

99-094

STATE WATERS, PORTS AND HARBORS: STATE WATER CONTROL LAW.

CONSERVATION: CHESAPEAKE BAY PRESERVATION ACT.

Lawful adoption of Virginia Pollutant Discharge Elimination System Permit Regulation and Virginia Water Protection Permit Regulation by State Water Control Board. Authority of Board to define "surface water" by regulation to include "wetlands"; inclusion of "nontidal wetlands" within regulatory definitions of "wetlands." Authority of Chesapeake Bay Local Assistance Board to establish criteria for protection of water quality within Chesapeake Bay Preservation Areas must not affect authority of State Water Control Board to regulate industrial or sewage discharges pursuant to State Water Control Law. Board's regulatory authority does not extend beyond § 401 certification over nontidal wetlands.

The Honorable Thomas W. Moss Jr.
Speaker of the House of Delegates
October 7, 1999

You inquire regarding the authority of the State Water Control Board ("Board") to regulate nontidal wetlands. You express concern regarding nontidal wetland destruction in the Commonwealth resulting from a June 1998 decision of the United States Court of Appeals for the District of Columbia Circuit that limits federal authority to regulate the ditching and draining of nontidal wetlands. You relate that the Virginia Institute of Marine Science estimates that nearly 8,000 acres of nontidal wetlands may be impacted by ditching.

You note that a 1991 opinion of the Attorney General¹ addresses the regulatory authority granted the Board under § 62.1-44.15:5 of the *Code of Virginia*.² You state that § 62.1-44.15:5, a portion of the State Water Control Law,³ was adopted to implement § 401 of the Clean Water Act of 1977.⁴ You indicate that a recent federal court decision removes the basis for the Commonwealth to require a permit pursuant to § 62.1-44.15:5 for certain activities related to the ditching of nontidal wetlands.⁵ You relate that the 1991 opinion of the Attorney General does not address the right of the Commonwealth to act absent a federal mandate or prohibition. You note that § 62.1-44.15(3a) explicitly acknowledges that the Board may enact standards of quality or policies "which are more restrictive than applicable federal requirements." Such standards must be forwarded to the appropriate standing committee of the General Assembly, "together with the reason why the more restrictive provisions are needed."⁶

The Congress of the United States has enacted laws, and federal agencies have promulgated regulations, protecting water quality in the United States.⁷ The Secretary of the Army, acting through the Army Corps of Engineers, issues federal permits for the discharge of dredged or fill material into waters of the United States, including nontidal wetlands.⁸ The Commonwealth does not issue permits for such discharge; however, in such instances, § 401 of the Clean Water Act requires that the applicant for the federal permit obtain from the state in which the discharge originates (1) a certification that the discharge will comply with applicable requirements; or (2) a waiver of such certification.⁹

The 1989 Session of the General Assembly created a separate mechanism for such certifications. Section 62.1-44.15:5(A) provides that, "[a]fter the effective date of regulations adopted by the Board pursuant to [§ 62.1-44.15:5], issuance of a Virginia Water Protection Permit shall constitute the certification required under § 401 of the Clean Water Act." The applicable Board regulation became effective May 20, 1992.¹⁰

You first ask whether the Board has the authority under state law to define "state waters" or "surface water" to include "wetlands." The 1991 opinion concludes that the "Board has the authority to define 'surface water' by regulation to include 'wetlands.'"¹¹ The presumption in favor of an administrative agency's regulatory interpretation of the statutes that agency implements remains applicable, and, therefore, I agree with the conclusion of the 1991 opinion.¹²

You next ask whether the Board's regulations defining "wetlands" as "state waters"¹³ were lawfully adopted pursuant to this authority. The regulations to which you refer are the Virginia Pollutant Discharge Elimination System Permit Regulation¹⁴ and the Virginia Water Protection Permit Regulation.¹⁵ It is my view that these regulations, which have been in effect for some time, appear to have been lawfully adopted.

