



Michael F. Easley, Governor

William G. Ross Jr., Secretary
North Carolina Department of Environment and Natural Resources

Coleen H. Sullins, Director
Division of Water Quality

October 12, 2007

MEMORANDUM

TO: 401 Water Quality Certification Mailing List

FROM: John Dorney, Program and Policy Development Unit
Cyndi Karoly, 401 Oversight and Express Permits Unit
John Hennessy, Transportation Permitting Unit

RE: Update on Permitting Programs for Waters of the State Administered by the Division of Water Quality

The purpose of this memo is to inform you of several items in relation to current and proposed wetlands programs administered by the Division of Water Quality (DWQ). If you have any questions regarding specific items, please contact the staff members referenced within each topic.

I. Electronic Submittal of Application Materials

The DWQ is proceeding towards digital storage, archiving, internal routing and public accessibility of project files. The ultimate goal is to create a process whereby applicants can submit forms and other application materials electronically. The conversion process is consuming considerable staff time due to simultaneous efforts involving archiving of records as well as scanning of all incoming applications. Furthermore, this process involves extensive coordination and infrastructural development within the Central and seven Regional Offices. In the interim, we ask that applicants continue to submit materials according to the customary paper and regular mail procedures. In particular, we advise against any improvisation of procedures on the part of applicants and consultants, such as sending application materials via fax or e-mail to individual staff members, and then assuming the submittal process is complete, particularly without backing up such submittals by regular mail. We understand that the Corps of Engineers will be processing some correspondence somewhat informally as a result of workload issues related to the Rapanos ruling; however, the DWQ will continue to process all incoming and outgoing correspondence formally.

Applicants and consultants who wish to contribute to expediting the electronic conversion effort may do so by providing a compact disc (CD) containing all application materials along with the customary submittal format (five paper copies of all materials including the Pre-Construction Notification, supporting documentation, maps, and so on). This will allow for dedication of more staff time and material resources to the conversion process, ultimately allowing for earlier conversion. If your company elects to participate in this optional digital submittal process, please review the attached Guidance for Electronic Document Submittal, which includes a Memorandum of Understanding for Electronic Submission. Each company choosing to engage in this effort should provide one signed copy of this MOU to the DWQ, Attention: Beverly Strickland, 2321 Crabtree Blvd., Suite 250, Raleigh, NC, 27604. The digital formatting requirements (Group IV Tiff format at a dpi of at least 300), which are in accordance with parameters established by the Department of Cultural Resources, are described in the Guidance. Please note, this electronic submittal will be considered supplemental until further notice, and will not serve alone as a formal, complete application until the conversion process is complete. Thank you for your assistance and cooperation in this effort. Questions may be directed to Beverly Strickland at 919-715-4617 or Bev.Strickland@ncmail.net.

II. Rule Development for Non-404 Jurisdictional Wetlands

During the November 2007 meetings of the Environmental Management Commission and Water Quality Committee, the DWQ will present a Temporary Rule to address all Non-404 Jurisdictional Wetlands, including those lacking a significant nexus as well as isolated wetlands. The intention of these Rules will be to develop a state permitting program for all Waters of the State, including wetlands, not under the jurisdiction of the U.S. Army Corps of Engineers' 404 Permitting program. These rules will be very similar in format and content to the Isolated Wetlands Rules (15A NCAC 2H .1300), which will ultimately be replaced by these new rules. Once these rules are made effective, applicants may apply to impact such wetlands, streams and waters in accordance with the procedures and limitations in the new rules. We anticipate the temporary rule to become effective upon approval by the EMC in January 2008. Question may be directed to Cyndi Karoly at (919) 733-9721 or Cyndi.Karoly@ncmail.net.

III. Jurisdictional Calls for Waters of the State by DWQ staff

Upon development of the new Non-404 Jurisdictional Wetlands Rules, DWQ will be administering four separate programs, including:

- 401 Water Quality Certifications for 404 jurisdictional wetlands (when a Federal 404 Permit is required by the U.S. Army Corps of Engineers)
- Isolated Wetlands – currently administered by DWQ under the Isolated Wetlands Rules (15A NCAC 2H .1300), which will be replaced by new Non-404 Jurisdictional Wetlands Rules (see item II above).
- Other Wetlands not under 404 jurisdiction by the U.S. Army Corps of Engineers – currently refers to wetlands lacking a significant nexus. To be addressed under the new Non-404 Jurisdictional Wetlands Rules (see item II above).
- Buffer Rules, 15A NCAC 2H .0200 (currently Neuse, Tar-Pamlico, Catawba and Randleman) – under the jurisdiction of the State of North Carolina. The Buffer Rules are unrelated to the U.S. Army Corps of Engineers' 404 permitting program.

