**REPORT OF THE VIRGINIA**
**DEPARTMENT OF ENVIRONMENTAL QUALITY**

# Study of the Costs and Benefits of State Assumption of the Federal § 404 Clean Water Act Permitting Program (HJR 243, 2012)

**TO THE GOVERNOR AND**
**THE GENERAL ASSEMBLY OF VIRGINIA**

# HOUSE DOCUMENT NO. 2

**COMMONWEALTH OF VIRGINIA**
**RICHMOND**
**2013**

# Study of the Costs and Benefits of State Assumption of the Federal § 404 Clean Water Act Permitting Program

*A Report to the Honorable Robert F. McDonnell, Governor and the General Assembly of Virginia*

Department of Environmental Quality

December 2012

# COMMONWEALTH of VIRGINIA

DEPARTMENT OF ENVIRONMENTAL QUALITY
*Street address:* 629 East Main Street, Richmond, Virginia 23219
*Mailing address:* P.O. Box 1105, Richmond, Virginia 23218
Fax: 804-698-4019 - TDD (804) 698-4021
www.deq.virginia.gov

Douglas W. Domenech
Secretary of Natural Resources

David K. Paylor
Director

(804) 698-4020
1-800-592-5482

To: The Honorable Robert F. McDonnell

Members of the General Assembly

From: David K. Paylor

Date: January 4, 2013

Subject: Study of the Costs and Benefits of State Assumption of the Federal § 404 Clean Water Act Permitting Program

---

I am pleased to provide you with a copy of the Department of Environmental Quality's study of the benefits and costs of seeking authority from the U.S. Environmental Protection Agency to administer the § 404 permitting program under the Clean Water Act. This study was conducted pursuant to House Joint Resolution 243 (2012).

This study also is being made available at:
http://www.deq.virginia.gov/LawsRegulations/ReportstotheGeneralAssembly.aspx.

If you have any questions about the study or would like a hard copy of the study, please call Angie Jenkins, Policy Director at (804) 698-4268.

## Introduction

This report was prepared by the Virginia Department of Environmental Quality (DEQ) pursuant to House Joint Resolution 243 (HJ 243) passed during the General Assembly's 2012 Session. This report sets forth the potential costs and benefits of the Commonwealth seeking authority from the U.S. Environmental Protection Agency (EPA) to administer the § 404 permitting program under the federal Clean Water Act (CWA).

## Executive Summary

The CWA's § 404 State assumption process provides the mechanism for individual States to realize enhanced water resource protection while providing a streamlined regulatory program with a single point of contact. Currently, only two States have assumed the § 404 program within their borders and this is due mainly to the prohibitive costs and complexities involved with the assumption process.

If the Commonwealth were to decide to seek assumption of the § 404 program, it would enter into a complex and lengthy process that could last up to two years with no certainty that EPA would approve the request. Section 404 assumption would require new funding for additional staff, training, and database improvements in advance of the Commonwealth requesting the program from EPA. Virginia's laws and regulations would need to be amended to provide the authorities to implement the CWA and ensure consistency with implementation requirements under the CWA, including potentially requiring changes or elimination of existing State regulatory exemptions for activities that are not authorized under the Federal program (e.g., the exemption for septic tank placement).

The potential benefits of § 404 assumption include improved efficiency, timeliness, certainty, consistency in permitting and improved accountability with a single point of contact for the regulated community.

The potential costs of § 404 assumption include among other things, the expense of acquiring the staff, administrative resources and information technology infrastructure needed to handle the expanded workload at the State level and in the short-term also include a potential loss of the knowledge and technical expertise of the existing Corps staff .

DEQ's cost and benefits analysis included internal research, input from stakeholders in the Commonwealth's regulated community and comments from natural resource organizations. DEQ also referenced research provided by the Environmental Council of States (ECOS) and the Association of State Wetland Managers (ASWM) summarizing the experiences of States that have previously studied § 404 assumption, or have actually assumed the program like Michigan and New Jersey. Reference materials from ECOS and ASWM are provided in Appendix E and at http://www.aswm.org/wetland-programs/s-404-assumption. From this broad range of data sources, a list of recurring benefits and costs associated with assuming the § 404 program has emerged:

Benefits:

- Regulatory streamlining and increased efficiency:
  State program assumption may significantly reduce duplicative State and Federal permitting requirements, resulting in reduced time for review of regulated activities.

- Increased consistency in permit decisions:
  A State run § 404 program provides a single point of contact for the regulated community and can eliminate potentially conflicting permit decisions and conditions.

- Increased regulatory program stability and certainty:
  During times of jurisdictional uncertainty at the federal level, such as in the wake of an individual federal legal decision, State governments are able to maintain a consistent and predictable definition of the waters they regulate.

- State-specific resource policies and procedures tailored to address specific conditions and needs of the State:
  A State run § 404 program can be designed in accordance with the individual State's unique water resources, geographic features and water protection goals.

Costs & Barriers

- High financial cost:
  The initial cost of program assumption includes development of an application to EPA, modification of State statutes and regulations and development of procedures for coordinating with federal agencies. The yearly costs to administer the program include hiring and retaining 40 new full time employees, providing ongoing training and expanding administrative and information technology resources. DEQ estimates that assumption will cost 18 million dollars over the first 5 years, and 3.4 million dollars annually thereafter.

- Lack of dedicated federal funding for 404 program operation and administration:
  Funding is not currently available from the federal government for implementation of the Section 404 program. While there are federal funds potentially available for a State's development of the 404 program, it is the implementation phase that is financially challenging.

- Difficulty in meeting the program requirements:
  In order to be approved to administer the federal program at the State level, a State must demonstrate that it has equivalent authority in all areas of the program. This can be difficult because the basis for State authority is different than the basis for federal authority.

- Lack of a partial assumption option:
  The Section 404 program does not include an option for partial assumption by States. States cannot seek to assume the 404 program for only specific geographic areas or certain types of activities; they must assume the entire program.

- Section 10 Navigable Waters that remain under Corps jurisdiction:
  Pursuant to § 10 of the River and Harbors Act, even if Virginia assumes the § 404 program, the Corps will retain authority over the Commonwealth's waters that have been defined by the Corps as navigable, including the wetlands adjacent to the navigable waters. In coastal States like Virginia a greater geographical extent of waters are defined as navigable, and the Corps would retain jurisdiction over those waters and their adjacent wetlands.

- Loss of Corps' knowledge base:
  State assumption of the federal program may potentially result in the loss of the knowledge and technical expertise of the existing Corps staff, especially with respect to wetlands delineation confirmations.

Pursuant to HJ 243, DEQ convened a group of stakeholders to advise DEQ on the costs and benefits of assuming the program. The Stakeholder Group provided many valuable comments and expressed concerns regarding assumption. Notes from the Stakeholder Group meetings are provided as Appendix A in this report. Two overarching themes emerged from the Stakeholder Group meetings. One theme is that the regulated community is largely content with the existing federal and State wetland programmatic structure, aside from some minor improvements that were suggested. Secondly, when polled, the majority of the members of the Stakeholder Group believed that the costs of assuming the § 404 program outweigh the potential benefits of assumption. Some of the Stakeholder Group members suggested that the only acceptable assumption scenario would be one that ensures significant improvements in every category to the level of service that is currently being provided by the dual programs. DEQ believes these goals could be met with an adequately funded State program.

The regulated community has expressed concern about the potential for DEQ to charge higher permit fees to help finance the costs of assuming the § 404 program. The Corps of Engineers does not charge a permit fee and DEQ charges no fee for a General Permit authorizing less than 1/10 acre of wetland impacts. For wetland impacts above 1/10 of an acre, DEQ assesses fees on a sliding scale based on the size of the wetland impact. This fee structure allows the regulated community to pursue projects involving minimal wetland impacts without an additional financial burden from permit fees. The percentage of the current program costs covered by permit fees has ranged from 25% in 2010 to 10% in 2012, a fluctuation due primarily to the effect of the economic slowdown on the construction industry. Under an assumed federal program DEQ would adjust the fee structure to preserve the fee exemption for the smaller, less complex projects. DEQ's costs analysis determined that financing the assumed program through fee funding above the current level is not viable as it would likely require fees for all permit authorizations and would disproportionately affect the proponents of smaller projects that are currently authorized under Nationwide Permits or DEQ's General Permits.

Virginia's current State Programmatic General Permit (SPGP) has helped to reduce duplicative permitting processes. Virginia's SPGP has reduced regulatory duplication for projects that qualify for the SPGP, but there is still a "two-stop shopping" experience for the regulated community for projects that are beyond the SPGP thresholds of 1.0 acre of wetland impacts and 2000 linear feet of stream impacts. Given the concerns expressed by the Stakeholder Group regarding § 404 assumption and, in the absence of a viable funding source, renegotiation and expansion of the SPGP may provide a viable alternative to § 404 assumption that would protect Virginia's wetland resources and improve consistency, timeliness and certainty for a broader range of projects.

## Background

Congress passed the CWA in 1972, and it is the primary federal law governing water quality in the United States. The goal of the CWA is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. Section 404 of the federal CWA establishes a permitting program to regulate the discharge of dredge and fill material into waters of the United States. This permitting program is administered by the U.S. Army Corps of Engineers (the Corps) with oversight from the U.S. Environmental Protection Agency (EPA). Section 401 of the CWA requires that any person applying for a federal permit, which may result in a discharge of pollutants into waters of the United States, must also obtain a State water quality certification that the activity complies with all applicable State water quality laws and standards. DEQ implements a permitting program for wetland impacts under the Virginia Water Protection (VWP) program which also serves as § 401 Certification for § 404 federal permits. In 2002 Virginia sought and was granted an SPGP that allowed the State Water Control Board to be the sole permitting authority for projects impacting nontidal wetlands or streams up to ½ acre and 300 linear feet. In 2007 negotiations between the Corps and DEQ resulted in Virginia's SPGP impact thresholds increasing to 1 acre of non tidal wetlands and 2000 linear feet of streams. The SPGP allows the processing and authorization of permits without Corps participation.

The CWA includes a provision whereby States may seek EPA's approval to assume and implement certain parts of the CWA under State law, including § 404. *See* CWA § 404(g); 33 U.S.C. 1344(g). The primary requirement for assuming the federal program is that the State program must be *no less stringent* than the assumed federal program. Additionally, EPA retains authority under the CWA to review a State's actions when implementing the program. EPA also retains the authority to oversee and object to a State's issuance of a specific § 404 permit should EPA determine that the permit issuance does not uphold the CWA. This is consistent with EPA's oversight authority of the Corps' administration of the § 404 permit program.

Assumption of the § 404 program does not give a State sole permitting authority over all of its waters. Section 10 of the Rivers and Harbors Appropriation Act (RHA) prohibits the creation of any obstruction to the navigable capacity of any of the waters of the United States not affirmatively authorized by Congress. Pursuant to § 10 of the RHA, even if Virginia assumes the § 404 program, the Corps would retain authority over the Commonwealth's waters that have been defined as navigable, including the wetlands adjacent to the navigable waters for purposes

of RHA §10. The Corps would continue to review projects and issue permits for any projects that result in the discharge of fill into Virginia's RHA §10 waters and adjacent wetlands. DEQ would need to formally request mapping of Virginia's RHA § 10 waters from the Corps and then draft a Memorandum of Agreement (MOA) with the Corps to establish procedures for coordinating and permitting projects that are conducted in those waters.

Currently, Michigan and New Jersey are the only States that have assumed the § 404 program. This is in contrast to the 46 States, including Virginia, that have been authorized by EPA to implement and enforce the § 402 National Pollutant Discharge Elimination System (NPDES) permit program. This disparity highlights the financial and administrative barriers that are specifically associated with § 404 assumption. Unlike the § 402 program, Federal funding is not currently available for State implementation of the § 404 program. The § 404 program is transferred to a State through primacy, more commonly called "§ 404 assumption". The § 404 assumption process differs from the transference of § 402 implementation authority, which is *delegated* to States by the EPA. This distinction between assumption and delegation renders States seeking to implement § 404 ineligible for federal funding. While there are federal funds potentially available for development of a State 404 program, there is no Federal funding available for State implementation of the program and it is the implementation phase that is financially challenging as an assumption State must hire new staff, fund new training programs, and expand administrative resources in advance of assumption.

**Costs and Benefits Study Method**

Pursuant to HJ 243, the purpose of this study is to evaluate the benefits and costs to the Commonwealth of Virginia for seeking authority from the EPA to administer the § 404 permitting program under the federal CWA. DEQ also convened a representative group of stakeholders to assist it in determining the benefits and costs of seeking § 404 program assumption.

For this study, DEQ assessed the current wetlands program including regulatory structure; jurisdictional scope; permit processing procedures; compliance mechanisms; existing staff; existing workloads; and cost analysis of permit fees, salaries and other expenditures. DEQ assessed the respective permit workloads for the VWP program and the Corps' Norfolk District for the period from calendar years 2010 through 2011, including permit types and processing timeframes. DEQ incorporated existing workload analysis data and previous status and trends reports as appropriate. DEQ's Human Resources and Finance staff provided estimates for salaries, expenditures, and revenue from current permit fees. The Corps' Norfolk District provided DEQ with an assessment of the Corps' existing program using data comparable to data available for the DEQ VWP program.

DEQ analyzed operations reports for both programs to identify areas where effort is duplicated, where the Corps is performing duties that DEQ is not (e.g. nationwide permits), and where DEQ's jurisdiction exceeds the Corps', as with isolated wetlands and excavation in jurisdictional waters. DEQ identified the necessary additional training and skill sets that would be required for DEQ staff if the § 404 program were assumed, e.g. wetland delineation training and training on § 404 permitting processes. DEQ also identified differences in permit workloads and processing

times, and analyzed them against existing available full time employees in both programs. DEQ then incorporated input from the agency's finance, human resources and Office of Information Systems (OIS) staff to identify changes necessary to assume the responsibilities of the existing Corps' program.

