore, Jr., regional supervisor for the New York State Department of Environmental Conservation

"It's cheaper to educate than to mitigate,"¹ says Dr. Merryl Kafka, Curator of Education at the New York Aquarium and one of the think-tanks behind Project POWER, a new wetlands workshop series held at the aquarium. Founded in 1994

by Jim Gilmore, regional supervisor for the New York State Department of Environmental Conservation, the program bloomed into Project POWER thanks in part to a federal EPA grant in 2005 and a grant from Wildlife Conservancy Society (WCS), launching the program to a national level.

According to an article in *Conservation in Practice*², the "wetlands violator" workshop smacks of traffic school but with a keen distinction: drivers who obey the speed limit don't usually turn up in traffic school. But in the New York Aquarium's Project POWER workshop, both violators and *non-violators* are welcome to participate—which puts the emphasis on prevention, not punishment. For a link to the article, "Ecological Reform School," by Douglas Fox in *Conservation in Practice*, go to:

<http://www.conservationbiology.org/CIP/article52ERS.cfm>



Spanky the Sea Otter at the New York Aquarium. Photo by C. Hackett/NY Aquarium

Violators who participate in the three-hour class, which focuses on the federal Tidal Wetlands Protection Act (TWPA), receive a \$250 reduction in their civil charges, on top of new understanding of wetlands' ecological value and how to avoid future violations. Because the class is set at an aquarium, families attend these workshops, too,

¹ Kafka, Merryl. Pers. comm.. 4/25/2007

² Fox, Douglas. "Ecological Reform School." *Conservation in Practice*. Vol. 5, No. 2. A publication of the Society for Conservation Biology. Spring 2004.

and the place provides neutral ground for regulators, violators and concerned citizens to co-mingle and learn about wetlands. The New York Aquarium exhibits several wetland ecosystems including salt marsh, the rocky coastline of Sea Cliffs, Jamaica Bay wetlands; participants also may get to meet Spanky the Sea Otter and other animals that depend on wetlands and coastal areas. For more information on the New York Aquarium, go to: <http://nyaquarium.com/nyahome>

Dr. Kafka says, “it’s a model not a mandate.” The collaborative Project POWER workshop model has sent off-shoots like rhizomes all over the country to at least 13 other state and regional wetland programs. Project POWER partners are located in Washington, California, North Dakota, Kansas, Oklahoma, Texas, New York, Massachusetts, New Jersey, Virginia, North Carolina and Florida. In addition to their official partners, word gets around. Each time this happens, the resulting workshop is finely tuned to meet the needs of a specific community. The San Diego Regional Water Quality Control (SDRWQC) Board was asked to partner with the San Diego Zoo as a requirement of the RFP. Project POWER requires that museums and aquaria partner with a regulatory agency. The combined talents and resources of aquaria and regulatory agencies make this national initiative unique.

The San Diego Regional Water Quality Control (SDRWQC) Board heard about Project POWER from the San Diego Zoo in California. The SDRWQCB and San Diego Zoological Society hosted a wetlands workshop this past January at the Wild Animal Park. There were 70 people in attendance—including staff from the U.S. Army Corps of Engineers, California Dept. of Fish & Game, local municipalities and conservation groups as well as the general public. But wait: no violators? Unlike other violator wetland classes in New York, Virginia and Massachusetts, this workshop assumed a preventative approach and none of the participants were violators.

According to David Gibson, Senior Environmental Scientist on the SDRWQC Board’s southern watershed unit, most violators in the San Diego region would not have been interested in participating after receiving notice of their penalties. This is because typical violations the SDRWQCB acts on result in Administrative Civil Liabilities ranging from \$10k-100k and in one current violator’s case, millions of dollars—for one violation. If the SDRWQCB offered to reduce these civil charges by \$250, as with New York’s Project POWER, it would not be enough of an incentive to attract violators to the San Diego workshop. Instead, the targeted audience for the San Diego Project POWER workshop is the general public in an effort to get them to see the many wetland mitigation sites strewn throughout the counties as community assets, not abandoned or valueless areas. “Sustaining those sites depends on the benevolence of the community,” Gibson told ASWM. It is important for the community to view these mitigated wetland areas as places to hike, watch birds and enjoy nature rather than as possible spots for BMX bike trails or development.