You next ask whether nontidal wetlands are encompassed within the Board's definition of "wetlands." Both sets of regulations adopted by the Board¹⁶ contain the same definition of "wetlands":

"Wetlands" means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.^[17]

Although the term "nontidal wetlands" is not a precise term, it appears to fall within this definition.

Your final questions focus on whether the Board has the authority, other than by § 62.1-44.15:5, to regulate wetlands.¹⁸ The 1991 opinion concludes that the Board's authority over wetlands is limited to those activities requiring a § 401 certification¹⁹—a Virginia Water Protection Permit under § 62.1-44.15:5. In reaching this conclusion, the 1991 opinion relies on the refusal of the General Assembly to pass legislation that would have established a comprehensive regulatory program concerning nontidal wetlands. At the 1988 Session of the General Assembly, legislation was introduced which would have authorized the Director of the Department of Conservation and Historic Resources to promulgate regulations protecting nontidal wetlands and to grant permits for activities proposed in or anticipated to adversely affect nontidal wetlands.²⁰ The bill was carried over to the 1989 Session by the Senate Committee on Agriculture, Conservation and Natural Resources.²¹ The Committee proposed substitute legislation in 1989 that would have created a Nontidal Wetlands Study Commission to evaluate existing programs and legislation related to nontidal wetlands.²² The General Assembly did not pass the substitute bill. However, the Virginia Nontidal Wetlands Roundtable was created, and it reported to the Governor and General Assembly in 1990.²³ In the executive summary the report states, "Roundtable members concluded that while effective management of nontidal wetlands should be of immediate and continuing concern to the Commonwealth, creation of a new regulatory program for the resource may be premature at this time."²⁴ I, therefore, concur with the 1991 opinion which inferred from the legislative decisions declining to act that the General Assembly did not intend for the Board to have authority beyond the § 401 certification over nontidal wetlands.

Furthermore, the General Assembly has taken no action in eight years to alter the conclusions of the 1991 opinion. In *Deal v. Commonwealth*, the Supreme Court of Virginia has stated that "[t]he legislature is presumed to have had knowledge of the Attorney General's interpretation of the statutes, and its failure to make corrective amendments evinces legislative acquiescence in the Attorney General's view."²⁵

The 1991 opinion focuses on the general authority of the Board concerning nontidal wetlands. Your inquiry specifically addresses the ditching and draining of wetlands in connection with

development.²⁶ You further inquire whether the ditching and draining of wetlands may be regulated pursuant to other provisions of the State Water Control Law.²⁷ Where, as here, the General Assembly has enacted several statutes that appear to bear on the same issue, the task is to ascertain the legislative intent. In its enactment of the Virginia Water Protection Permit statute, § 62.1-44.15:5, the legislature directed a particular program to comply with the § 401 certifications. The Supreme Court repeatedly has affirmed that it is a presumption of statutory construction that, where both general and specific statutes appear to address a matter, the General Assembly intends the specific statute to control the subject.²⁸ Accordingly, I must conclude that the legislature intended the activity you describe to be regulated by the Board to the extent authorized by § 62.1-44.15:5.

There is yet another indication of legislative intent on this matter. The 1988 Session of the General Assembly created the Chesapeake Bay Preservation Act.²⁹ The Act establishes the Chesapeake Bay Local Assistance Board³⁰ to "promulgate regulations which establish criteria for use by local governments to determine the ecological and geographic extent of Chesapeake Bay Preservation Areas."³¹ The Chesapeake Bay Preservation Act further directs that, "[i]n developing and amending the criteria, the [Chesapeake Bay Local Assistance] Board shall consider all factors relevant to *the protection of water quality from significant degradation as a result of the use and development of land.*"³² Statutes should not be construed to frustrate their purpose.³³ In addition, the use of the word "shall" in a statute generally implies that its terms are intended to be mandatory, rather than permissive or directive.³⁴ Finally, when a statute creates a specific grant of authority, the authority exists only to the extent specifically granted in the statute.³⁵ The express legislative intent is for local governments, with the assistance of the Chesapeake Bay Local Assistance Board, to protect water quality from the effects of land development, at least in the Chesapeake Bay Preservation Areas.