**Potential Benefits**

HJ 243 identifies inefficiencies in Virginia's dual federal and State wetlands regulatory programs and notes potential benefits of assuming the federal program. HJ 243 acknowledges that Virginia's existing regulatory structure is comprised of parallel State and federal wetland programs; a system that creates duplication of effort and may present unnecessary challenges to an applicant who must deal with two separate agencies with two sets of regulations. HJ 243 also states that the requirements of the Corps' permitting process can be unpredictable and inconsistent and that Virginia is better positioned than the federal government to create a consistent and sustainable permitting program across the State.

DEQ utilized the research that the Environmental Council of the States (ECOS) and the Association of State Wetland Managers (ASWM) have conducted to identify the advantages and challenges of § 404 assumption. ECOS is the national non-profit, non-partisan association of State and territorial environmental agency leaders. The potential benefits identified by DEQ are in line with other States' findings as set out in the ECOS resolution broadly adopted by its State members. Namely, that assumption of the § 404 program could provide a consistent, streamlined permitting process with a single point of contact and broader resource protection than the CWA. Reference materials from ECOS and ASWM are provided in Appendix E and at http://www.aswm.org/wetland-programs/s-404-assumption.

A State administered program could be tailored to provide a regulatory structure that is consistent, responsive to Virginia's regulated community, and protective of the Commonwealth's unique wetland and stream resources. During times of jurisdictional uncertainty at the federal level, such as in the wake of the *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* ("SWANCC") decision[1], States are able to maintain a consistent and predictable definition of the waters they regulate.

In addition to consistency, a State administered § 404 program can provide the regulated community with an efficient and streamlined "one-stop permitting" experience, effectively removing the duplication of effort that often occurs with parallel State and federal programs while still retaining the protections provided by the CWA. EPA's website that provides resources to States assessing § 404 assumption acknowledges that, "State and Tribal regulators are, in many cases, located closer to the proposed activities and are often more familiar with local resources, issues, and needs than are Federal regulators," and concludes, "by formally

[1] The Court held that the Corps' assertion of jurisdiction over isolated waters on the basis of the "migratory bird rule" exceeds the authority granted under § 404(a) of the CWA. The Court based its decision on the CWA alone, thereby avoiding the constitutional question of whether the regulation was within Congress' power under the Commerce Clause. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001)

assuming administration of the Federal regulatory program, States or Tribes can eliminate unnecessary duplication between programs."

## Costs

DEQ's analysis of the costs revealed that the single largest impediment to Virginia's assumption of the federal program is the expense of acquiring the staff, administrative resources, and information technology (IT) infrastructure needed to handle the expanded workload. DEQ would need to create 40 new full time positions, more than doubling the size of the existing program to 76 total employees. The cost associated with upgrading DEQ's legacy databases and other IT infrastructure to adequately address the expanded workload is significant. As shown in Table 1, DEQ is projecting a total cost of assumption at $3.4 million in year one, $4.0 million in year two, $3.8 million in year three, $3.4 million in year four, and $3.4 million annually thereafter. Some of this cost could be defrayed through the phasing in of key personnel with the full workforce coming on line towards the end of the assumption process.

Note that these costs do not include rent or other common (overhead or indirect) costs. These costs also do not include any type of contingency amount added to these direct costs. These calculations were completed using the standard procedures for cost/benefit and fiscal impact analyses used in DEQ. To allow for economic fluctuations DEQ also analyzed costs for potential permit workload increases of 15% and 20% beyond what was used in the baseline data from 2010 and 2011.

***Table 1: Baseline Cost Estimates***

| | Estimated Annual Costs - Year 1 | Estimated Annual Costs - Year 2 | Estimated Annual Costs - Year 3 | Estimated Annual Costs - Year 4 | Estimated Annual Costs - Year 5 |
|---|---|---|---|---|---|
| Salaries and Benefits | 1,160,450 | 2,593,890 | 3,044,310 | 3,044,310 | 3,044,310 |
| Information Technology | 2,037,533 | 1,076,103 | 570,688 | 164,238 | 164,238 |
| Furniture | 59,500 | 85,000 | 25,500 | | |
| Training | 62,900 | 100,800 | 44,200 | 49,500 | 49,500 |
| Travel | 20,175 | 73,575 | 92,325 | 92,325 | 92,325 |
| Public Notices | 19,000 | 36,500 | 36,500 | 19,000 | 19,000 |
| Field Equipment | 3,500 | 8,000 | 3,000 | 2,900 | 2,900 |
| Total Estimate | $3,363,058 | $3,973,868 | $3,816,523 | $3,372,273 | $3,372,273 |

For a point of comparison, DEQ estimates that based on average salaries, the number of full time employees and administrative costs, the Corps' Norfolk District that currently administers Virginia's § 404 Program has an annual budget of 7.3 million dollars. A detailed cost analysis including the baseline plus 15% and 20% figures are included in Appendix B.

In addition to the cost estimates evaluated by DEQ, the Department of Historic Resources (DHR), the Department of Game & Inland Fisheries (DGIF), and the Department of Conservation & Recreation-Division of Natural Heritage (DCR-DNH) submitted comments to DEQ that those agencies will each need additional staff to handle the increased workload associated with § 404 assumption.

The initial staffing estimates for DEQ are based on the premise that DEQ staff would take over all the functions currently carried out by the USACE. This should minimize the need for additional resources at DCR, DHR, and DGIF. However, in developing a memorandum of agreement with EPA, DEQ may be required to consult with the other State Natural Resources agencies at a higher level than is currently required of the Corps. In this case, some additional responsibility would be shifted to those agencies lessening the staffing requirements at DEQ. Until that agreement is finalized, the distribution of required staffing among the agencies can not be stated with certainty. To provide for a margin of safety, we added three additional FTEs to the estimated staffing requirements. DEQ believes this adequately represents the staffing needed for Natural Resources agencies with the understanding that distribution among them would be determined later.

Costs and adequate funding were a primary concern of the Stakeholders Group. Group members expressed concern that as the State faced continuing budget concerns and agencies face continuing budget cuts, maintaining sustainable funding and staffing for the program could be a challenge. A straw poll of the Stakeholder Group taken at the conclusion of the final meeting showed that most of the Group members present believed the costs of assumption outweighed the benefits at this time.

## Stakeholder Group Meetings

HJ 243 directed DEQ to "convene a representative group of stakeholders to assist it in determining the benefits and costs of seeking [§ 404 assumption] from EPA." On May 7, 2012, DEQ issued a "Public Notice of Intent to Convene A Stakeholder Group on the Virginia Regulatory Town Hall". DEQ received 38 expressions of interest to serve on the stakeholder group, and the DEQ Director accepted all 38 interested parties to ensure that the group was as representative of as many interests as possible. The complete list of stakeholders can be found in Appendix A.

The Stakeholder Group met on June 21 and August 30, 2012 to assist DEQ in determining the benefits and costs of seeking authority for the Commonwealth to administer the § 404 permitting program under the federal Clean Water Act. DEQ staff facilitated discussions by the Stakeholder Group and provided data and information, including current staffing levels for DEQ and the Corps and estimated resource needs. Detailed meeting notes from both meetings are provided in Appendix A.

During both meetings, Stakeholder Group members discussed both the positive and negative aspects of the existing system, and whether there were problems with the current system that needed addressing, through assumption, or otherwise. During these meetings, some Stakeholder Group members expressed concern about what they perceived as a lack of "need" for State assumption of the § 404 program.

Stakeholder Group members noted that there were several aspects of the existing program that are working well. Specifically, Group members noted that Virginia's SPGP works well and provides a more predictable process than was the case prior to the renegotiated SPGP. Some Group members suggested that an improvement to the existing system would be to raise the threshold for the SPGP so that more projects would qualify for that process. Some Group members noted the value the regulated community placed on the Corps' expertise and institutional knowledge of the program. Stakeholder Group members noted that DEQ tends to be more consistent in its interpretation of the regulations than some Corps staff. Some Group members noted the value of DEQ's ability to stick to timelines. Some Group members value the pre-application process that the Corps provides. Additionally, some Stakeholder Group members believe the non-reporting nationwide permits work well.

Stakeholder Group members also identified aspects of the existing program that are not working well. Specifically, some Stakeholder Group members noted that the individual permit (IP) process, which generally involves more complex projects, needs improvement. Some Group members from the consulting and regulated community noted that the lack of timelines, or of agencies sticking to the timelines, can be a problem, specifically with respect to the IP process and Jurisdictional Determinations by the Corps. Some Group members noted concerns with the lack of consistency of some regulatory determinations by the Corps. Other Group members noted that there can be a lack of consistency in policy determinations across the State within both agencies. Group members also noted concerns with the issue of ephemeral streams, the ability of Federal agencies to comment at any time related to Threatened and Endangered Species with no regard for permitting timelines, the lack of clarity/definition with respect to the State Protected Species Mitigation Policies and the cumbersomeness of the DEQ's enforcement program for smaller impacts compared to the Corps' enforcement program. At least one Group member noted a concern about a lack of a level playing field because there appear to be different requirements for the mining industry. Some Group members suggested that finding ways to make improvements in these areas may reduce the perceived interest for the Commonwealth to assume the § 404 program.

Through its discussions, the Stakeholder Group identified costs (and concerns) and benefits of the Commonwealth assuming the § 404 program. Those costs/concerns and benefits are set forth below.

*Costs/Concerns*

<u>Adequate and Consistent Program Funding</u>

A number of Group members expressed concerns about funding and resources for an assumed § 404 program. Group members expressed concern that funding estimates would be based on the

current economic climate, which would leave DEQ with inadequate funding, staffing and resources to manage the program once the economy recovered. Stakeholder Group members expressed concern about identifying and maintaining a consistent and sustainable source of funding for the program to ensure that the program would have consistent staffing and resource levels. Group members expressed concern that as the State faced continuing budget issues and agencies face continuing budget cuts, maintaining sustainable funding and staffing for the program could be a challenge. At least one Group member representing a conservation group expressed her concern and experience that there has never been a natural resources agency that has not been "woefully underfunded."

Recognizing that DEQ would be questioned about the costs of the program beyond the "bare minimum" for § 404 program assumption, Group members suggested that DEQ prepare a range of costs to show not just the "bare minimum" but to show cost estimates with a 15-40% "buffer," as Group members believed any business would, to account for the unknowns and the unexpected and to ensure sufficient program funding, including funding for additional staff, training, equipment, facilities and information technology needs. DEQ did analyze potential future permit workload increases beyond the baseline data to provide the requested buffer estimates. However, DEQ's analysis of the permit workload during calendar year 2012 indicated that permit load growth scenarios of 15% to 20% adequately account for unknowns and reasonably address anticipated base workload increases related to economic recovery. Additionally, some Group members suggested that the range of costs should include estimates for improving the program, not just assuming the current § 404 program. Among the resource needs that the Group recommended, was the need for additional legal resources at the Office of the Attorney General due to the potential for more litigation since the Commonwealth would now have a much larger program and, like the COE, may see numerous lawsuits over issues such as ephemeral streams. Some Group members suggested that there may be additional and/or undetermined, costs to other State agencies as well.

Potential for Increased Permit Fees

Stakeholder Group members from the regulated community expressed concern about the potential for higher permit fees to cover the costs or portions of the costs of the Commonwealth assuming the § 404 program. In the absence of increased permit fees, Group members questioned how the program would be funded and, as discussed above, whether such funding would be sustainable and consistent over time.

Loss of Knowledge

Some Stakeholder Group members expressed concern over the potential loss of knowledge and technical expertise of the Corps staff, especially with respect to wetlands delineation confirmations. These members noted the importance of sufficient funding for training to ensure DEQ staff have the knowledge and skills they need to quickly transition to assuming the § 404 program, and funding to ensure that once achieved that level of training and expertise is maintained. These Group members also expressed concern about DEQ's ability to retain experienced staff during times when State budgets are shrinking and there are limited resources for hiring and retaining experienced staff.

Loss of Checks and Balances

Some Stakeholder Group members expressed concern about the potential loss of checks and balances that they believe are in the current system. Two Group members expressed their belief that the protections of Virginia's wetlands and streams would diminish with an assumed program, because both agencies, the Corps and DEQ, bring their own strengths to the program. Additionally, these Group members expressed their concern that the General Assembly may be working under a misunderstanding about what assumption of the program would mean and noted that it would not mean that Virginia gets to run the program without oversight from EPA. Finally, these members noted their belief that there has never been a natural resource agency that was not "woefully underfunded" and their expectation that, if assumed, this program would not be adequately funded and DEQ would not be provided adequate resources to run the program.

*Benefits*

Improved Efficiency

Some Stakeholder Group members noted that there may be an improvement in the efficiency of the overall § 404 program if the Commonwealth assumed it. Those members noted that, although the program will still be subject to federal oversight, assumption of the program would eliminate the duplication of permit and compliance review by two agencies and provide "one-stop" permitting. Group members also noted that there would be more efficiency in dealing with one agency contact. As an example, one Group member noted that under the current process, when there are disagreements on delineation and one of the regulators is not available then it is difficult to get a resolution. If the program is assumed then one of those parties would be eliminated from the process, which would eliminate one opportunity for disagreement and speed up the process. Group members also noted that when problems arise the State may be more responsive and resolution may be found more quickly when working with a single agency.

Shorter Time Frames

Given the importance of timeliness to the regulated community, some Group members noted that they would benefit from shorter timeframes under an assumed program. Those members noted that under an assumed program, time frames may be reduced and permits may be issued faster because the process would be more streamlined.

More Consistency

Some Stakeholder Group members noted that one of the potential benefits of the Commonwealth assuming the § 404 program would be that there would be more consistency in the process and in regulatory interpretation. Group members noted that the benefit of consistency is that it provides the regulated community with predictability.

