

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF ENVIRONMENTAL QUALITY
WATER DIVISION

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SUBJECT: Guidance Memorandum No. 09-2012, Amendment No. 1 – 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: November 23, 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 amendment describes DEQ Water Division procedures for identifying records that may be withheld pursuant 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.

Guidance Memorandum No. 09-2012 was originally issued on August 18, 2009. This amendment clarifies that, in most cases, standard practice should be to redact certain location information from a document rather than withholding the entire document.

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 amendment describes Water Division procedures for identifying records that reveal the location of a protected resource and therefore may be withheld from a FOIA response 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 purpose of FOIA is to promote an increased awareness by all persons of governmental activities. 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 disclosure under 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. However, when release of site specific location information could jeopardize the continued existence or integrity of the resource, the site specific location information will be withheld from disclosure.

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 may be withheld under FOIA (See § 2.2-3705.7(10) above) and will not be released in response to FOIA requests when the information could jeopardize the continued existence or integrity of the resource.

When information in the permit file reveals the documented, site specific 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 unless staff is aware that the information is already in the public domain.

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).

The exemption is invoked by redacting from the document the pertinent language identifying the location of the protected resource, and placing an unredacted copy of the same document(s) in a subfolder labeled, "FOIA Exempt." In the case of Electronic Content Management files, the unredacted copy should be saved separately and identified as FOIA exempt using the appropriate document type, file series, or metadata. In certain cases it may be appropriate to withhold an entire document (e.g. a scientific report with numerous descriptions and diagrams revealing the location of the protected resource). Prior to withholding an entire document, staff must consult with the office FOIA Coordinator, office management and/or the agency FOIA Officer.

In the location within the file, where the redacted and/or exempt documents were located (e.g. as part of the 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*).

In summary, documents that are not subject to FOIA, either wholly or in part, will be identified twice in DEQ files. The form letter, with the redacted document if applicable, will be placed in the project file. The withheld document or unredacted document will be placed in an alternate file (electronic or paper), that is identified as "FOIA Exempt".



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

Pursuant to § 2.2-3705.7(10) of the Virginia Code, following information is not subject to mandatory disclosure:

“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.”

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.

AND/OR

The following document(s) was withheld pursuant to § 2.2-3705.7(10) of the Freedom of Information Act:

- ___ List document name, type, date (e.g. Broad Run Archaeological Survey, April 2000; or Fish and Wildlife Service T & E Consult, December 2007))

Please feel free to contact the coordinator if you have any questions or wish to discuss your request in further detail. The coordinator is the person responsible for compiling the FOIA response in the location where the document resides.