Applicants must coordinate with the U.S. Army Corps of Engineers to confirm the extent of 404 jurisdiction for all wetlands, waters and streams within project boundaries. The resources not claimed by the Corps will then be solely under state jurisdiction, namely, isolated systems and those lacking a significant nexus. Just as applicants are required to map 404 jurisdictional lines that are then signed by Corps staff, state jurisdictional lines must be approved by staff of the DWQ. Applicants and their consultants are to locate and map state waters and wetlands on maps prepared for specific projects, but state jurisdictional lines for streams, buffers and wetlands can only be officially confirmed by active DWQ staff or, where appropriate, by active employees of officially delegated state or local programs. Typically, an applicant will submit a single application to DWQ for simultaneous review under one or more of these four programs. The DWQ issues a single authorization letter addressing all resources under its jurisdiction. This is the most efficient way to address sites with a variety of resource types involved.

In the interest of enhancing the efficiency of this process, please note the following. Ideally, the applicant or consultant should schedule a pre-application meeting with the Corps and DWQ. We recognize that scheduling constraints may preclude an applicant's ability to meet with both agencies simultaneously. If it is not possible to meet with both agencies at once, the applicant should first meet with the Corps, and be certain to clearly identify all water resources appropriately as 404 jurisdictional, isolated, or lacking a significant nexus. Following this pre-application coordination with the Corps, applicants are strongly advised to schedule a pre-application field meeting with the appropriate DWQ Regional Office staff (contacts are listed on the DWQ web site at http://h2o.enr.state.nc.us/ncwetlands/documents/DOT_nonDOT_ExpressContacts_000.xls) prior to submitting an application. Scheduling a pre-application meeting with DWQ staff will ensure that all water resources under state jurisdiction are correctly delineated and signed by DWQ staff within the application upon submittal to DWQ. This will contribute to expediting the review process for the applicant. If a pre-application meeting is not scheduled, then the application will be subject to a field

review for verification of state jurisdiction, based upon scheduling constraints of DWQ staff. Applications with incorrect jurisdictional calls for Waters of the State will be placed on hold following field verification inspections, and corrected application materials will be required. An applicant therefore runs the risk of having an application placed on hold later in the review process if a pre-application meeting with DWQ staff is not scheduled. Questions may be directed to Cyndi Karoly at (919) 733-9721 or Cyndi.Karoly@ncmail.net.

IV. Updated Stormwater Tools on the DWQ Web Site

The second version of the new Best Management Practices (BMP) manual was issued on Monday, October 1, 2007. A new web site has been created to make it easier for applicants to obtain the information they need about stormwater BMPs: http://h2o.enr.state.nc.us/su/bmp_forms.htm.

Whenever an applicant submits a stormwater management plan for review and approval by the 401 Express/Oversight Unit, he or she must include a separate BMP Supplement Form (referred to in the past as "BMP Worksheet") for each proposed BMP. The BMP Supplement Forms may be updated in the future as the need arises. Therefore, applicants should use the current BMP Supplement Forms from the web site rather than saving the current version of the forms on a personal drive to use in the future. When using the BMP Supplement Forms, applicants should be certain to fill out and submit both worksheets – the Design Summary and the Required Items Checklist.

Sample BMP Inspection and Maintenance Agreements (referred to in the past as "BMP Operation and Maintenance Agreements") for each BMP are also available on the web site. These updated forms should be used as a template for all future BMP Inspection and Maintenance Agreements.

If you have any questions about the new stormwater materials, please contact Annette Lucas at (919) 715-3425 or Annette.Lucas@ncmail.net or Joseph Gyamfi at (919) 715-3473 or Joseph.Gyamfi@ncmail.net.

V. Clarifications Regarding Implementation of the New BMP Manual

The DWQ would like to provide the following clarifications regarding the implementation of the new BMP Manual:

- If DWQ issued a Certification, Permit or Authorization with a stormwater management condition prior to the release of the new BMP manual on October 1, 2007, the applicant may choose to follow either the new BMP manual or the version of the BMP manual in effect on the date of the authorization. However, if the applicant fails to submit a stormwater management plan to DWQ within the timeframe specified in the Certification, Permit or Authorization, then the October 1, 2007 version of the BMP manual shall apply. All authorizations issued on or after October 1, 2007 will be conditioned upon development of stormwater facilities in accordance with the new BMP manual, if a stormwater management plan is required.
- If the development is phased, future phases will usually be required to comply with the BMP manual in effect on the date of the future stormwater management plan submittal. However, the DWQ will consider on a case-by-case basis whether the applicant has demonstrated a clear hardship indicating the need to follow the version of the BMP manual in effect on the date of the 401 Certification.