Increased Accountability

Some Stakeholder Group members noted that an assumed program would provide more accountability because there would be a single point of contact.

*Improvements In Lieu Of or In Addition to Assumption of the § 404 Program (Wish List)*

Through this process, the Stakeholder Group also identified a "wish list" of items that they believed would improve the existing program whether the program is assumed or not, and that these ideas may be worth considering in lieu of assumption (and should be considered if the program were assumed by the State). Some Group members suggested that an improvement to the existing system would be to raise the threshold for the SPGP so that more projects would qualify for that process. Another potential improvement to the existing system would be to have an on-line permit tracking system that would allow the regulated community to easily check the status of a permit and provide more transparency to the program. Another potential improvement discussed by Group members was to increase staffing at the Corps to expand the number of staff who could perform wetland delineations.

*Straw Poll*

A straw poll of the Stakeholder Group taken at the conclusion of the final meeting showed that the majority of the Group members present believed the costs of assumption outweighed the benefits. At least one member believed the benefits outweighed the costs and four members indicated they needed more information. DEQ sent the final draft of the § 404 Assumption Feasibility Study to the Stakeholder Group on November 7, 2012 to solicit comments for a one week period ending on November 14, 2012. The Stakeholder Group's responses to the final draft report are located in Appendix G.

**Small Impoundments and Mitigation Ratios**

Pursuant to HJ 243, DEQ also reviewed the exemptions for small impoundments and the mitigation ratio for ponds and ephemeral streams. There are exemptions for farm and stock ponds in both State and federal law. Other types of ponds, for instance the construction of recreational ponds or impoundments that impact water of the United States or State surface waters, enjoy no such exemption in State or federal law.[2]

*Small Impoundments*

Both § 404 of the CWA and federal regulations set forth exemptions for construction and maintenance of farm or stock ponds, except that the exemption does not apply to discharges "of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be

[2] References in this section to "pond exemptions" refer to farm and stock ponds.

reduced." *See* CWA 404(f), 33 U.S.C. 1344(f), 33 C.F.R. 232.3, 323.4; *see also* Army Corps of Engineers Nationwide Permit 40 & Norfolk District Regional Permit 5. The Corps has a nationwide permit (Nationwide Permit 40) for farm ponds (and some other agricultural activities) that does not qualify for the exemption. Nationwide Permit 40 identifies the availability of the exemption on the permit document itself. The Corps' Norfolk District utilizes a regional permit (Regional Permit 5) for farm ponds that do not qualify for the exemption. Unfortunately, because Regional Permit 5 makes no reference to the availability of the exemption on the permit, the Norfolk District's use of Regional Permit 5 has caused confusion about whether the Corps recognizes the farm pond exemption in Virginia.

With respect to the treatment of farm ponds in States that have assumed the § 404 program, it appears that both New Jersey and Michigan have provided farm pond exemptions, but the States have taken slightly different approaches. New Jersey has a farm pond exemption, and a similar recapture provision similar to the recapture language provided in Federal law. Michigan has a farm pond exemption; however, the exemption does not have any provisions similar to the recapture provisions found in Federal law and regulations regarding activities in or impairing navigable waters. At this time, and in the absence of detailed and holistic programmatic discussions with EPA, it is unclear whether Virginia, if it were to seek assumption of the § 404 program would need to take an approach to the farm pond exemption similar to the New Jersey approach or whether Virginia would be able to apply its current farm pond exemption with minimal changes for activities regulated under § 404.

*Mitigation ratios for ponds and ephemeral streams*

Per 9VAC25-690-70.I, compensation for permanent open water (non-exempt ponds) impacts *may* be required at a 1:1 replacement to impact ratio, as calculated on an area basis, to offset impacts to State waters and fish and wildlife resources from significant impairment. DEQ has determined that the issue of mitigation ratios for ponds may need additional evaluation and is planning to convene a group of interested stakeholders to focus on that issue and discuss whether there is more information that needs to be considered.

Regarding compensatory mitigation requirements for impacts to ephemeral streams, DEQ and the Corps, in a collaborative effort, developed the Unified Stream Methodology (USM), to establish a unified and consistent method for use in Virginia to rapidly assess proposed stream impacts and determine the appropriate amount of stream mitigation needed to offset those impacts. This methodology is designed to assess impacts to "wadable" streams, which include perennial, intermittent and ephemeral streams. These three stream types are defined as:

- **Perennial Streams** - Perennial streams were not defined in the USM, however, generally speaking they are streams that have flowing water year round in a typical year.

- **Intermittent Streams** - streams that have flowing water during certain times of the year, when groundwater provides water for stream flow. During dry periods, intermittent streams may not have flowing water. Runoff from rainfall is a supplemental source of water for stream flow.

- **Ephemeral Streams**[3] - streams that have flowing water only during and for a short duration after, precipitation events in a typical year. Ephemeral streambeds are located above the groundwater table year-round. Groundwater is not a source of water for the stream. Runoff from rainfall is the primary source of water for these streams.

DEQ and the Corps' Norfolk District determine compensatory mitigation requirements for stream impacts using the USM. The USM can be modified to assess ephemeral streams. Parameters evaluated for intermittent and perennial streams are channel condition, riparian buffer, in-stream habitat, and previous channel alteration. For ephemeral streams, the USM only looks at the riparian buffer parameter. For a given length of impact and impact severity, ephemeral streams generally require less compensatory mitigation than intermittent and perennial streams. Mitigation ratios for impacts to ephemeral streams range from 0:1 to 0.75:1 depending on the condition of the riparian buffer surrounding the ephemeral stream and the severity of the impact.[4]

## Conclusion

The CWA's § 404 State assumption process provides the mechanism for individual States to realize enhanced water resource protection while providing a streamlined regulatory program with a single point of contact. States implement regulations protective of water resources such as groundwater, ephemeral streams, and isolated wetlands that the federal program does not address. Currently, only two States have assumed the § 404 program within their borders and this is due mainly to the prohibitive costs and complexities involved with the assumption process.

If the Commonwealth were to decide to seek assumption of the § 404 program, it would enter into a complex and lengthy process that could last up to two years with no certainty that EPA would approve the request. Section 404 program assumption would require new funding for additional staff, training, and database improvements in advance of the Commonwealth requesting the program from EPA. Virginia's laws and regulations would need to be amended to provide the authorities to implement the CWA and ensure consistency with implementation requirements under the CWA, including potentially requiring changes or elimination of existing State regulatory exemptions for activities that are not authorized under the Federal program (e.g., the exemption for septic tank placement).

In spite of these hurdles, DEQ has identified a number of potential efficiencies from § 404 assumption. In addition to consistency, a State administered § 404 program can provide the regulated community with an efficient and streamlined "one-stop permitting" experience,

[3] Ephemeral streams fall under the category of "non-navigable, not relatively permanent tributaries" and, following the U.S. Supreme Court's decision in *Rapanos v. United States and Carabell v. United States*, fall under Federal jurisdiction when they have a "significant nexus" to traditionally navigable waters.

[4] DEQ has determined that the issue of mitigation ratios for ponds and ephemeral streams may need additional evaluation and is planning to convene a group of interested stakeholders to focus on that issue and discuss whether there is more information that needs to be considered or whether the USM needs modification.

effectively removing the duplication of effort that often occurs with parallel State and federal programs while still retaining the protections provided by the CWA.

The Stakeholder Group provided many valuable comments and expressed concerns regarding assumption. Two overarching themes emerged from the Stakeholder Group meetings. One is that the regulated community is largely content at present with the existing federal and State wetland programmatic structure, especially with the implementation of the SPGP, aside from some improvements that were suggested. Secondly, when polled, the majority of the members of the Stakeholder Group believed that the costs of assuming the § 404 program outweigh the potential benefits of assumption. Some of the Stakeholder Group members suggested that the only acceptable assumption scenario would be one that ensures significant improvements in every category to the level of service that is currently being provided by the dual programs.

Virginia's SPGP allows the State to be the sole permitting authority for impacts of up to 1 acre of non tidal wetlands and 2000 linear feet of streams. Virginia's existing SPGP provides many of the benefits identified as potential benefits of § 404 assumption without the costs associated with assumption. In lieu of, or until a stable funding mechanism is identified, the Commonwealth could explore working with the Corps to renegotiate and expand the SPGP to provide resource protection as well as consistency, timeliness and certainty to a broader group of projects.

# APPENDIX A

## Stakeholder Advisory Group Member List and Meeting Notes

# COSTS/BENEFITS OF ASSUMING THE § 404 PERMITTING PROGRAM STAKEHOLDER ADVISORY GROUP

# MEETING NOTES - FINAL
# ADVISORY GROUP MEETING – THURSDAY, JUNE 21, 2012
# DEQ CENTRAL OFFICE 2ND FLOOR CONFERENCE ROOMS

## Meeting Attendees

| ***STAKEHOLDERS*** | Nikki Rovner - The Nature Conservancy - VA Chapter | ***INTERESTED PUBLIC*** |
|---|---|---|
| Robin Bedenbaugh - Virginia Association of Wetland Professionals | Avi Sareen - ECS Mid-Atlantic | Phil Abraham - VECTRE (VACRE) |
| Gretchen Clark - Reynolds-Clark | Kevin Seaford - Virginia Association of Professional Soil Scientists & Golder Assoc. | John Brooks - VTCA/Resource International |
| Maggie Cossman - Liberty University | N. Scott Sutherland - Izaak Walton League of America - Roanoke Valley Chapter | Marcia Degen - VDH |
| Mark Davis - Virginia Manufacturers Association & Altria | Mike Toalson - Home Builders Association of Virginia | Chris Egghart - DEQ |
| Chris Dodson - Timmons | Shannon Varner - Troutman-Sanders | Brandon Kiracofe - DEQ |
| Sumalee Hoskin - U.S. Fish & Wildlife Service (Alternate for Kimberley Smith) | Tim Wagner - Wiley/Wilson | Nick Korchuba - U.S. Corps |
| Ron Jefferson - Appalachian Power Company | Tom Witt - Virginia Transportation Construction Alliance (Alternate for Jeff Southard) | Kip Muman - Ecosystem Services |
| Ann Jennings - Chesapeake Bay Foundation | | Jan Roller - Ecosystem Services |
| John Paul Jones - Alpha Natural Resources | ***TECHNICAL SUPPORT*** | Andrea Wortzel - Hunton & Williams |
| Bob Kerr - Kerr Environmental | Allison Dunaway - DEQ | ***SUPPORT STAFF*** |
| Blair Krusz - Virginia Agribusiness Council | Ethel Eaton - DHR | Cindy Berndt - DEQ |
| Larry Land - Virginia Association of Counties | Ray Fernald - DGIF | Melanie Davenport - DEQ |
| Kim Lanterman - Dominion | Tracey Harmon - VDOT | Dave Davis - DEQ |
| Ben Leatherland - Hurt & Proffitt | Carl Hershner - VIMS | James Golden - DEQ |
| David Mergen - City of Chesapeake | Rene' Hypes - DCR - Natural Heritage Program | Steve Hardwick - DEQ |
| Chris Miller - Piedmont Environmental Council | Jeffrey Jones - USDA - NRCS | Mike Murphy - DEQ |
| Deborah Murray - Southern Environmental Law Center | Butch Lambert - DMME | Angela Neilan - DEQ |
| Thornton Newlon - Virginia Coal Association | Barry Matthews - VDH | Bill Norris - DEQ |
| David O'Brien - NOAA Fisheries Services | Brad McDonald - DHR | David Paylor - DEQ |
| Stephanie B. Perez - Dewberry/NVBIA | Tony Watkinson - VMRC | Ann Regn - DEQ |
| Chuck Roadley - Williamsburg Environmental Group (Alternate for Mike Kelly) | Ricky Woody - VDOT | Rick Weeks - DEQ |
| Mike Rolband - Wetland Studies and Solutions | Tom Walker - U.S. Army Corps of Engineers (Corps) - Norfolk District | |
| | | |

NOTE: The following Stakeholders were absent from the meeting: John Carlock - Hampton Roads PDC; Mike Kelly - Williamsburg Environmental Group; Ed Kirk - REI; Marina Phillips - Kaufman & Canoles; Kimberley Smith - U.S. FWS; Jeff Southard - VTCA; Richard Street - Spotsylvania County; Skip Styles - Wetlands Watch & VCN

.

1. **Welcome & Introductions (Bill Norris):**

Bill Norris, Regulation Writer with the DEQ Office of Regulatory Affairs welcomed all of the meeting participants. He asked for all of the stakeholders to be seated at the table. He asked for introductions from all of the "Stakeholders" and "Interested Parties".

2. **Welcome & Historical Perspective (David Paylor):**

David Paylor, Director of the Virginia Department of Environmental Quality welcomed the meeting attendees and provided a brief historical perspective for the task at hand. He noted the following:

- Welcomed everyone to the meeting and thanked everyone for their interest and participation in this effort.
- This issue did not come from the administration - it came from the Patron.
- It is an issue that came up at the beginning of the Kaine administration. At that time the administration was hearing complaints about the 404 program. DEQ was also seeing some challenges with coordination between the Corps and the department. Different kinds of mitigation decisions (i.e., stream mitigation requirements) were being made by the Corps and DEQ which resulted in a lot of frustration by the applicants. The Corps was calling for one set of mitigation goals while DEQ was requiring different mitigation goals for the same impacts.
- A lot of those concerns and issues were resolved at that time and the administration chose not to pursue 404 program assumption. Not sure what all of the reasons were, but among them were the costs of 404 program assumption.
- DEQ did work with the Corps at that time and expanded the State Programmatic General Permit. Before then as a functional matter the Corps got involved in every application greater than a tenth of an acre. Even though we had a SPGP of one acre, functionally the Corps was involved in every project over a tenth of an acre. At that time we worked with the Corps so that now they are only functionally involved in projects that are over one acre. They also do have some comment opportunities for projects over a 1/2 acre.
- Also worked with the Corps diligently to get to a Unified Stream Methodology so that the Corps and DEQ were making similar decisions.
- All of these things occurred during the Kaine administration.
- There continue to be some questions about One-Stop Shopping.
- This study resolution was given to DEQ from this General Assembly session and not from the administration.
- DEQ's primary end-game at this point is to meet the goals of the study resolution.
- DEQ is diligently working with the Corps to identify what resources would be required if DEQ assumed the program, including both costs and staffing, which would be considerable. We are trying to identify what the associated work load would be. We would be taking over responsibilities that we don't now have. We don't know yet what we would have to do to our database to be able to assume those responsibilities. There are a lot of logistical and operational details that staff is working with the Corps to identify.