The Chesapeake Bay Preservation Act provides additional guidance concerning the authority granted local governments to protect water quality and that granted under the State Water Control Law:

No authority granted to a local government by [the Chesapeake Bay Preservation Act] shall affect in any way the authority of the State Water Control Board to regulate industrial or sewage discharges under Articles 3 (§ 62.1-44.16 et seq.) and 4 (§ 62.1-44.18 et seq.) of the State Water Control Law (§ 62.1-44.2 et seq.)."^[36]

Under generally accepted principles of statutory construction, the mention of one thing in a statute implies the exclusion of another.³⁷ The clear implication is that the grant of authority to localities does affect the Board's authority under other articles of the State Water Control Law. The statutes about which you inquire are found in those other articles. This further demonstrates the intent of the General Assembly that the Board's authority in this area be limited to that demanded by the § 401 certification process.

The 1991 opinion concludes that the Board does not have authority to regulate wetlands beyond that contemplated by the § 401 certification process.³⁸ In light of the indication of legislative intent on which the 1991 opinion relies and the eight-year acquiescence of the General Assembly in that opinion, accepted principles of statutory construction, and the express directive to the Chesapeake Bay Local Assistance Board, I concur in that opinion. Accordingly, the answers to your final four questions are identical: at the present time, the Board may regulate nontidal wetlands only to the extent necessary to carry out its responsibility under § 401 of the Clean Water Act.

¹1991 Op. Va. Att'y Gen. 307, 311, 312-13 (Board authority to regulate wetlands is limited to those federally permitted activities that require § 401 certification).

²Section 62.1-44.15:5 provides:

"A. After the effective date of regulations adopted by the Board pursuant to this section, issuance of a Virginia Water Protection Permit shall constitute the certification required under § 401 of the Clean Water Act.

"B. The Board shall issue a Virginia Water Protection Permit for an activity requiring § 401 certification if it has determined that the proposed activity is consistent with the provisions of the Clean Water Act and will protect instream beneficial uses. The preservation of instream flows for purposes of the protection of navigation, maintenance of waste assimilation capacity, the protection of fish and wildlife resources and habitat, recreation, cultural, and aesthetic values is a beneficial use of Virginia's waters. Conditions contained in a Virginia Water Protection Permit may include, but are not limited to, the volume of water which may be withdrawn as a part of the permitted activity. Domestic and other existing beneficial uses shall be considered the highest priority uses. When a Virginia Water Protection Permit is conditioned upon compensatory mitigation for adverse impacts to wetlands, the applicant may be permitted to satisfy all or part of such mitigation requirements by the purchase or use of credits from any wetlands mitigation bank, including any banks owned by the permit applicant, that has been approved and is operating in accordance with applicable federal and state guidance, laws or regulations for the establishment, use and operation of mitigation banks as long as: (1) the bank is in the same U.S.G.S. cataloging unit, as defined by the Hydrologic Unit Map of the United States (U.S.G.S. 1980), or an adjacent cataloging unit within the same river watershed, as the impacted site, or it meets all the conditions found in clauses (i) through (iv) and either clause (v) or (vi) of this subsection; (2) the bank is ecologically preferable to practicable on-site and off-site individual mitigation options, as defined by federal wetland regulations; and (3) the banking instrument, if approved after July 1, 1996, has been approved by a process that included public review and comment. When the bank is not located in the same cataloging unit or adjacent cataloging unit within the same river watershed as the impacted site, the purchase or use of credits shall not be allowed unless the applicant demonstrates to the satisfaction of the Department of Environmental Quality that (i) the impacts will occur as a result of a Virginia Department of Transportation linear project or as the result of a locality project for a locality whose jurisdiction crosses multiple river watersheds; (ii) there is no practical same river watershed mitigation alternative; (iii) the impacts are less than one acre in a single and complete project within a cataloging unit; (iv) there is no significant harm to water quality or fish and wildlife resources within the river watershed of the impacted site; and either (v) impacts within the Chesapeake Bay watershed are mitigated within the Chesapeake Bay watershed as close as possible to the impacted site or (vi) impacts within U.S.G.S. cataloging units 02080108, 02080208, and 03010205, as defined by the Hydrologic Unit Map of the United States (U.S.G.S. 1980), are mitigated in-kind within those hydrologic cataloging units, as close as possible to the impacted site. After July 1, 2002, the provisions of clause (vi) shall apply only to impacts within subdivisions of the listed cataloging units where overlapping watersheds exist, as determined by the Department of Environmental Quality, provided the Department has made such a determination by that date.