Further questions may be directed to Annette Lucas at (919) 715-3425 or Annette.Lucas@ncmail.net or to Joseph Gyamfi at (919) 715-3473 or Joseph.Gyamfi@ncmail.net.

VI. Clarification of Points Regarding Locally Delegated State Stormwater Programs

DWQ released a memorandum dated August 20, 2007 from Coleen Sullins, Director, regarding a policy change in the review and approval process for stormwater management plans associated with applications for programs administered by the 401 Oversight and Express Permits Unit. The following clarification points are provided for your information:

- Applicants should check with the applicable local jurisdiction to determine if the proposed project is subject to a stormwater program that is included in the August 20, 2007 policy. Applicants should be aware that not all communities that are designated as Phase II have begun implementing approved Post-Construction Stormwater Programs as of the date of this public notice. If a jurisdiction is designated as Phase II but has not yet obtained DWQ approval for its Post-Construction Stormwater Program, then the stormwater management plan must be reviewed and approved by the 401 Oversight/Express Unit.
- If a project requires a 401 Certification with a stormwater management plan and is exempt from local Phase II stormwater requirements due to vested rights, then the stormwater management plan for the project must be reviewed and approved by the 401 Oversight/Express Unit.
- In March and April 2008, several BMP Reviewer Certification Courses will be offered by the DWQ for local governments that implement state stormwater programs. Only those local governments who have a staff member who successfully completes one of these courses will retain the authority described in the August 20, 2007 memo. After April 2008, a list of the certified local governments will be posted on the DWQ web site for applicants to reference.
- In areas with locally delegated state stormwater programs, the DWQ will retain the responsibility to review projects for compliance with riparian buffer rules, including the diffuse flow provisions (unless buffer protection has been locally delegated).

Further questions may be directed to Annette Lucas at (919) 715-3425 or Annette.Lucas@ncmail.net or to Joseph Gyamfi at (919) 715-3473 or Joseph.Gyamfi@ncmail.net.

VII. General Certification Revision Update

The new General Certifications (GC's) have been posted with hyperlinks on the DWQ web site at http://h2o.enr.state.nc.us/ncwetlands/rd_wetlands_certifications.htm. These GC's have an effective date of November 1, 2007. Please note the following information items:

- Any application for a General 401 Water Quality Certification received on or before October 31, 2007, will be reviewed in accordance with the conditions of the GC in effect on the date of the application. Any application received on or after November 1, 2007 will be reviewed in accordance with the conditions of the new GC.
- If an applicant has a specific preference to be reviewed under the conditions of one of the new GC's, but applies prior to November 1, 2007, the application can be reviewed under the conditions of the new GC provided that the applicant specifically advises DWQ of a preference for the new GC. Please note that no project-specific authorizations can be issued under the new GC's until November 1, 2007.
- Note that the two existing GC's associated with CAMA Permits and the proposed GC for Sills have not been finalized. Until the new GC's are fully developed for these permits, the GC's currently in place will remain effective.
- A copy of the inventory of public comments received during the development of the new GC's is posted on the web page where the GC's are hyperlinked.

Question may be directed to Cyndi Karoly at (919) 733-9721 or Cyndi.Karoly@ncmail.net or Ian McMillan at (919) 715-4631 or Ian.McMillan@ncmail.net.

Cc: Tom Reeder
Shelton Sullivan
DWQ Regional Wetland Contacts
Central Files
Dave Lekson, US Army Corps of Engineers, Washington
Ken Jolly, US Army Corps of Engineers, Wilmington
Keith Harris, US Army Corps of Engineers, Wilmington
Amanda Jones, US Army Corps of Engineers, Asheville
Jean Manuele, US Army Corps of Engineers, Raleigh
LeiLani Paugh, NC Department of Transportation
Suzanne Klimek, EEP

**ELECTRONIC SUBMISSION
MEMORANDUM OF UNDERSTANDING**

THIS MEMORANDUM OF UNDERSTANDING, dated _____, is between the **Division of Water Quality ("DWQ")**, and _____ ("**COMPANY**") with offices at _____

_____ DWQ desires to offer the Submission of 401 Water Quality Certification, Isolated Wetland Permits, and Buffer Permitting applications and associated documents by electronic means providing for the receiving and transmitting of documents electronically in substitution for conventional paper based documents and to assure that transactions are not legally invalid or unenforceable as a result of the use of available electronic technologies, to the mutual benefit of the parties of the transactions.