The Corps is being very cooperative in working with staff on this effort.

- We also have to identify whether there would be any additional statutory authorities that we don't have that would be required for us to assume the program.
- We want to also be able accurately describe what the stakeholder concerns are, where there is agreement and where there isn't. Ideally we would like to be able to report where there is consensus and where there isn't. That may be asking a lot from you as stakeholders, because there may be preferences that you are not prepared to compromise on at this time. We are trying to be descriptive in our efforts to answer the study resolution.
- Don't anticipate that there will be an administrative position on this one way or another.
- This is not an isolated effort across the country. There are several States that are looking into assumption of the 404 program. Not sure all of the States, but it looks like at least Ohio and Oregon are looking into the assumption of the program. There are some areas of Congress where the concept of One-Stop Shopping for permitting is being discussed.
- Did have a conversation with Dan Wyatt in Michigan (Director of Michigan DEQ) regarding assumption of the 404 program. There are two States that have been delegated the 404 program, Michigan and New Jersey. Within the last couple of years, Michigan had actually proposed to give the program back to EPA because of budget problems. The applicant community stepped up and said that they would rather pay higher fees than have the program returned to the federal government. Their experience has worked and has been long standing.
- DEQ is trying to be descriptive. We want to be able to represent your views as stakeholders as best we can. Where there is consensus we want to be able to report that. Whether this will lead to legislation or not is uncertain. We want to be as thorough and responsive as we can to the study resolution.
- Appreciate you being here. It is evident that there is a lot of interest in this topic.
- There will be at least one more meeting. This is an open-ended process. We want to be as responsive as we can be to what we hear from you today.

### 3. First Meeting of the Stakeholder Advisory Group - Costs/Benefits of Assuming the § 404 Permitting Program (Dave Davis):

Dave Davis, Director of DEQ's Office of Wetlands & Stream Protection, provided a brief presentation to further set the stage and starting point for today's discussions. His presentation included the following:

| | |
|---|---|
| **Stakeholder Meeting Coordinators:** | • Angela Neilan - Community Involvement Specialist, Office of Public Information & Outreach<br>• Ann Regn - Director, Office of Public Information & Outreach<br>• Bill Norris - Regulatory Analyst, Office of Regulatory Affairs<br>• Cindy Berndt - Director, Office of Regulatory Affairs<br>• Steve Hardwick - VWP Permit Coordinator, Office of Wetlands & Stream Protection<br>• Dave Davis - Director, Office of Wetlands & Stream Protection<br>• Melanie Davenport - Water Division Director<br>• James Golden - Deputy Director of Operations |
| **Who are the Stakeholders:** | Representatives from:<br>• Environmental Advocacy Groups<br>• Development & Real Estate |

| | |
|---|---|
| | • Transportation<br>• Agriculture<br>• Utilities<br>• Mining<br>• Consultants & Attorneys<br>• Local Government<br>• Federal Agencies |
| **Technical Assistance:** | Other State Agencies:<br>• Department of Transportation (VDOT)<br>• Department of Historic Resources (DHR)<br>• Department of Game & Inland Fisheries (DGIF)<br>• Department of Conservation & Recreation (DCR)<br>• Virginia Institute of Marine Sciences (VIMS)<br>• Virginia Department of Health (VDH)<br>• Virginia Marine Resources Commission (VMRC)<br>• Department of Mines, Minerals & Energy (DMME) |
| **Why Are We Here?** | The Department of Environmental Quality shall:<br>• Study the **benefits and costs** of seeking authority from the U.S. Environmental Protection Agency (EPA) to administer the § 404 permitting program;<br>• Determine whether there are appropriate exemptions for small impoundments;<br>• Determine whether there is an appropriate mitigation ratio for ponds and ephemeral streams;<br>• Convene a representative group of stakeholders to assist it in determining the **benefits and costs** of seeking such authority from EPA |
| **HJ 243 Resolution:** | "RESOLVED by the House of Delegates, the Senate concurring, That the Department of Environmental Quality be requested to study the **benefits and costs** of seeking authority from the U.S. Environmental Protection Agency (EPA) to administer the § 404 permitting program under the federal Clean Water Act." (emphasis added) |
| **404 Assumption Requirements:** | States seeking to administer 404 programs must submit:<br>• Governor's letter requesting program approval;<br>• **A complete program description;**<br>• Attorney General's statement;<br>• MOA between the Director and EPA Regional Administrator;<br>• MOA between the Director and Corps Secretary |
| **Feasibility Study:** | • Compare current Virginia Water Protection (VWP) program and Section 404 program (jurisdiction, workload, responsibilities, processes and procedures, etc.);<br>• Identify current overlaps between both programs, and areas that don't overlap;<br>• Identify Stakeholder perspectives on the benefits and costs. |
| **Feasibility Study:** | DEQ is evaluating:<br>• Legal, Statutory, and Regulatory Issues;<br>• Staffing and Training Needs;<br>• IT Infrastructure Requirements;<br>• Financial Resources Needs;<br>• Compliance and Enforcement Requirements;<br>• Special Topics - Mining, T&E, Section 106, etc.<br>• Implementation. |
| **Where Are We Now?** | • Analyzing Corps and DEQ data;<br>o Workload, staffing, jurisdiction, training, infrastructure<br>• Comparing CWA requirements with State law and regulations;<br>• Projecting required resources;<br>• Getting stakeholder input on benefits and costs. |
| **Where Are We Going?** | • Synthesize<br>o Data;<br>o Legal requirements;<br>o Stakeholder input<br>• Compile draft information and begin draft report preparation;<br>• Conduct 2nd Stakeholder meeting on August 30th<br>• Finalize Draft Report in September for Executive Review;<br>• Prepare Final Report in October/November |
| **Wait…I Didn't Finish!!** | • Stakeholder input is not limited to two meetings;<br>• Meeting minutes will be distributed for your review before finalizing;<br>• Detailed, written comments and suggestions can be submitted anytime between now and September 14th…but, **sooner is better!**<br>• Send written comments to:<br>William K. Norris<br>DEQ Office of Regulatory Affairs |

| | |
|---|---|
| | P.O. Box 1105<br>Richmond, VA 23218<br>William.norris@deq.virginia.gov |

Discussions included the following:

- The requirement for submission of a "complete program description" requires a large amount of work.
- The Corps data was received by DEQ last week - staff is in the process of working through that data.
- The goal is to have a final report by November 15th.
- This is a very compressed time schedule.
- Stakeholders are encouraged to send their comments and issues directly to Bill Norris as soon as possible so that they can be considered and incorporated into the study report.
- In regard to consideration of work load and staffing considerations that are part of the study, DEQ needs to consider the economics of anticipated work load and staffing calculations. The housing industry is currently operating at about 10% of capacity, so if the calculation of work load and staffing requirements is based on today's economy, then a future upswing in the economy would leave DEQ with insufficient staffing to handle the workload. The Housing Industry and construction is a long way from what one could consider normal.
- Two questions: Is DEQ able to share the information that has been received from the Norfolk District? And Will DEQ public notice the draft of the report? *Staff Response: The data is not currently in a format to share with the group today. But after the analysis by staff is completed and some comparison are made then that information can be provided to the group at least in a draft form prior to the next meeting. With regard to the public noticing of the draft report - there are no requirements to do so- but the agency will consider it and check posting requirements and schedules because of the compressed schedule to see if that is feasible. It is the goal of DEQ that the stakeholders not be surprised by the content or conclusions of the study. We want to make sure that you all have an adequate opportunity to review the materials and to provide input.*
- Is there an Army Corps position on this? Do they like it? Do they support it? *Staff response: the Director noted that he had spent some time with the Colonel and his reaction was that the Corps is very comfortable with the program as it is right now, but that he also recognizes that DEQ has to do what they need to do to answer the study resolution and that the Corps was going to help DEQ where they could to collect the information needed.*
- Does the Corps support this? *Corps Response: The Corps will help DEQ where needed to answer the study resolution and provide information as requested. This effort is legal under the auspices of the Clean Water Act - the Corps will support the effort anyway it can.*
- To follow up on the projection of future needs - The issue of sea-level rise should be considered when calculating future staffing needs and the calculation of workloads. *Staff response: That is not an area that we are looking at for this study. We are looking at the administrative processes required to take on a program that is currently being run by*

*another management structure. The idea is that since this is a delegated program from EPA that there would be some leadership provided by EPA on this type of issue no matter who is running the program.*

- The process needs to be transparent.

**4. Guidelines for Stakeholder Advisory Group Discussions (Bill Norris):**

Bill Norris briefly went over the guidelines for stakeholder advisory group discussions that had been provided to the group at sign-in. These included:

- Please mute or turn-off your cell phones and other electronic devices to minimize interruptions. You can reconnect during the breaks.

- Listen with an open mind and heart – it allows deeper understanding and, therefore, progress.

- Speak one at a time; interruptions and side conversations are distracting and disrespectful to the speaker. "Caucus" or private conversations between members of the audience and people at the table may take place during breaks or at lunch, not during the work of the group.

- Be concise and try to speak only once on a particular issue, unless you have new or different information to share.

- Simply note your agreement with what someone else has said if you feel that it is important to do so; it is not necessary to repeat it.

- If you miss a meeting, get up to speed before the next one, as the Stakeholder Advisory Group cannot afford the luxury of starting over.

- Focus on the issue, not the speaker – personalizing makes it impossible to listen effectively.

- Present options for solutions at the same time you present the problems you see.

**5. Costs/Benefits of Assuming the § 404 Permitting Program - Facilitated Discussions (Angela Neilan; Stakeholders and Program Staff):**

Angela Neilan went over the ground rules for the facilitated discussions. A copy of "Guidelines for Stakeholder Advisory Group Discussions" was distributed to the group. She noted that the meeting was being recorded so that we can ensure that we have captured all of your thoughts and concerns. She requested that all participants speak up so that all of the attendees can hear and participate in the discussions. She introduced Ann Regn, the Director of the Office of Public Information & Outreach, who will be taking some flip-chart notes electronically so that we can have a visual idea of where we are. She went over the agenda and the process for the rest of the

day's activities. She noted that there were white index cards on the tables for the stakeholders to use to write down their questions that they think of during the course of the discussions. Staff will collect those questions and provide answers to the group after the lunch break.

Angela Neilan posed some questions for the group for this phase of the facilitated discussions. She asked for the stakeholders think about "What is on your mind? What are the Pros and Cons? What are the Costs & Benefits? Thoughts that were generated through this process included the following:

- Would hate for decisions to be made based on the current economic climate only to find that those economic assumptions were incorrect and then DEQ would be left with inadequate funding; staffing and resources to manage the program. They may be left with a resource need that the General Assembly wouldn't be inclined to fund.
- Concerned about funding.
- Concerned about resources. A lot of projects use the Corps Nationwide Permit - concerned that the program might not go as smoothly or cost more if that option was not available under a DEQ run 404 program.
- Concerned about implementation.
- Consistent funding is a major concern. With State budgets set every two years, program funding might not be provided at a consistent level. The program would need a consistent funding source.
- Consistency of wetland delineations needs to be a part of the considerations for the assumption program. The level of training to ensure consistency of those delineations needs to be considered.
- From the perspective of the Mining Industry - The industry uses a lot of 404 permits. Has worked a lot in the Appalachian Region - work with a lot of State agencies - everyone will tell you that Virginia has the best State agencies to work with and the Norfolk District of the Corps is the best 404 group to work with. With the reauthorizations of the general permits, the Industry's Nationwide 21s are practically useless to us now, the industry will dependent on Individual Permits on a more frequent basis - there hasn't been an Individual Permit out of the Norfolk District for 4 to 5 years for mining operations. Open to any kind of change. Also interested in what role EPA is going to play.
- Concern in getting permits without unnecessary changes or conflicts, etc. with requirements.
- Concern in a lack of need for assumption by the State, especially given the changes that were made 5 or 6 years ago. Lack of an identified need.
- Funding and manpower concerns. If we don't have the manpower it will be a slower process.
- Funding and consistency and how it will be applied.
- No matter whether it is one agency or two that manage these activities, the concern should be to make sure that we are adequately protecting the resource and meeting the programmatic goals of the Clean Water Act and the State Water Control Law. Need to ensure that we are protecting the functions and values that wetlands provide to the public. Are wetlands going to be adequately protected? Is there going to be adequate oversight over the program?