During the January workshop held in San Diego, participants learned not only about Clean Water Act section 404 permits and the SDRWQCB section 401 Water Quality Certification, but also the California Dept. of Fish & Game Streambed Alteration Agreement permits, other state and federal regulations as well as local ordinances. The workshop also discussed the various types of wetlands found in the region, the structure,

functions, and values of those wetlands, the differences between federal and state jurisdictions, and the importance of avoidance of impacts to those wetlands. Recognition of non-perennial streams and ephemeral wetlands (e.g. vernal pools) was also an important subject for the workshop participants. The presentation provided examples of ‘what people are allowed to do’ and ‘not allowed to do,’ covering topics such as the kinds of activities that alter streams. While the SDRWQC Board does have authority to regulate dredging and fill and waste-related activities in wetlands, they limit enforcement actions for illegal wetland dredging or filling activities to serious and egregious violations due to limitations in staffing resources. The SDRWQCB and Zoological Society seek funding to continue the wetlands workshop. Gibson says there is also a possibility that construction contractors with smaller violations might be willing to participate in future workshops, e.g. by sending their foreman and subcontractors to take the class. For a link to the San Diego Regional Water Quality Control Board’s webpage, visit: <http://www.swrcb.ca.gov/rwqcb9/>



New England Aquarium & MassDEP’s “Wetland Matters” Workshop

Workshop facilitators: John Anderson, Director of Education, New England Aquarium; Jessica Soule, Teacher Resource Center, New England Aquarium. Speakers included Alice Smith and Andrea Langhauser from the MassDEP Bureau of Resource Protection, Wetlands and Waterways Program.

The New England Aquarium in Boston, Massachusetts held its second wetlands workshop, *Wetland Matters*, on April 26, 2007 in partnership with the Department of Environmental Protection (MassDEP). The aquarium’s Director of Education, John Anderson, and other aquarium staff, had attended a Project POWER workshop in New York, with a MassDEP representative, Andrea Langhauser of the Division of Wetlands & Waterways, where they got the idea to collaborate on a wetlands education program in Boston. The *Wetland Matters* workshop focused on why wetlands are important and how people engaged in real estate, land planning and development can help protect wetlands, according to the workshop flier. The workshop targeted an adult, professional audience, unlike many of the Aquarium’s other programs, which are geared for families, school groups and the general public. The presenters discussed state permits required by MGL Chapter 91, “the Public Waterfront Act,” as well as MGL c.131 s.40, the State “Wetlands Protection Act” (WPA). Although the Corps still reviews Sec. 404 permits in Massachusetts, this workshop did not cover the dredge & fill section of the Clean Water Act but remained focused on state statutes and regulations as well as fun, interactive demonstrations on the nature and importance of wetland functions.

MassDEP’s Wetlands Circuit Rider Program, which started as a pilot program in 1996, provides technical assistance and training to conservation commissions on wetland issues under the Wetlands Protection Act. Wetlands Circuit Rider Coordinator Alice Smith was among the speakers who presented on the wetland permitting process at the *Wetland Matters* workshop. To view one of the MassDEP’s presentations for the workshop, go to:

http://www.aswm.org/member/wetlandnews/april_2007/wetland_matters_presentation.pdf To read more about the Wetlands Circuit Rider Program, see: http://www.aswm.org/member/wetlandnews/april_2007/overview_of_mass_dep_circuit_rider_program.pdf and visit: <http://www.mass.gov/dep/water/compliance/cridr.htm>

Norfolk, Virginia Wetlands Board: Free Public Wetlands Education Seminar

A hands-on, participatory, intimate approach to wetlands enforcement

Current Director(s): Kevin Du Bois, Bureau of Environmental Services, Norfolk, VA.



A relatable problem for anyone who lives near wetlands. High water near Sebago Lake in Maine.
Jeanne Christie photo

Since its inception in the 1980s, the primary goal of the Norfolk Wetlands Board has been to restore wetlands and to educate the public about the regulatory process, not to be punitive.³ Until a few years ago, members of the Wetlands Board were concerned about the fairness of assessing monetary civil charges for violations—except in those cases which involved repeat, “knowing” offenders, such as marine contractors and others who regularly work in wetlands—and so the Board did not assess civil charges very often. But now that the Norfolk Wetlands Program offers a free, public wetlands education seminar—open to both violators and non-violators—the amount of civil charges has increased significantly and violators may no longer get away with saying, “I didn’t know.” In addition to the “knowing” violators, homeowners, who made an honest mistake and concerned citizens, who are non-violators, have a chance to learn about the importance of wetlands as well as the steps necessary to comply with state and federal regulations.



Williamsburg, VA
Jeanne Christie photo

How did they get started? The Norfolk Wetlands Board asked Kevin Du Bois, an environmental engineer and wetland delineator with the City of Norfolk, to develop “a driver’s education course” for wetland violators. Du Bois then contacted his colleague, Jim Gilmore, at the NY State Department of Conservation; Gilmore had created the concept that later became “Project POWER.” Norfolk’s Wetlands Program staff then developed their own workshop with specific topics and information designed to suit the needs of the community. Du Bois has accomplished this by adding what he calls “more hands-on, participatory and intimate” components, including field activities. He takes participants of the workshop into wetlands, where they “seine for fish, dig sediment samples and sift for critters, see the plant zones and species [used] in delineation and see the interplay

³[1] Du Bois, Kevin. The Virginia Wetlands Report: a Local Board’s Experience with Civil Charges and Penalties (2006). Bureau of Environmental Services, City of Norfolk, VA.

between plants and organisms,” explains Du Bois. The wetlands workshop in Norfolk shows participants examples of familiar sites in order to emphasize the relevance of wetland protection laws in that area.