For purposes of this Memorandum of Understanding, **Electronic Submittal** is defined to be the electronically based submitting of documents from **COMPANY** to **Division of Water Quality** and electronically based receipt of confirmation of Submission from **DWQ** to **COMPANY**.

All parties of the Electronic Submission transaction desire to operate and maintain a secure Submission system that safeguards parties to recordation from deceit, fraud and forgery. This Memorandum of Understanding outlines the procedures and rules for the trusted relationship between the parties involved in Electronic Submission in order to facilitate a safe and secure Electronic Submission relationship. Participation in the Electronic Submission program is voluntary.

The **DWQ** performs an electronic examination of the electronic documents and indexing information then completes the Submission process using the electronic documents.

Neither the **DWQ** nor **COMPANY** shall be liable to the other for any special, incidental, exemplary or consequential damages arising from or as a result of any delay, omission or error in the Electronic Submission transmission or receipt.

Neither party shall be liable for any failure to perform processing of the transactions and documents where such failure results from any act of God or other cause beyond the party's reasonable control including, without limitation, any mechanical, electronic or communications failure which prevents the parties from transmitting or receiving the electronic Submission transactions.

Either party may terminate this Memorandum of Understanding for any reason by providing 30 days written notice of termination.

There will be no added fees or costs of any kind charged by the **DWQ** for Electronic Submission although **COMPANY** will be required to meet **DWQ** requirements in order to record electronically.

COMPANY is responsible for the costs of the system or services provided by a third party that enables the **COMPANY** to meet the Electronic Submission Program requirements.

DWQ Responsibilities:

DWQ shall attempt to protect the integrity of the Recordation process through ongoing monitoring of documents received and recorded through Electronic Submission means.

DWQ shall test and maintain Electronic Submission software and hardware required to operate the Electronic Submission capability. **DWQ**, however, shall be held harmless and not liable for any damages resulting from software or equipment failure.

DWQ shall apply the same level of diligence in handling documents submitted electronically as those submitted through the normal manual paper process.

COMPANY Responsibilities:

COMPANY shall work to insure that all security measures and credentials implemented are protected from unauthorized access. **COMPANY** assumes all responsibility for documents submitted through unique credentials provided to **COMPANY** for the purposes of engaging in Electronic Submission.

COMPANY shall be diligent in ensuring that documents submitted for Electronic Submission have been checked before submission for errors, omissions, and other deformities that would impact the validity of the document. This includes adherence to North Carolina indexing standards.

COMPANY acknowledges that Electronic Submission permits them to prepare, sign and transmit in electronic formats documents and **DWQ** approved attachments, and the document or attachments shall be considered as the "original" record of the transaction in substitution for, and with the same intended effect as, paper documents and, in the case that such documents bear a digital or electronic signature, paper documents bearing handwritten signatures.

By use of electronic or digital certificates to sign documents, **COMPANY** intends to be bound by those electronic signatures affixed to any documents and such electronic signature shall have the same legal effect as if that signature was manually affixed to a paper version of the document.

The **COMPANY** and/or its' employees attest to the accuracy and completeness of the electronic records and acknowledge responsibility for the content of the documents submitted through the Electronic Submission Program. Should a dispute or legal action arise concerning an electronic transaction, the **DWQ** will be held harmless and not liable for any damages.

COMPANY must maintain an audit trail of all activity.

COMPANY is responsible for supporting any technical issues associated with Electronic Submission.

COMPANY shall work in good faith with any Provider, if applicable, and **DWQ** to resolve issues with the Electronic Submission process.

COMPANY shall provide an effective mechanism to both an Electronic Submission Provider and **DWQ** through which problems or issues can be reported and addressed. In the event that problem is determined to be with the Electronic Submission software and not the infrastructure provided, the **COMPANY** shall work to resolve issues with **DWQ** and any Electronic Submission Provider.

COMPANY is solely responsible for any and all costs of the system or services that enables **COMPANY** to meet the Electronic Submission Program requirements.

COMPANY is responsible for coordinating all technical problems and issues through any Electronic Submission Provider and **DWQ**.