- Timing is a concern. The development of the SPGP took awhile and has worked out well. There is a lot of experience at the Norfolk District that helped with that. Industry is concerned over the length of the transition period involved to reach similar level of expertise within DEQ, Concerned over how long it would take for DEQ to reach that level of expertise.
- Concerned over the potential loss of technical resources that are currently available at the Norfolk District. There is a potential for statutorily differing mandates and law changes. How will those be handled over time? Concerned over compliance with the latest statutes (NEPA; Section 106) and other related federal requirements. The handling of interagency reviews at the State level by State agency rather than federal agency may actually cause delays. Currently when there are overlapping jurisdictions any conflicts can be resolved in the field. With State assumption you could have formalized reviews which could delay the process. There is a potential for conflicts and delays. Concern over how interagency reviews would be handled if DEQ would be assuming the program.
- Funding is a concern.
- Concern that the Endangered Species obligations are fulfilled.
- The main thrust at the State level is to make sure that both the Corps and DEQ are fully aware and understand all of the implications of DEQ assumption of the 404 program. The Corps is trying to do all they can to help DEQ collect the information that is needed and required by the study resolution. They are also trying to provide information so that the State can fully evaluate what the benefits and possible detriments of State assumption of the program. The Corps representative stated that they are here to help.
- From the perspective of other State programs that at times have been well funded and then through a budget process have lost some of that funding, there is a need for this program to maintain its funding and staffing if it is to be functional. Need to maintain the level of expertise that currently exists and build on it. The program needs to have consistent staffing and funding.
- The Norfolk District has been doing this a little longer than DEQ. A representative from consulting community noted that when clients comes to them with a project, they are trying to steer them to a Nationwide Permit or a one agency process or vehicle, the consultant steers them to the Corps. The process at DEQ is not always as straight forward as the Corps process. The Corps brings a lot of institutional knowledge to the table. Mechanics and predictability of the process is important to establish upfront.
- Concerned over the effect this would have upon project and infrastructure costs. The efficiency of the permit review process needs to be considered.
- Sustainable funding is needed. Costs are a concern.
- Dialogue between the two agencies is very helpful and useful.
- A one-stop shop would be helpful.
- Would like to hear more about the opportunity of having a one-stop shop to streamline the process.
- Proper funding is a concern. Would State assumption speed up or slow down the process? Anything that slows the process down is not good.
- Regardless of whether it is two agencies or one, predictability is an issue. There is a need for consistent answers.
- Loss of experience with regulators is a concern. The level of training for those that would

be identifying wetlands is a concern.

- Need to define what an appeals process would look like if this were to happen is a necessary part of this process.
- Streamlining the process would be helpful. Improved timing and streamlining is important. If it took longer to get a permit that would be a problem. What would the Corps's role be if DEQ were to assume the program (i.e., consultation with other agencies and analysis, etc.)? Funding requirements need to be looked at.
- There is a lot of front end work that goes into these projects from a consulting firm's perspective. Consistency is an issue. There needs to be predictability and consistency with the process no matter who has the program. What is the estimated transition time frame if this were approved to move forward? Are we talking one year or two years? Or more?
- As DCR is trying to shed some responsibilities for stormwater and erosion and sediment control to the local level, is there an opportunity to transition some of that DCR staff (expertise) and funding to DEQ? What is the timing of those changes?
- Funding and viability of the program under changing economic and political conditions is a concern and needs to be considered.
- Interested to know what conditions have driven the General Assembly to this point where assumption of the program is to be evaluated. Virginia engaged in this exercise before a number of years ago. What has changed either economically or with the permitting programs themselves that brings us here today?
- What are the implications of the Corps not being an "action" agency for the requirements for interactions with other federal action agencies, if the State assumes the program?
- There is a need to focus on the issue or issues that drove this resolution to be created. What has changed? Let's use any available funding to fix those issues or problems. The rumor is that there were or are conflicts or disagreements between the Corps and DEQ with people getting permits. Sometimes the agencies don't agree or the clients don't agree. Maybe the creation of a "coordinator" role should be considered. There should be a management system to track the permit through the approval process. There needs to be a transparent tracking system. Maybe this group should be looking at adding a few more trained staff to better manage the current program for both the Corps and DEQ.
- If this were to happen, what would be the Corps continuing responsibilities? This group needs to identify what are the Corps responsibilities if the State were to assume the program. What is left for the Corps? Without that information it is hard to evaluate the actual impact of this assumption. How would the compliance component work under this scenario? *Corps Response: Some of the details would not be worked out until an MOA was developed with EPA and the State regarding State assumption of the program. Geographically, the Corps would maintain all of its Section 10 authorities and their 404 authorities related to wetlands adjacent to Section 10 waters. There are some gray areas as to what is considered wetlands adjacent to Section 10 waters, those areas are handled differently in those States that have assumption of the program. Those details would need to be worked out through the MOA process. If there is State assumption, then for those areas covered under the assumption, the Corps would be basically "hands-off". In some States there is a clause in the MOA where EPA could step in and take the program back, based on the program in general or on a particular permit action, and return it to the*

*Corps.*

- What is the problem? What are the issues that need to be resolved?
- It appears that this group is here because legislator thinks that there is a problem with the current program and wants a study to occur. In going around the room, no one came out and said that what we have is bad; actually it appears to be the opposite. The focus needs to be on the benefits and costs based on the study resolution.
- *Staff Comment: It was pointed out that the language of the resolution and the "whereas" contained in the resolution represent the thoughts of the General Assembly and should be looked at before moving further in our discussions. DEQ is doing what the General Assembly has asked us to do. See text included below:*

---

Language of HJ 243 (Copies were distributed to the stakeholders electronically prior to the meeting and made available at the meeting.):

**2012 SESSION - ENROLLED - HOUSE JOINT RESOLUTION NO. 243**

*Requesting the Department of Environmental Quality to study the benefits and costs of seeking authority from the U.S. Environmental Protection Agency to administer the § 404 permitting program under the federal Clean Water Act. Report.*

Agreed to by the House of Delegates, February 10, 2012
Agreed to by the Senate, February 28, 2012

WHEREAS, in 2000, the General Assembly enacted legislation to ensure protection of Virginia's wetlands and, at the same time, streamline the permitting process by reducing the number of projects that required redundant State and federal permits; and

WHEREAS, both the State Water Control Board and the U.S. Army Corps of Engineers regulate construction and dredging projects that impact Virginia's wetlands and surface water; and

WHEREAS, the current structure of these programs means that many of Virginia's businesses and local governments need both a State and a federal permit establishing resource protection requirements when they build homes, construct roads, or undertake other projects that destroy wetlands or impact surface waters; and

WHEREAS, in 2002, Virginia sought and was granted a State Programmatic General Permit (SPGP), which was a good first step in reducing duplicative permitting processes; and

WHEREAS, on June 1, 2007, by agreement between the Department of Environmental Quality and the U.S. Army Corps of Engineers, the U.S. Army Corps of Engineers amended the SPGP to allow the State Water Control Board to be the sole permitting authority for all wetland impacts up to one acre for development projects and up to one-third acre for transportation projects and for all stream impacts up to 2,000 linear feet without U.S. Army Corps of Engineers participation; and

WHEREAS, the U.S. Army Corps of Engineers insists on maintaining jurisdiction over wetland impacts above one acre; and

WHEREAS, a dual federal/state permitting process can slow development and impede economic development; and

WHEREAS, such a dual process can lead to duplication and inefficiencies; and

WHEREAS, the requirement to deal with two separate agencies with two sets of regulations can present challenges for applicants; and

WHEREAS, the requirements of the U.S. Army Corps of Engineers permitting process can be unpredictable and inconsistent across the state; and

WHEREAS, Virginia is in a better position than a federal agency to create a predictable and sustainable permitting environment across the state;

WHEREAS, if the EPA approved Virginia's assumption of the § 404 permitting program, the Commonwealth would be the sole permitting authority for all projects, regardless of size, in state wetlands and surface waters "other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto." (§ 404(g) of the Clean Water Act, 33 U.S.C. 1344); and

WHEREAS, Virginia's assumption of the § 404 permitting program will eliminate duplication and minimize unnecessary delay to ensure timely and efficient permitting that can foster economic development and ensure environmental protection; now, therefore, be it

RESOLVED by the House of Delegates, the Senate concurring, That the Department of Environmental Quality be requested to study the benefits and costs of seeking authority from the U.S. Environmental Protection Agency (EPA) to administer the § 404 permitting program under the federal Clean Water Act. In conducting the study, the Department shall determine whether there are appropriate exemptions for small impoundments and whether there is an appropriate mitigation ratio for ponds and ephemeral streams. The Department shall convene a representative group of stakeholders to assist it in determining the benefits and costs of seeking such authority from EPA.

All agencies of the Commonwealth shall provide assistance to the Department of Environmental Quality for this study, upon request.

The Department of Environmental Quality shall complete its meetings by November 30, 2012, and shall submit to the Governor and the General Assembly an executive summary and a report of its findings and recommendations for publication as a House or Senate document. The executive summary and report shall be submitted as provided in the procedures of the Division of Legislative Automated Systems for the processing of legislative documents and reports no later than the first day of the 2013 Regular Session of the General Assembly and shall be posted on the General Assembly's website.

---

- One stakeholder group member suggested that the "whereas" statements all seem to be speculative. Has there been duplication or delays of approvals? Some history of any issues would be helpful.
- Are there records of where there were differences between the Corps and DEQ in the permitting process?
- What advantages would be gained if DEQ assumed the program?
- The duplicative process was set up in 1972 by Congress. The SPGP process eliminated a lot of that duplication
- Maybe in 1 to 2 % of the time there may be a problem with duplication of efforts but are the costs of addressing that percentage in this manner appropriate.
- When the general permit came out it was determined that 95% of the projects were below 2 acres, so DEQ set its general permit limit at 2 acres. The Corps set their threshold for their SPGP at 1 acre. Don't know why there is a difference between the two agencies.
- If 95% of the program is working relatively well what are we spending money to fix? The remaining 5% are contentious just by their size and scale.
- *Staff comment: The "feasibility study" components that have been presented are those*

*items that we believe the agency needs to identify and look at to answer the benefits and costs questions. We think that those are the items that we need to study to develop costs of assumption. There needs to be an objective analysis to determine those costs. Have we hit all the things that need to be considered to tally the costs? What have we missed? Have we hit on everything that we need to calculate the costs associated with assumption of the program and to accomplish the scope of the study resolution? Identification of the benefits is a bit more subjective and is an important role for you as our advisory group.*

- One stakeholder group member noted that with regard to the history of this effort - A number of members were on the stakeholder group formed in 2006 where there was a proposal for the State to assume the 404 program. It was very different then this current effort. In that earlier effort, the administration started out being very much involved in the notion of assumption. Industry had a lot of concerns they were raising about the management of the program. Those concerns were in part resolved by the development of the SPGP and improvements and changes made at that time and the administration decided not to proceed with the assumption of the program. In this current effort, in looking at the benefits of the assumption of the program as directed by the study resolution, it is important to note that the "whereas" clauses are unsupported assumptions. In looking at the benefits, we need to go behind these assumptions. We need to identify "what are the facts behind these assumptions". Where is the evidence to support these assumptions? We need to look closely at the "whereas" clauses as we go through this process to identify the costs and benefits of State assumption of the program. We need to look at those "whereas" statements and not just let them stand.
- The outline of the "feasibility" study provided in the staff presentation is too generalized for the group to accurately identify whether DEQ is looking at all of the issues and concerns that should be addressed. Whenever the word "etc." is used more detail is needed. It would be good to see the bigger outline of what DEQ is looking at. The group could be more effective in answering these questions if they could have access to the bigger picture of what the agency is looking at to develop their responses to the study resolution.
- Worried about the issues associated with interagency coordination. That topic area is not included in this outline of the "feasibility" study components that has been presented by staff.
- More detail is needed.
- This is not a study that the coal industry asked for and was somewhat of a surprise to the industry. The industry does have a real problem with getting permits. The issues have to do with continual recycling of requirements and additional requirements and generally EPA's failure to respond in a timely manner in their approval process. The general problem is getting permits and stopping viable industries from operating in the State. That may be part of the "why" for this study resolution.
- Would encourage looking at the question of costs not just as a "bare minimum". Need to look at all of the costs of having an effective program. Need to look at the program as a complete picture. Need to look at costs associated with enforcement; compliance; permitting; technical expertise; training costs of new staff; professional development costs; staffing needs; costs associated with the review of mitigation, etc. There needs to be a comprehensive, robust assessment of what realistically are the costs for a program that ensures that our wetlands are adequately protected.

- One member noted that there needs to be consistency between the two agencies (DEQ and the Corps). Differences between the two agencies may be the cause for delays in the permitting process. There are certain types of projects that are more contentious just by their very nature. There are some larger projects across the State, where DEQ has done a good job of sticking to their time lines. They respond on schedule. There is consistency and predictability in the State's process. The process at the federal level can be a more delayed and protracted process. There are more comments that the applicant has to work through. It is also important to understand that there are certain types of projects that do have delays because of the complexities of the projects. Economic development projects are often caught up in this delay because of the complexity of the project.
- In regard to the funding and costs questions, it is important to remember that when this first came up in 2005/2006 that the economy was going crazy and there was a huge amount of frustration with the process because of the delays in project permitting because of the number of projects that were being proposed. There was a lot of frustration at the time, DEQ had a time-line, and the Corps did not. A lot of those issues have been resolved with the SPGP. Currently the economy is slow and the number of projects is somewhat limited. Now DEQ and the Corps are responsive but they are not dealing with the same level of projects that they were working with previously. If the State assumes the program, the concern would be the ability of the State to be able to gear up to deal with the number of projects that might be proposed if the economy improves. Would they have the necessary resources available? How would the need for future funding be addressed?
- *Corps Comment: Point of Clarification - The EPA administers the Clean Water Act. They have delegated authority for the 404 permitting program to the Secretary of the Army. They can delegate this authority to the State if they want to assume it. EPA and the responsibilities imposed by EPA don't go away if the State assumes the program.*
- *DEQ Comment: Whether it is DEQ or the Corps, EPA still sets some requirements. Whether it is DEQ or the Corps wrestling with permitting requirements and issues, the rules from EPA's perspective still remain unchanged.*
- At the height of economic development activities in 2004, 2005 & 2006, DEQ was dealing with 450 or so permits a year, now it is handling about 40% less. This significant drop-off needs to be taken into consideration. The study resolution suggests that the current process may slow development, most of that stems from potential issues with the Individual Permit (IP) process. From what is being said, that appears to be where the crux of the issue lies. With the General Permit system it works, there is a 60 day clock, the same as a Nationwide Permit; 15 days to review; if complete you have 45 days; with an automatic authorization after that. The exact same rules apply to the Corps for the "Nationwide" permits as they do for DEQ's General Permits. It doesn't appear that anything is slowed down with the current General Permit system with the SPGPs. The issues seem to be with the Individual Permits, which are generally contentious by nature. If that is where the problem lies then we need to focus on teasing out some of those issues in communication and wetland determinations and try to identify where those issues are and try to get those issues resolved.
- One member noted that it typically takes about a year to get an individual VWP permit from DEQ, while it takes up to 2 years to get a permit from the Corps. The concern is that most of what is slowing down the Corps process is all of the NEPA analysis and

interagency coordination process involved. If DEQ assumes the program then they will have to be coordinating those activities or doing these activities; going through the same process. Not sure that it would make the process run any faster if DEQ assumes the program. Not sure that DEQ would be able to issue the permit much quicker than the Corps. It is frustrating to be able to get a VWP permit from DEQ in a year and then have to wait 6 to 12 months or more to get a permit from the Corps for the exact same project before beginning work on that project. It would much simpler to have to only get one permit to authorize a project to proceed. But if it is only going to be one agency that has to go through all of that process then we may not be getting the one permit any quicker than it is taking to get two permits from the two agencies now. Unless the process can be streamlined so that the permitting process can be shortened, there doesn't appear that there might be much of a benefit to the regulated community. Need to look at the timeline of the permitting process. Is it possible to only have one permit, but have both agencies involved in that type of permitting process? There are significant delays between the issuance of the two permits (DEQ & Corps) even though they essentially authorize the same thing, even though they may have different mitigation requirements. Even though they are basically the same, there needs to be more coordination between DEQ and the Corps for the existing program, because a lot of the time they are requiring different things in the permits.