"C. Prior to the issuance of a Virginia Water Protection Permit, the Board shall consult with, and give full consideration to the written recommendations of, the following agencies: the Department of Game and Inland Fisheries, the Department of Conservation and Recreation, the Virginia Marine Resources Commission, the Department of Health, the Department of Agriculture and Consumer Services and any other interested and affected agencies. Such consultation shall include the need for balancing instream uses with offstream uses. Agencies may submit written comments on proposed permits within forty-five days after notification by the Board. The Board shall assume that if written comments are not submitted by an agency within this time period, the agency has no comments on the proposed permit.

"D. No Virginia Water Protection Permit shall be required for any water withdrawal in existence on July 1, 1989; however, a permit shall be required if a new § 401 certification is required to increase a withdrawal.

"No Virginia Water Protection Permit shall be required for any water withdrawal not in existence on July 1, 1989, if the person proposing to make the withdrawal has received a § 401 certification before January 1, 1989, with respect to installation of any necessary withdrawal structures to make such withdrawal; however, a permit shall be required before any such withdrawal is increased beyond the amount authorized by the certification."

³Tit. 62.1, ch. 4.2, §§ 62.1-44.2 to 62.1-44.34:28.

⁴33 U.S.C.A. § 1341 (West 1986).

⁵National Min. Ass'n v. U.S. Army Corps of Engineers, 145 F.3d 1399 (D.C. Cir. 1998) (holding that Corps of Engineers exceeded scope of its regulatory authority under Clean Water Act by regulating incidental "fallback," i.e., *de minimis* redeposit of dredged material, including excavated material, at its point of removal from water).

⁶Section 62.1-44.15(3a).

⁷33 U.S.C.A. ch. 26, §§ 1251 to 1387 (West 1986 & Supp. 1999).

⁸33 U.S.C.A. § 1344(a), (d) (West 1986).

⁹33 U.S.C.A. § 1341(a)(1) (West 1986).

¹⁰See Virginia Water Protection Permit Regulation, 9 VAC 25-210-10 to 25-210-260 (Law. Coop. 1996).

¹¹1991 Op. Va. Att'y Gen., *supra* note 1, at 312.

¹²See Commonwealth v. Wellmore Coal, 228 Va. 149, 154, 320 S.E.2d 509, 511 (1984) (construction of statute by official charged with its administration is entitled to great weight).

¹³See 9 VAC 25-31-10 (West Supp. 1999); 9 VAC 25-210-10.

¹⁴See 9 VAC 25-31-10 to 25-31-940 (West Supp. 1999) (eff. July 24, 1996).

¹⁵See cite *supra* note 10.

¹⁶See *supra* notes 10 & 14 and accompanying text.

¹⁷See cites *supra* note 13.