COMPANY will appoint a representative, whose name will be given to the **DWQ** Recorder in writing, who is responsible for enforcing the security procedures. The Recorder will be notified in writing of staff changes.

General Understanding

DWQ will not incur any liability for the information electronically transmitted by the **COMPANY** to **DWQ**.

DWQ will not incur any liability for any breach of security, fraud or deceit as a result of Electronic Submission.

Neither the **DWQ** nor **COMPANY**, nor any Electronic Submission Provider shall be liable to the other for any special, incidental, exemplary or consequential damages arising from or as a result of any delay, omission or error in the Electronic Submission transmission or receipt.

The Electronic Submission Provider, **DWQ**, and **COMPANY** will attempt in good faith to resolve any controversy or claim arising out of or relating to Electronic Submission through either negotiation or mediation prior to initiating litigation.

The **DWQ**, **COMPANY**, and any Electronic Submission Provider acknowledge that the electronic Submission process is an emerging technology and that State and National standards will continue to evolve. To further the technology and the electronic submitting process, all parties agree to meet to discuss changes and additions to this Memorandum of Understanding.

ENTIRE AGREEMENT. Except as expressly provided otherwise herein, this Agreement represents the entire agreement between the parties.

TERMINATION. Either party may terminate this Agreement without cause with 30 days written notice to the other party. User remains responsible for payment of fees for the filing and recordation of documents prior to the effective date of termination.

NO WARRANTIES/RELEASE OF LIABILITY. Absent gross negligence or willful misconduct, **COMPANY** agrees to release the **DWQ** from any liability in connection with the electronic filing and recordation of documents under this Agreement. User understands that there are no warranties, express or implied, in connection with such transactions.

ATTACHMENTS

Attachment A defines the technical specifications including format, models of Submission supported, and transmission protocols of the electronic records required by **DWQ**. **COMPANY** agrees to provide the transmission to the **DWQ** following the specifications outlined. **COMPANY** understands that the specifications may change from time to time. In the event changes to the specification are required, the **DWQ** will provide a written notice to the **COMPANY** within a reasonable timeframe.

Attachment B contains the document specifications for the Electronic Submission program.

Agreed and Accepted:

By: _____ (**COMPANY**)

Name _____

Title _____

Date: _____

By: _____ (**DWQ**)

Name _____

Title _____

Date: _____

MEMORANDUM

DATE: October 5, 2007

TO: 401 Water Quality Certification Mailing List

FROM: Tom Reeder, Supervisor
Wetlands and Stormwater Branch

RE: Guidance for Electronic Document Submittal

The DWQ 401 Programs are in the process of moving toward electronic submittal of applications. The first step in this process is for applicants of 401 applications to send one copy of all information on disk as well as the 5 paper copies requested in the Pre-construction Notification Application (PCN). The 401 Programs are working in conjunction with the Department of Cultural Resources to preserve and archive our files.

The guidelines for electronic documents submittal are listed below:

Formatting: All images must be stored in a Group IV Tiff format at a dpi of at least 300.

Color/Black and White: All applications and maps between the sizes of 8 ½ X 11 and 11 X 17 should be in black and white. If it is a photo of the property, color is acceptable.

We concede that color is needed at times but its use should be kept to a minimum. When allowed, grey-scale is preferred to color.

All large-scale maps must be in black and white for storage purposes.

We are also making a change in the need for large-scale maps. Instead of providing 5 copies of the full size plans please provide two copies of the full size plans along with three copies of the 11 X 17.

Please bear with us while we work toward electronic submittals for our applications. We hope to move the 401 Programs toward electronic submittal and distribution between agencies in order to better improve our permitting process. This first step will give us additional information to move toward our ultimate goal of electronic submittal for all applications.

If you would like to participate in this project you will have to fill out the attached document and return it to DWQ at 2321 Crabtree Blvd, Suite 250, Raleigh, NC 27604.

Thanks for your help and if you have any questions, please feel free to call Bev Strickland at 919-715-4617.

cc: File Copy
Cyndi Karoly, Supervisor, 401 Oversight Unit
John Hennessy, Supervisor, Transportation Permitting Unit
John Dorney, Supervisor, Program Development Unit
Kelly Eubanks, Electronic Record Archivist, Dept. of Cultural Resources, 4615 Mail Service Center, Raleigh, NC 27699
Bev Strickland, DWQ

File Name: Guidance for Electronic Document Submittal 3.doc