- One member noted that a lot of the "whereas" clauses came from constituents across the State not just from the resolution's patron. If you look at some of the key words in the "whereas" clauses it is evident that the focus is on "slow development" and "impede economic development". That basically raises the question of whether there is a way to make the permitting process more efficient regardless of whether it is one agency or two? Budgets and timelines are developed to accommodate the current permitting process timeline. If that timeline gets extended to double or three times the estimated time then the economics of a planned project often will not work. In looking at other "whereas" clauses, it is perceived that there are inefficiencies in dealing with the two agencies. According to the "whereas" clauses it appears that it is perceived that the Corps permitting process is unpredictable and inconsistent across the State. Whether that is the case or not, it is apparently perceived that it is. "Timely" and "efficient" are words also included in the resolution. We keep hearing that the process is slow. That the process needs to be more efficient. Whether that is done with DEQ or the Corps both having roles or just DEQ that is the key. There needs to be some predictable timelines for the permitting process. The Nationwide Permit and the SPGP seem to work fairly well, but when you go into the IP process, you don't know where the finish line is.
- If we just focus on the inefficiencies, then maybe we should forget about the State taking over the program since it is going cost so much money and we aren't likely to get any better efficiency and focus on the inherent conflicts of the process in the Clean Water Act, dealing with coordinating with all of these issues and agencies. Someone still has to do that. Maybe we should suggest that we spend a little bit of money on a coordination process or a management process, with maybe a web based tracking system which could identify all the different milestones of the permitting process. Then everyone involved, from the management at the Corps and DEQ and the applicant, the consultants, etc. could see where the project was in the process and where there are holdups or where there are issues/problems that need to be resolved. It could identify where there are issues or

slippages in the timeline so that they can be resolved. The key is to have someone that then could correct the issues and stop the slippage.

- Maybe instead of looking at assumption of the program, we need to be looking at getting better coordination between the Corps and DEQ in writing the permits.
- There needs to be more coordination between the Corps and DEQ permit writers when they are essentially writing a permit to address the exact same impacts for the most part. Currently there can be slightly different requirements between the two permits.
- The rumor is that this resolution resulted from issues associated with an industrial project proposed in Southwest Virginia, where a "purpose and need" couldn't be identified or justified. The developer just wanted to develop a site in anticipation of a future, undefined project. The Corps can't approve a plan for a site without identification and demonstration of the purpose and need for the project.
- VDOT currently uses a web-based tracking system for their projects. It works for them because they are the sole agency involved in their projects. With this program you have multiple agencies involved, both State and federal, which would complicate the tracking system needed.
- Is there any way that the State could assume the program for anything above an acre? Let the SPGP and the General Permit programs exist for anything under an acre, and let DEQ assume the program for anything above an acre. The way to streamline something is to make one person accountable. If only one person is accountable then there cannot be excuses beyond that person not doing his job. If only one agency is accountable for the permits then they are responsible for everything and it would allow this type of tracking system to be applicable. For example: There have been instances where permit writers at the Corps have forgotten to issue the public notice or the coordination letter has not gone out which has resulted in a delay in the permitting process. Those types of things could be included on a web-based tracking system that could be managed by one agency. It could reduce some redundancy within the process and increase the accountability. A tracking system in the current program with two agencies would be difficult to implement.
- Can assumption be limited to certain size projects? Could there be a threshold for the assumption?
- An Individual Permit requires a lot of coordination.
- A representative of the mining industry noted that for larger projects, with the reauthorization of the General Permits, the Nationwide 21 permits are essentially nonexistent for the mining industry after this year. We can't do a mining project with 300 feet of stream impacts. The Mining industry is looking at using all Individual Permits for their projects moving forward. When the industry had the Nationwide 21s, they didn’t have to do the State's VWP. The VWP covers more mining area because of jurisdiction over isolated wetlands. The ideal would be to have one permit with buy-in by both agencies and programs.
- One member suggested that there needs to be a permit coordinator. There needs to be accountability for the permitting process. It needs to be a transparent process. A tracking system would be useful.
- There have been statements made that there are those who don't understand the issue. It may be more of a southern Virginia issue rather than a northern Virginia issue because of

the way economic development is undertaken in Southwestern Virginia. The normal process for economic development in Southwestern Virginia is "pad development", where there is not always an industry ready to move onto a site. The local government would normally develop the site and provide the development pad and then go after an industry to use the site. As the developed pads fill up with industries that bring jobs then additional pads are developed. There is not always a well defined "purpose and need' for a site.

- There is a need for a robust upfront process. Much of the coordination that is being discussed does not require program assumption.
- Should be focused on coordination rather than delegation.
- If the idea is to make things more efficient - we need to know what is being done inefficiently now.
- The main issue is "what is the problem with the existing program?" What is such a problem that it has resulted in this discussion of program assumption? The statement of the resolution that reads: "Resolved…In conducting the study, the Department shall determine whether there are appropriate exemptions for small impoundments and whether there is an appropriate mitigation ratio for ponds and ephemeral streams…" The sentence above that refers to studying the "benefits and costs" of seeking authority to administer the 404 program, while this sentence spells out two specific items that the Department "shall determine". Is DEQ studying these two items separately and is this the problem? If this is the problem then shouldn't this group be discussing these items specifically? *Staff Response: DEQ is not covering these items individually as part of the study but will be addressing these as part of the evaluation of each of the 7 different components of the study.* These are interesting questions that do come up. They are mechanical issues that would require tool box changes rather than whole programmatic changes.
- Wasn't there a State law change a few years ago that exempts small farm ponds from regulation. *Staff Response: Under current State law there is an exemption for small farm ponds but under federal law there is not a comparable exemption. There are some technical and legal thoughts that have to go into answering this question. The general thoughts are even though they are exempt under State law; they still have to meet the requirements of federal law. The question is: Do they need a permit or not?*
- We do not want to have any duplication of work. Should make sure that the Corps current checklist of items is included in the DEQ checklist to make certain that all of the items that are currently being looked for by the Corps would be considered by DEQ.

**6. Costs/Benefits of Assuming the § 404 Permitting Program - Facilitated Discussions - Agency Thoughts (Angela Neilan &Agency Support Representatives):**

Angela Neilan asked for comments and thoughts from the Agency Support representatives of the Stakeholder Advisory Group. Comments included the following:

- A representative from DGIF noted that a lot of people around the table have referenced that the majority of the projects are running relatively smoothly and that it is only a small percentage of projects where there are currently problems. What this group needs to look

at is that these larger more complex projects require permits under both Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act. For those types of projects, assumption of 404 by the State is not going to change those permitting problems or issues. If the State did assume 404 then you would end up with two different projects, one being permitted under the 404 program by the State and another project being permitted as a Section 10 project by the Corps. What are the net benefits under this scenario?

- DHR has an electronic tracking system and process which is coordinated with the Corps that has been useful.
- Issues that VDOT is looking at include:
    - Managing the volume of actions/activities that are not covered by the SPGP, i.e., maintenance and dredging;
    - Making sure that the scope of work will cover activities; such as emergency actions;
    - VDOT currently has autonomy in decision making through the Corps under the Nationwide Program. There is delegated authority for VDOT staff to make decisions at the site. VDOT would like to see any changes in the program to continue to provide that autonomy in decision making;
    - Constantly looking for streamlining efforts - standardized practices. Would like to see any new program to incorporate existing MOAs and efficiency of approaches that currently exist.
    - The information and resource approach and decisions and requirements made may also affect other agencies. Those potential impacts need to be taken into consideration.
- VDOT currently has interagency coordination meetings at the State and federal level. Monthly meetings are held for interagency coordination in order to get permits. Would like to see that process continued. Don't see this as one-stop shopping. Would need to have a separate process for those projects that would require only a DEQ permit versus those that would require action by the Corps.
- DMME works closely with the Corps. They have a robust electronic tracking system which is shared with the Corps. The Corps has the ability to access the system and review any of the permits and can make comments as can the companies and industry representatives that they have the system with. DMME is working on an agreement with the Corps to assume responsibility for mitigation projects and putting them into a coal surface mine permit and inspecting to make sure they meet the requirements. Still looking at the possibility of this type of project. DMME has a good working relationship with the Corps. DMME does currently have delegated authority for the NPDES program for Coal Surface Mining from DEQ.

### 7. Costs/Benefits of Assuming the § 404 Permitting Program - Check of Consensus (Angela Neilan; Stakeholders and Program Staff):

Angela Neilan asked for the group to consider whether the group thought that the costs outweigh the benefits or the benefits outweigh the costs of assuming the 404 program and to note their answer on paper so that the results can be tallied.

She reviewed the "feasibility study" list of items that DEQ is currently evaluating to address the requirements of the study resolution:

- Legal, Statutory, and Regulatory issues;
- Staffing and Training needs;
- IT Infrastructure requirements;
- Financial Resources needs;
- Compliance and Enforcement requirements;
- Special topics - mining, T&E, Section 106, etc.;
- Implementation.

Angela Neilan noted that this Stakeholder group needs to be looking at costs and benefits related to these study resolution "feasibility study" lists as identified by program staff. She tasked the group to partner with the person next to you to develop 2 "benefits" and 2 "costs" associated with State assumption of the 404 program.

Angela Neilan opened up the discussions about whether the "costs outweigh the benefits" or the "benefits outweigh the costs". It was noted that: What we need are the figures - the group needs to make an informed decision. It should be an informed decision.

Ann Regn provided a tally of the votes regarding the costs/benefits question:

The Costs Outweigh the Benefits - 19
The Benefits Outweigh the Costs - 5
NEED MORE INFORMATION - 4

TOTAL: 28

Angela Neilan noted that we were closer to consensus than it might have appeared at the beginning of the meeting. Stakeholder discussions included the following:

- Costs outweigh benefits - will depend on what the numbers show after the technical analysis by staff. *Staff Comment: The kinds of numbers that were developed in 2006 when this concept was previously examined were in terms of millions of dollars, not hundreds of thousands. After the staff has a chance to review the Corps data we should be able to refine the current estimates.*
- Need more information.
- Need to consider the costs not only to DEQ but also to the regulated community. *Staff Response: DEQ is looking at the current fee structure to determine whether changes are needed if DEQ were to assume the program.*

**8. Themes from the Morning's Discussions (Ann Regn):**

Ann Regn and Dave Davis reviewed the materials from the morning discussions. The following list of topics and themes have been compiled based on the group's discussions:

**Problem—what is the problem; need for change**

- Need for Change:
  - What has changed since 2006 that brings us to this re-consideration of assumption—what are the issues that drove the study
  - Concern about need for assumption
  - Most coordination issues discussed don't seem to require assumption of program by State
- Issues:
  - What are the staffing and management issues
  - What are the issues/problems –what is evidence for some of the assumptions (the "where-as's)
  - Southern and **Southwest** Virginia development is different than in urban areas—develop a site first
  - Perceptions (problems)—inefficiencies and unpredictable timelines need to be addressed
  - Issue with Individual Permit (IP) –DEQ can take 1 year; Corps can take 2 years b/c of federal reviews so unless timeline is shortened, won't be benefit
  - Issues remain with larger economic development projects (out of state), especially with federal review
  - Are these specific problems—from study language "Are there appropriate exemptions for ponds, stream impoundments…?"
- General Concerns:
  - Need good data, evidence, examples of inefficiencies
  - How to go from good to great
  - Estimate that 5% of permits are contentious
  - Economics of projects won't work if increased timeline for permit approval
  - Are there examples to consider? Prince William County is currently using a transparent tracking and coordination system for their interactions with the Corps.
  - Are there examples / cases of problems (delays, etc) of having 2 programs?

**Legal**

- Role of Corps:
  - What would be Corps's role in the process
  - If assumption, Corps/DEQ would have a Memorandum of Understanding (MOU); that would put the Corps in basically a "hands-off" posture for projects handled by the State.
- Alternatives:
  - Regional general permit by one agency
  - Look at threshold for permit program jurisdiction for Individual Permit (IP)
  - How to resolve conflicts—can it be done in field (expediency)
  - Getting permits without un-necessary/additional requirements
- Different Requirements:
  - Potential for different mandates; compliance with new and related requirements such as National Environmental Policy Act (NEPA) Farm ponds appear to be

handled differently under State law and federal law. Do they need a permit or not?