¹⁸Specifically, you ask: (1) whether ditching and draining of nontidal wetlands constitute an alteration of "the physical, chemical or biological properties of ... state waters," which is prohibited under § 62.1-44.5, "[e]xcept in compliance with a certificate issued by the Board"; (2) whether the Board has the authority under § 62.1-44.15(5) to require a permit for the ditching and draining of nontidal wetlands as an "alteration ... of the physical, chemical or biological properties of state waters"; (3) whether the Board has the authority under § 62.1-44.15(3a) and 9 VAC 25-380-30(B) to establish standards and policies and to "take all appropriate steps" to prevent ditching and

dredging of nontidal wetlands; and (4) whether the Board has the authority under § 62.1-44.15(8a) to issue a cease and desist order to parties currently engaged in ditching and draining of nontidal wetlands or to seek injunctive relief against such actions.

¹⁹1991 Op. Va. Att'y Gen., *supra* note 1, at 313.

²⁰See H.B. 1037 (introduced Mar. 7, 1988) (§§ 10-262.3(2), 10-262.4).

²¹See *id.*

²²See *id.* (proposed Jan. 16, 1989).

²³3 H. & S. Doc., *Report of the Virginia Nontidal Wetlands Roundtable*, H. Doc. No. 54 (1990).

²⁴*Id.* at 2.

²⁵224 Va. 618, 622, 299 S.E.2d 346, 348 (1983).

²⁶In particular, your inquiry arises from the decision in *National Mining Association v. U.S. Army Corps of Engineers*, which invalidated an effort by the U.S. Army Corps of Engineers to require a § 404 permit for *any* discharge, including the "incidental fallback" that accompanies dredging operations. One example of "incidental fallback" occurs "during dredging, 'when a bucket used to excavate material from the bottom of a river, stream, or wetland is raised and soils or sediments fall from the bucket back into the water.'" 145 F.3d at 1403 (quoting plaintiff's briefs). The court held that the excavation of material is not a discharge where only a small portion of the material happens to fall back. *Id.* at 1404. For the five years from the Corps' promulgation of a rule regulating incidental fallback until the decision in this case, the federal government required a § 404 permit; state certification under § 401 also was required. During that interim, the activity about which you inquire required a Virginia Water Protection Permit under § 62.1-44.15:5. I note that the *National Mining Association* decision addresses the situation where excavated material is hauled away; the filling of wetlands, e.g., the placement of excavated material into wetlands, without a permit remains prohibited.

²⁷See, e.g., § 62.1-44.15(3a), (5), (8a).

²⁸See *Dodson v. Potomac Mack Sales & Service*, 241 Va. 89, 400 S.E.2d 178 (1991); *Barr v. Town & Country Properties*, 240 Va. 292, 396 S.E.2d 672 (1990); *Va. National Bank v. Harris*, 220 Va. 336, 257 S.E.2d 867 (1979).

²⁹See 1988 Va. Acts ch. 608, at 784, 792-96 (enacting earlier provisions of tit. 10.1, ch. 21, §§ 10.1-2100 to 10.1-2116).

³⁰Section 10.1-2102.

³¹Section 10.1-2107(A).

³²Section 10.1-2107(B) (emphasis added).

³³See 1982-1983 Op. Va. Att'y Gen. 309, 311 (illogical result frustrates purpose of statute).

³⁴ See *Andrews v. Shepherd*, 201 Va. 412, 414-15, 111 S.E.2d 279, 281-82 (1959); see also *Schmidt v. City of Richmond*, 206 Va. 211, 218, 142 S.E.2d 573, 578 (1965); Op. Va. Att'y Gen.: 1998 at 56, 58; 1996 at 178, 178; 1991 at 238, 240; 1989 at 250, 251-52; 1985-1986 at 133, 134.

³⁵ See 2A Norman J. Singer, *Sutherland Statutory Construction* § 47.23 (5th ed. 1992 & Supp. 1999); Op. Va. Att'y Gen.: 1992 at 145, 146; 1989 at 252, 253; 1980-1981 at 209, 209-10.

³⁶ Section 10.1-2113.

³⁷ See 1992 Op. Va. Att'y Gen. 145, 146, and opinions cited therein.

³⁸ 1991 Op. Va. Att'y Gen., *supra* note 1, at 313.