

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF ENVIRONMENTAL QUALITY
WATER DIVISION

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SUBJECT: Guidance Memorandum No. 09-2012 – Applying the Freedom of Information Act Exemption of Location Information to DEQ Water Division Permit Files

TO: Regional Directors, Regional VWPP and Water Permit Managers, Water Division Staff, Diana Monroe

FROM : Ellen Gilinsky



DATE: August 18, 2009

COPIES: Tom Smith, Director, Division of Natural Heritage, DCR; Julie Langan, Director Division of Resources Service and Review, DHR; Raymond Fernald, Manager of Nongame and Environmental Programs, DGIF

SUMMARY:

The Virginia Freedom of Information Act (FOIA), located at § 2.2-3700 et. seq. of the Code of Virginia, guarantees citizens of the Commonwealth and representatives of the media access to public records held by public bodies, public officials and public employees. This guidance describes DEQ Water Division procedures for identifying records not subject to the Freedom of Information Act (FOIA) because the record reveals the location of a protected resource and is therefore not subject to FOIA pursuant to 2.2-3705.7(10) of the Virginia Code. This procedure ensures that DEQ is meeting the rights of citizens when details about the location of a protected resource are withheld from a FOIA response.

Electronic Copy:

An electronic copy of this guidance in PDF format is available for staff internally on DEQNET, and for the general public on DEQ's website at: <http://www.deq.virginia.gov/waterguidance/>.

Contact Information:

Please contact David Davis, Office of Wetlands and Water Protection, (804) 698-4105 or dldavis@deq.virginia.gov if there are any questions about this guidance.

Disclaimer:

This document is provided as guidance and, as such, sets forth standard operating procedures for the agency. However, it does not mandate any particular method nor does it prohibit any particular method for the analysis of data, establishment of a wasteload allocation, or establishment of a permit limit. If alternative proposals are made, such proposals should be reviewed and accepted or denied based on their technical adequacy and compliance with appropriate laws and regulations.

I. Purpose

This guidance describes Water Division procedures for identifying records not subject to the Freedom of Information Act (FOIA) because the record reveals the location of a protected resource and is therefore not subject to FOIA pursuant to 2.2-3705.7(10) of the Virginia Code. This procedure ensures that DEQ is meeting the rights of citizens when details about the location of a protected resource are withheld from a FOIA response.

II. Background and Authority

The Virginia Freedom of Information Act (FOIA), located at § 2.2-3700 et. seq. of the Code of Virginia, guarantees citizens of the Commonwealth and representatives of the media access to public records held by public bodies, public officials and public employees.

A public record is any writing or recording, regardless of whether it is a paper record, an electronic file, an audio or video recording, or any other format, that is prepared or owned by, or in the possession of a public body or its officers, employees or agents in the transaction of public business. All public records are presumed to be open, and may only be withheld if a specific, statutory exemption applies.

The policy of FOIA states that the purpose of FOIA is to promote an increased awareness by all persons of governmental activities. In furthering this policy, FOIA requires that the law be interpreted liberally, in favor of access, and that any exemption allowing public records to be withheld must be interpreted narrowly.

There is an exemption to FOIA at 2.2-3705.7(10) for “records containing information on the site specific location of rare, threatened, endangered or otherwise imperiled plant and animal species, natural communities, caves, and significant historic and archaeological sites if, in the opinion of the public body that has the responsibility for such information disclosure of the information would jeopardize the continued existence or integrity of the resource.” This exemption is relevant to certain documents in DEQ Water Division files.

The DEQ is authorized to issue the following water permits in accordance with the indicated sections of SWCL and regulations:

- VPDES permit for point source discharges of treated wastewater to surface waters per the Virginia Pollutant Discharge Elimination System Permit Regulation (9VAC25-31).
- VPA permit for pollutant management activities that protect surface and ground waters, but do not have a point source discharge to surface waters per the Virginia Pollution Abatement Permit Regulation (9VAC25-32). More specifically, 9VAC25-32-250 gives authority to DEQ to issue a VPA permit for agricultural production activities that involve animal feeding operations.
- VPDES or VPA permit for facilities producing or distributing reclaimed water per the Water Reclamation and Reuse Regulation (9VAC25-740).

- VWP permit for impacts to state waters per §§62.1-44.15:20 and 62.1-44.15:21 of SWCL and the Virginia Water Protection (VWP) Permit Program Regulation (9VAC25-210).

To ensure that water permit issuances comply with state and federal law, Water Division Staff must be aware of the ranges, probability of occurrence, and site specific locations of rare, threatened, endangered or otherwise imperiled plant and animal species, natural communities, and caves in the vicinity of locations being permitted. Where DEQ is performing permit actions on behalf of the Federal Government, historic and archaeological sites must also be identified in the vicinity of locations being permitted. Water Division Staff routinely obtain site specific location information from private consultants and other state agencies to inform permit decisions.

III. Applying the Freedom of Information Act Exemption of Location Information to DEQ Water Division Permit Files

Specific locations of certain species, natural communities and cultural resources are not subject to release under FOIA (See 2.2-3705.7(10) above) and should not be released in response to FOIA requests. When the permit file reveals the documented location of a protected resource (e.g. a green floater mussel population was found between river-mile 14 and 14.5 of the little green river), staff should invoke the FOIA exemption. The exemption is invoked by placing the exempt documents in a subfolder labeled, "FOIA Exempt." In the case of Electronic Content Management files, exempt documents should be saved as a document type or file series established for FOIA exempt documents. Appropriate metadata should also be used to further identify the document as FOIA exempt.

In the location within the file, where the exempt documents were located (e.g. as part of the Joint Permit Application, or inter-agency review correspondence) a completed form letter should be inserted informing citizens or staff viewing the file that FOIA exempt materials were relocated. The form letter must identify the nature of the withdrawn document(s) (*See* attached template document).

Records in the permit file documenting that no resource was found or describing a range or suspected occurrence of a protected resource, are subject to FOIA (e.g. the green floater mussel is known to occur within two miles of the proposed project site, or the Virginia Pigtoe mussel has been historically documented in the James River).



**VIRGINIA FREEDOM OF INFORMATION ACT
EXEMPT DOCUMENT NOTIFICATION**

Pursuant to 2.2-3705.7(10) of the Virginia Code, certain site-specific information is not subject to the Freedom of Information Act (FOIA). The following information is not subject to FOIA:

“records containing information on the site specific location of rare, threatened, endangered or otherwise imperiled plant and animal species, natural communities, caves, and significant historic and archaeological sites if, in the opinion of the public body that has the responsibility for such information disclosure of the information would jeopardize the continued existence or integrity of the resource.”

Please feel free to contact the custodian if you have any questions or wish to discuss your request in further detail.

The following FOIA-exempt information was removed from these records.

- ___ Site specific location of rare, threatened, or otherwise imperiled plant and animal species, natural communities, and/or caves.
- ___ Site specific location of significant historic and/or archaeological sites.