- Interaction with other federal programs/agencies:
  - National Oceanic and Atmospheric Administration (NOAA) interacts with Corps—what are the interactions/triggers for other federal programs
  - EPA retains authority and sets requirements regardless of the delegation (independent of who is implementing)
  - Corps retains all of Section 10 Rivers & Harbors responsibilities for waters & adjacent wetlands; is separate from 404 in the federal Clean Water Act (CWA)
  - Endangered species are protected – ecosystem
- General Concerns/Comments:
  - Consistency of application and how it will be applied to the Virginia Manufacturers Association
  - Assurance of protection of wetlands/goals of CWA; mitigation, assessment and oversight regardless of **whether it is one agency or two agencies involved.**
  - Accountability by one agency might reduce redundancy; improve coordination

**Implementation**

- Transition:
  - Transition period—what time of time frame
  - Transition period for industry
  - Anything that slows down process is not good
- Consistency
  - SPG program resolved many issues; consistent
- Coordination:
  - Role of EPA
  - Mitigation requirements may differ but will need careful coordination by DEQ for federal requirements
  - Is there opportunity to consider efficiencies with DCR/stormwater program
  - Interagency coordination or compliance issues need to be considered
  - Dialogue between 2 agencies is useful for resolutions
  - Corps has long experience and knowledge—nationwide permits and predictability, mechanics
- Staffing:
  - Replacement of experienced staff with new
- One Stop Shop:
  - One stop/streamlined process is/can be efficient
  - One stop shop is good for clients
  - Is one-stop more efficient / streamlined?

**Funding Resources**

- Workload:
  - Workload today is much less than in past; consider costs associated with increased activity—40% fewer permits less than in past
- Costs:
  - What is effect on projects; costs to local governments?

    - Resources /costs for permit fees/ implementation
    - Realistic costs associated with staffing--enforcement, inspection/compliance, training, reviewing litigation
- Program Funding:
    - That future Program is well-funded to achieve goals
    - Funding –would permit fees increase?
    - Funding for assumption
    - Consistent funding source

**Staffing**

- Manpower
- How to account for changes in economic activity
- Consistency of delineation/training of staff

**Compliance**

- Suggestion for improved transparency—one online tracking system with all federal comments in one place (example Northern Virginia)
- Streamlined program to shorten time for permits
- Predictability is important for consistency
- Political considerations
- Awareness of consistency –predictability of program helps steer permittees in right direction
- Approval of permits /additional EPA requirement difficult for coal industry
- An Appeals process is important to consider

Angela Neilan asked for comments from the agency representatives on the Stakeholder Group. Agency comments included the following:

- VDOT would like to retain autonomy for decision making
- VDOT actions such as dredging –managing volume is challenging
- State agencies e.g. DHR have implemented tracking with the Corps
- Retain Efficiencies through MOA, standardized approaches
- Processes for other federal regulations
- Monthly interagency coordination meetings –efficient
- DMME robust electronic permitting system is viewable by Corps; SW office in dialogue on mining permits with Corps and DEQ
- Consider federal programs (e.g. Section 10) requirements that won't go away

Stakeholder discussions included:

- What are the federal responsibilities independent of which agency or agencies have delegated authority? *Corps Response: This assumption action is related only to the 404 program under the Clean Water Act. All of the Section 10 of the Rivers and Harbors Act responsibilities would remain with the Corps. Not only for Section 10 waters but also for "wetlands adjacent to Section 10 waters". All of Section 10 and some of the 404 program would remain the responsibility of the Corps.*

- How has the assumption been dealt with in other States? *Corps Response: In New Jersey the Corps typically retains section 404 authority on wetlands within 500 feet of traditionally navigable waters. Staff comment: The Michigan program has been in place since 1983. Kentucky studied this issue a couple of years ago and decided to back away from it.*

**9. Questions from the Morning's Session (Angela Neilan and Dave Davis):**

Angela Neilan asked Dave Davis to go over the questions that stakeholders had provided from this morning's session. Questions and Responses are provided below:

- **"Can we have a general show of hands - are components of feasibility study complete/all encompassing?"** The group indicated - *YES.*
- **"Will DEQ staff that assume the 404 program and confirm wetland/stream delineations (including ditches) and work with 404 permitting be required to be certified as a Professional Wetland Delineator (PWD), since it is a Virginia certification?"** *Staff Response: Maybe. We could look at that during the discussions of implementation.*
- **"Right now we have had some drainage ditches that have been classified as ephemeral streams and require permits and mitigation. Is this issue being studied now? Is there any update on this?"** *Staff Response: No knowledge of any study that is going on with respect to that issue, DEQ has the Unified Stream Methodology and internal ditch guidance (both documents have been publically vetted over the years and appear to be working) that determines whether we regulate activities in ditches, channelized streams & jurisdictional streams conveyed by ditches.*
- **"Has the mitigation ratio for a pond impact on a stream been studied to this point? Specifically, what would the mitigation ratio be if we have an existing detention pond with a stream running through it and we are converting it to a wet pond?"** *Staff Response: DEQ has not studied it. We would use the USM to come up with the current nature or function of the stream and come up with mitigation requirements based on that assessment and treat the impact accordingly.*
- **"Could we get some background on how ephemeral streams became regulated streams? At one time they were not."** *Staff Response: DEQ takes jurisdiction over all State waters. We had an issue with what is a stream and does it matter if it is intermittent or not? We changed our regulations in 2004 and took out the distinction between intermittent and perennial and just used the term streams. DEQ developed our ditch guidance. The Rule- of-thumb is if it has a bed and a bank it is a stream. If it meets the three parameters of the Wetland Delineation Manual it is a wetland. If it doesn't fall into either of those categories, there is a very good likelihood that DEQ doesn't have a role to play on that piece of land as a general rule-of-thumb. Corps Response: The Corps exerts jurisdiction over direct and indirect tributaries to traditionally navigable waters. The limits of that jurisdiction are tied to the ordinary high water mark (OHWM) or high tide line. The Corps has guidance related to establishing ordinary high water mark. Stream assessments are more tied to general permit thresholds and determining the appropriate level and type of compensatory mitigation. Not all tributaries are classified as "streams." The Corps has an appeals process that can be used if the determination is in*

*question. Use the appeals process with the Corps if there is an issue with the Corps interpretation.* Stakeholders discussed the issue of ephemeral streams and jurisdictional determination. Permitting and compensation of ephemeral versus intermittent streams were discussed briefly by the group. *Staff Response: This topic was dealt with initially in the development of the Unified Stream Methodology - maybe this topic can be dealt with by a separate working group of this stakeholder group.* The issue is a question of consistency. Maybe DEQ and the Corps could agree that no mitigation is required for ephemeral streams.

- **"Instead of assuming the Section 404 program, why not just issue one permit for impacts (outside of VWPP/SPGP) instead of an Corps IP and DEQ IP? A joint permit?** *Staff Response: There are notable differences between the requirements of the Clean Water Act and State Water Control Law. Could talk about issuing one IP that covers both authorities. Maybe use a more robust SPGP with a higher threshold.*
- **"How does DEQ interpret the "problem" to be regarding whether "there is an appropriate mitigation ratio for ponds and ephemeral streams" that the Resolution directs DEQ to look at?** *Staff Response: Use the Unified Stream Methodology and the DEQ Ditch Guidance.*

**The following questions were submitted by members of the Stakeholder Advisory Group, but were not addressed during the course of the meeting:**

- **"If the DEQ assumes 404, would NEPA Clearances still be required? What is the federal action that requires NEPA compliance?"**
- **"Some comments have indicated that the Corps requires that the permit application state the purpose of the project. If so, why? Are certain types of projects being discriminated against by the Corps/EPA?**
- **"Tom Walker with the Corps stated that the Corps has regulatory authority over navigable waters through Sections 9 and 10 of the Rivers and Harbors Act and over waters of the US through Section 404 of the Clean Water Act. The Corps responsibilities under the Rivers and Harbors Act are not transferrable to the States. Additionally, in accordance with CWA Section 404 (g) under State assumption, the Corps maintains permitting responsibility to wetlands adjacent to navigable waters.**

**ACTION ITEM: DEQ Program staff will address the questions raised by the group and will provide the necessary answers or clarifications.**

**10. Benefits and Costs Identification by Stakeholders (Angela Neilan & Stakeholders):**

Angela Neilan asked for an identification of the "benefits and costs" as developed by the working groups of the stakeholders. A compilation of the ideas generated through this exercise resulted in identification of the following "benefits" and "costs":

- **Benefits:**
  - Efficiency:
    - Better under one umbrella

        - Improvement of efficiency – closer relationships with State agencies under a single umbrella may be more efficient (keeps permitting authority primarily at State level)
        - More efficient
        - Higher level of efficiency
        - Confirmation of permits
        - Eliminate duplication of permit review and compliance
        - Localized process
        - one agency for 404 permits; perceived efficiencies in permitting; lower costs for permitting - reduced inconsistencies in mitigation requirements more efficiency;
        - one person/one agency contact, less duplication
        - Efficiency and likelihood that the State would be more responsive with one point of contact
    - Time Frame:
        - Reducing Time frame
        - Streamlined process
        - Shorter time frames for some permits
    - Consistency:
        - More consistency
    - Costs:
        - Reduction of overall costs
    - Accountability:
        - More accountability if one "quarterback" and on-line tracking
        - Public Relation benefits
        - One coordinator – one person to contact
        - Single POC; holding federal agencies to their timelines and possible time savings. Exception in additional requirements such as ESA requiring add study
        - one agency (though Corps retains some authorities)

- **Costs:**
    - Staffing:
        - New staff training – training costs – new facility costs
        - Staffing and training
        - Investment in training for DEQ compared to the Corps and consultants (get up to speed and to maintain)
        - Additional qualified and seasoned staff; start up delays in interim transition
    - Program Costs/Permit Fees:
        - Potential for higher permit fees
        - Who foots the bill for the increased costs? Are you shifting the costs between payees?
        - How do you pay for the program? Increased fees?
        - Costs of transition
        - More lawsuits for the State – especially related to ephemeral

streams – The Corps gets sued all the time over this program; if DEQ assumes the program then they could also be sued.

- Implementation:
  - Implementation of permitting program – costs
- Checks and Balances:
  - Loss of checks and balances
- Efficiency:
  - Is it really more efficient?
- Loss of Knowledge Base:
  - Loss of Corps knowledge base
- IT structure
- Impacts:
  - Impacts to other State agencies to comply with Threatened and Endangered Species Act and Historic Resources

Stakeholder discussions included the following:

- If there is a delegation from the Corps - Section 106 would still apply to DEQ - Interagency Coordination Requirements, including coordination with Indian Tribes. Part of the timeframe is that the Corps must comply with certain federal laws - Section 106 requirements.
- What will happen with Corps staff if DEQ assumes the program? *Corps Response: The Corps budget is determined by workload.*
- Would there be federal funding if DEQ assumes the program? Would the time frame for approval or disapproval be shortened? There is a concern that we could lose resource protection. Concern that the protection of other resources, i.e., endangered species, be continued or compromised? Would assumption address industry concerns? What would the role of EPA be?
- Compliance with the Endangered Species Act notifications/requests sometimes come in after the identified timelines for commenting periods, but still require action by the applicant.

*DEQ Comment: Point of Clarification - Delegation of a program (like NPDES) does come with Federal dollars. Assumption of a program (404) does not come with federal monies. There are no federal dollars associated with the assumption of the 404 program.*

**11. Questions to the Group - (Angela Neilan & Stakeholders):**

Angela Neilan asked the stakeholders to break into multiple table groups to share with the group the answers to the following two questions:

- What is going well with the existing program? What do you not want to lose? (Provide examples if possible.)
- What is NOT going well with the existing program? What are the problem areas? (Provide examples if possible.)