Another unique characteristic of the Norfolk wetlands class is that public participation is highly encouraged—an essential ingredient in pairing violators with non-violators, who apply a certain amount of “peer pressure.” But no one wears a dunce cap and sits in the corner. The violators are not identified as such and may respond more positively to their neighbors and fellow citizens, who are there to become wetland advocates.

The Norfolk Wetlands Board revised their civil charges matrix, a chart used as a guide to assess monetary fines for violations, in 2003. Once the Board and staff developed the class, which premiered in fall of 2004, the Board began to feel more comfortable with the fairness of assessing civil charges within a program with a broader range of enforcement tools. The Board reviewed 37 violation cases and collected \$9,200 in civil charges (an average of \$248 per violation) between 2004 and 2005, according to the City of Norfolk.⁴ Then in 2005, the Board deferred half of the charges when violators agreed to attend the wetlands education seminar. Approximately thirty citizens and all of the violators, who had been offered this option, actively participated in the workshop. Kevin Du Bois may be reached at kevin.dubois@norfolk.gov , (757) 664-4369 in Norfolk, VA.

Technology & GIS

Technology can also play a part in identifying potential violations, which may have otherwise gone unnoticed because of their geographic location. In Massachusetts, for example, the state’s Department of Environmental Protection (MassDEP) has developed sophisticated technology using aerial photography to identify wetlands change using “before” and “after” images of land. These changes are then compared to available permitting history data to determine whether a change site represents a possible violation. First launched in 2002, the MassDEP’s Wetlands Change Program’s mapping staff used state wetland maps that had originated from the Wetland Conservancy Program and developed a 1:12000 DEP Wetlands datalayer for 70% of the state, which allowed staff to create a database—as well as a baseline for future analysis of change in wetlands.



Redwing blackbird,
restored wetland, Salt Bay
Farm, Damariscotta River
Association, Damariscotta,
ME
Leah Stetson photo

Massachusetts DEP has shared the data from the 2001 flyover with local conservation commissions with wetland change maps specific to towns. “Data from the 2005 flyover will be made available via the internet. (see link below, Wetlands with Change datalayer) The purpose is to allow each of the towns to know where wetland

⁴ Du Bois, Kevin. “Wetlands Report: A Local Board’s Experience with Civil Charges and Penalties (2006). Bureau of Environmental Services, City of Norfolk, VA.

changes have been identified and enlist their help in researching the permitting or enforcement status of each identified change. This will allow a greater number of the identified changes to be followed up on,” explains Lealdon Langley, Director of the Wetlands Program with Mass DEP. The Wetlands Change Project staff compare newer digital imagery to the older photos of mapped wetlands in order to detect differences, such as areas that have been cleared, filled, or altered. Because this process is based on photo interpretation, it is not used for wetland delineation; however, the comparative process is useful in identifying possible violations of state wetland laws, such as the Wetlands Protection Act and Public Waterfront Act (both in MA) as well as federal regulations, such as Section 404 of the Clean Water Act. In the future, Langley says that the Mass DEP hopes to develop specific compliance and enforcement plans for certain interest groups, e.g. sand and gravel, commercial developers, homeowners and other professionals. For a link to the Mass DEP’s Wetland Change Project, go to:

<http://www.mass.gov/mgis/wetchange.htm> To learn more about Mass DEP’s Wetlands with Change datalayer, visit:

http://maps.massgis.state.ma.us/WETLANDS12K_CHANGE/viewer.htm To view other MassDEP thematic maps, e.g. eel grass and other wetland maps, go to:

<http://www.mass.gov/dep/service/compliance/maps.htm> Additional resources, wetland change maps showing loss of wetlands in Buzzards Bay watershed, MA, can be found at: <http://www.buzzardsbay.org/wetlandloss.htm>

Helpful resources on Sec. 404 permits



Jeanne Christie photo

American Rivers has just written a new draft citizens’ guide to understanding the Army Corps of Engineers’ permitting process under Clean Water Act. Here is a link to the draft guide. The final version may be available on their website by August 2007.

http://www.aswm.org/member/wetlandnews/april_2007/3_regulatory_corps_guide_draft.pdf

New England district:

<http://www.nae.usace.army.mil/>

All Corps districts:

<http://www.usace.army.mil/cw/cecwo/reg/district.htm>

Sierra Club has a list of interpretations of wetland permitting issues from 1994:

http://www.sierraclub.org/wetlands/resources/state_guidelines.asp

Wetlands 404 Permit Training Seminars (taught by retired Corps Engineer)

Boss International

<http://www.training.bossintl.com/html/wetlands-404-permitting-traini.html>

Association of Massachusetts Wetland Scientists (AMWS)

<http://amws.org/> (main website)

Workshops on difficult wetland delineations, negotiating business ethics, New England

http://amws.org/upcoming_workshops.html