Stakeholder answers included:

- What is going well with the existing program? What do you not want to lose? (Provide examples if possible.)
    - Nationwide permits – non-reporting nationwide permits; works well;
    - SPGP program – maybe raise the threshold; works well; a more predictable process;
    - Efficiency of communications between agencies – works very well in some instances;
    - Institutional knowledge, where it exists, maintained with career employees;
    - Keep accepting electronic submissions;
    - Existing in-house expertise;
    - Pre-application process – currently in place with the Corps works well – the accessibility of staff is important – the pre-application process should be retained no matter who is running the program;
    - DEQ's ability to meet and stick to timelines;
    - Corps expertise and institutional knowledge;
    - DEQ's General Permit;
    - DEQ staff has been more consistent than the Corps in the interpretation of regulations;
    - Corps expertise and institutional knowledge of the program and sophistication regarding other federal laws and dealing with other federal agencies;
- What is NOT going well with the existing program? What are the problem areas? (Provide examples if possible.)
    - Efficiency of communication between agencies – doesn't seem to work as well in all instances;
    - Some sort of tracking and standardization of review periods; communication of timelines and milestone to help better management our time;
    - The Individual Permit (IP) process doesn't always work – needs some improvement. IPs are for inherently more complex projects – if you increase the complexity of any situation and you increase the amount of communication and increase the potential for mis-communication and additional information needs. Unsure what issues are related to the IPs themselves and what is related to the inherent complexity of the projects;
    - The issue of ephemeral channels is a problem;
    - Jurisdictional determinations often take longer than they should (often as much as two months);
    - Individual Permits with no defined timelines; an initial consultation with the Corps and DEQ if both agencies stay involved to identify realistic timelines is needed for when a permit can be expected; there need to be realistic timelines;
    - The ability of a federal agency – USFWS – to comment at any time related to Threatened and Endangered Species and requirements to comply with no regard to the permitting timelines is an issue and can complicate the permitting process defeats the purpose of having all the other timelines;
    - There are some policy inconsistencies across the State whether it is with the Corps or DEQ. (Written guidance is easy to point too – the unwritten "how we doing business" often trips you up.);
    - Improve the application form;

- There are some more nebulous timelines that are not being met; whether it is related to the Individual Permit process or a Jurisdictional Determination request – some of that is not as consistent – don't know if that is a Corps issue or just human nature – some people are more responsive than others;
- More defined and transparent timelines are needed;
- Delay in the issuance of public notice on Corps permits – if you don't get that letter out you can't do the federal coordination part of the process;
- The State Protected Species Mitigation Policies are ill-defined – can be a big time drain on the permitting process – lack of internal guidance written on how to deal with certain issues; As DEQ's role has grown over the last several years, the State Protected Species Issue has grown – don't know whether DEQ has the resources or capability to handle it;
- Newer staff at the Corps – Interpretations of regulations are not consistent between younger staff and senior staff;
- Need for a level playing field – there are different requirements for the mining industry; (Back in 2006 the discussion was if DEQ did take over the 404 program they could delegate the mining components of the program to DMLR as they did with the NPDES program – where there is mining expertise.);
- DEQ's enforcement program is more cumbersome than the Corps program for smaller impacts. (The DEQ program is more costly than the Corps – complicated = costs.) A minor issue/violation can usually be resolved with the Corps after a face-to-face meeting and work it out in a couple of hours and have it resolved in a week or two while with DEQ it takes 6 months or so if you are lucky. The Corps wants to reward those that report themselves – have them apologize and fix the problem – the Corps will work with them to resolve the problem. While with DEQ the policy seems to be to "hammer" those in violation.) *DEQ Response: The Citizen Board aspect of DEQ's programs can add an element of complication;*
- Permit processing – in some areas the 14 day timeline is held to and you get a complete application – in others that is not the case – there is unpredictability in the completeness review process for a permit in different areas of the State (a checklist might improve this issue);
- Lack of a regulatory timeline for the Corps – Jurisdictional Determination timeframes – takes 30 to 60 days to get the Corps on a calendar to go look at a site and then another 30 to 45 days to get a letter from them – lack of accountability;
- Things are slow now – what is going to happen if the economy picks up? How much slower can it get?
- There are no defined timelines for the Individual Permit process;
- Staff turnover – staff retention – maintenance of existing knowledge base at the Corps.

**POINT OF CLARIFICATION:** Even if DEQ were to assume the 404 program it would not get rid of the requirements of the Clean Water Act. It doesn't absolve Virginia of having to adhere to what EPA is calling for. All of the federal agencies and requirements don't go away with program assumption.

### 12. Public Comments:

Angela Neilan asked if there were any members of the public that wanted to provide any public comments for the good of the group's discussions.

No public comment was offered.

### 13. Next TAC Meeting:

The next meeting of the TAC is scheduled for Thursday, August 30, 2012 and will be held from 9:15 AM (Sign-In) to 4:00 PM at the DEQ Central Office 2nd Floor Meeting Rooms (629 East Main Street, Richmond, VA 23219).

### 14. Meeting Adjournment:

The meeting was adjourned at approximately 3:10 P.M.

# COSTS/BENEFITS OF ASSUMING THE § 404 PERMITTING PROGRAM

# STAKEHOLDER ADVISORY GROUP

# MEETING NOTES - FINAL
# ADVISORY GROUP MEETING – THURSDAY, AUGUST 30, 2012
# DEQ CENTRAL OFFICE 2ND FLOOR CONFERENCE ROOMS

## Meeting Attendees

| | | |
|---|---|---|
| ***STAKEHOLDERS*** | Richard Street - Spotsylvania County | Kip Muman - Ecosystem Services |
| Corey Chamberlain - Dominion Resources, Inc. (Alternate for Kim Lanterman) | N. Scott Sutherland - Izaak Walton League of America - Roanoke Valley Chapter | Bert Parolari - DEQ - TRO |
| Gretchen Clark - Reynolds-Clark | Mike Toalson - Home Builders Association of Virginia | Craig Pennington - Spotsylvania County |
| Maggie Cossman - Liberty University | Shannon Varner - Troutman-Sanders | Jan Roller - Ecosystem Services |
| Dan Cox - Timmons Group (Alternate for Chris Dodson | Tim Wagner - Wiley/Wilson | Robin Siegfried - UR&A |
| Mark Davis - Virginia Manufacturers Association & Altria | Tom Witt - Virginia Transportation Construction Alliance (Alternate for Jeff Southard) | Troy Tignor - Spotsylvania County |
| Tara Fisher - City of Chesapeake (Alternate for David Mergen) | ***TECHNICAL SUPPORT*** | ***SUPPORT STAFF*** |
| Ron Jefferson - Appalachian Power Company | Ethel Eaton - DHR | Melanie Davenport - DEQ |
| Ann Jennings - Chesapeake Bay Foundation | Amy Ewing - DGIF | Dave Davis - DEQ |
| John Paul Jones - Alpha Natural Resources | Tracey Harmon - VDOT | David Grandis - Office of the Attorney General |
| Bob Kerr - Kerr Environmental | Rene' Hypes - DCR - Natural Heritage Program | Steve Hardwick - DEQ |
| Nick Korchuba - U.S. Corps (Alternate for Tom Walker) | Jeffrey Jones - USDA - NRCS | Peggy Hawkins - DEQ |
| Blair Krusz - Virginia Agribusiness Council | Brad McDonald - DHR | Angela Jenkins - DEQ |
| John Lain - Virginia Association of Wetland Professionals | ***INTERESTED PUBLIC*** | Chris Moore - DEQ |
| Deborah Murray - Southern Environmental Law Center | Trisha Beasley - DEQ | Bill Norris - DEQ |
| Thornton Newlon - Virginia Coal Association | John Brooks - VTCA/Resource International | Ann Regn - DEQ |
| David O'Brien - NOAA Fisheries Services | Dell Cheatham - DEQ - NRO | |
| David Phemister - The Nature Conservancy - Virginia Chapter (Alternate for Nikki Rovner) | Marcia Degen - VDH | |
| Chuck Roadley - Williamsburg Environmental Group (Alternate for Mike Kelly) | Kip Foster - DEQ - BRR | |
| Avi Sareen - ECS Mid-Atlantic | Richard Grossman - VECTRE | |
| Kevin Seaford - Virginia Association of Professional Soil Scientists & Golder Assoc. | Katie Hillebrand - VGPA/VWC | |
| Kimberley Smith - U.S. Fish & Wildlife Service | Brandon Kiracofe - DEQ | |
| | | |

NOTE: The following Stakeholders were absent from the meeting: Robin Bedenbaugh - Virginia Association of Wetland Professionals; John Carlock - Hampton Roads PDC; Chris Dodson - Timmons Group; Mike Kelly - Williamsburg Environmental Group; Ed Kirk - REI; Larry Land - Virginia Association of Counties; Kim Lanterman - Dominion; Ben Leatherland - Hurt & Proffitt; David Mergen - City of Chesapeake; Chris Miller - Piedmont Environmental Council; Stephanie B. Perez - Dewberry/NVBIA; Mike Rolband - Wetland Studies and Solutions; Nikki Rovner - The Nature Conservancy - Virginia Chapter; Jeff Southard - VTCA; Skip Styles - Wetlands Watch & VCN; Tom Walker - USACE, Norfolk District

.

**15. Welcome & Introductions (Bill Norris):**

Bill Norris, Regulation Writer with the DEQ Office of Regulatory Affairs welcomed all of the meeting participants. He asked for all of the stakeholders to be seated at the table. He asked for introductions from all of the "Stakeholders" and "Interested Parties".

**16. Correspondence from Committee Member (Bill Norris):**

Bill Norris noted that he had received correspondence from John Carlock with the Hampton Roads Planning District Commission who was unable to attend the meeting. A copy of that correspondence was provided to the meeting attendees and is attached.

**17. Review and Approval of Meeting Notes from the June 21, 2012 meeting of the Stakeholder Advisory Group (Bill Norris and Stakeholders):**

Bill Norris noted that he had received a couple of comments and edits to the meeting notes that had been distributed to the stakeholders. He noted that these changes had been incorporated in the most recent version of the meeting notes that had been distributed to the group. He asked the members of the Stakeholder Group for any edits to the draft meeting notes from the June 21st meeting. No additional comments or edits were offered.

**ACTION ITEM:** The meeting notes from the June 21st meeting of the Costs/ Benefits of Assuming the 404 Permitting Program Stakeholder Advisory Group will be marked as "Final" and submitted for posting to Town Hall.

**18. Welcome (Melanie Davenport):**

Melanie Davenport, DEQ's Water Division Director, welcomed the meeting attendees coming back. She noted that this is our second and last meeting and expressed her and the agency's appreciation for their time and participation.

**19. Process (Bill Norris):**

Bill Norris noted that the main purpose for today's meeting was to get feedback from the stakeholders on the Preliminary Summary of Costs and Benefits of State Assumption of Clean Water Act Section 404 document that had been distributed to the group. He noted that DEQ would be taking note of the comments on the summary document today, but that stakeholders can also put together their thoughts on this version of the summary and forward them to him for compilation and consideration by program staff. It is envisioned that the stakeholders will have another opportunity to see the fleshed out semi-final version of the complete document that is being compiled to address the requests made in the Joint Resolution. That semi-final version of the document will be distributed to the stakeholders with the goal of getting final comments back from the group on a quick turnaround basis for consideration for final edits to the document prior

to submittal.

A question was raised as to when comments on the summary would be needed. It was suggested that comments should either be made today or by email as soon as possible following today's meeting (within the next couple of weeks at the max.) to help the agency stay on schedule to meet the submittal deadlines set forth in HJ 243.

**20. Language of the August 30, 2012 "Preliminary Summary of Costs and Benefits, State Assumption of Clean Water Act Section 404" (Dave Davis)**

Dave Davis introduced the August 30, 2012 "Preliminary Summary of Costs and Benefits, State Assumption of Clean Water Act Section 404" document that had been distributed to the stakeholders prior to the meeting (attached).

Dave Davis noted that the final report will provide more details and then asked for the Group's comments regarding the costs and the benefits that were identified and whether there were any additional items that need to be considered and included in the final document. He noted that the agency hoped to finish its work and provide a final draft to the stakeholders for review by mid-Fall and may require a short (possibly week) turn-around time for stakeholder review in order to ensure timely submission of the final document.

Dave Davis noted that there had been one change to the study outline that was presented at the first meeting - the "legal" write-up is being incorporated now under the "Implementation" part of the study report.

- The Group then discussed the draft summary document. Some stakeholders expressed concern about what they described as a disconnection between the notes from the June 21st meeting and the contents of the "summary" document. Those stakeholders noted that the preliminary poll taken at the June 21st meeting suggested that the majority of the stakeholders present at the meeting felt that the costs of assumption of the program outweigh the benefits and that the summary document did not fully capture the strong concerns expressed about costs overriding benefits and the lack of need for the study or assumption of the program.
- One stakeholder noted that the program in place now has experience; expertise; and qualified Corps personnel that are dealing with a lot of these projects. With assumption we are talking about eliminating them from the equation and replacing them with DEQ personnel; who will require a lot of training and will result, very likely, in inconsistency in review. That stakeholder expressed belief that to the consulting and development community that is a potential cost that drastically outweighs the benefit which is the reason the Group needs to see how much money it will take to do these things.
- Group members expressed concern about ensuring that both the Executive Summary to the final report as well as the body of the report reflects stakeholder discussions and concerns.
- At least one stakeholder expressed concern about the statement in the summary document that the "case for assumption is compelling." In her opinion there had been no indication of any need for assumption. The stakeholder noted that there were discussions of some

things that could be improved, but there has been no indication of any need.

**21. Costs/Benefits of Assuming the § 404 Permitting Program - Facilitated Discussions (Ann Regn; Stakeholders and Program Staff):**

Ann Regn facilitated a discussion of the information contained in the summary document that had been provided to the stakeholders prior to the meeting. Discussions included the following:

- Group members questioned the basis for the dollar figures in the summary of costs and whether those costs were comparable to the Army Corps of Engineers (Corps) staffing numbers. DEQ staff noted that they had the Corps' general budget information and their workload figures over a particular period of time (i.e., number of permits). DEQ also used its own internal workload study from 2007-08. And using that information DEQ staff developed the estimates of staffing and costs in the draft summary.
- At least one stakeholder recommended that the report include a discussion of the Federal role if the State assumed the program and clarification that there would continue to be Federal oversight by EPA. The stakeholder also recommended that the summary should read more neutrally on the issue and should include a discussion of what is working with the program and what is not working with the program. Group members questioned whether the cost estimates were standardized in some way to account for the economic downturn in 2008 and to assure that the estimates were reflective of program needs in a better economy. DEQ staff noted that they looked at information from 2006. DEQ staff reviewed the difference in the permit load and workload between then and now and saw a 40% drop in permit activity over that 6 year period. Staff then made a "best guess" as to the costs based on current workload with a small adjustment (15%).
- Group members raised questions about the DEQ workload analysis used in the study. DEQ staff noted that DEQ conducted an internal analysis of the VWP staff (3 years ago). DEQ does not have a workload analysis from the Corps. DEQ's analysis was basically how many folks do we have in the program; how do they spend their time; how long does it take to process a permit; etc. There is not a corollary federal analysis. DEQ staff has permit numbers from the Corps. Staff noted that the workload analysis shows that there are multiple steps that need to be followed from the point that an application walks in the door until a permit is issued. DEQ does not have a lot of data from the Corps but we do have information on the number of Corps permits issued over a certain period of time (5 years). DEQ staff made the assumption that the Corps' process would take a similar amount of time because we don't have any other information.

**ACTION ITEM:** DEQ staff will provide the DEQ workload analysis documentation to the stakeholder group for their review. This information will be emailed out to the stakeholders.

**22. A Closer Look at the Costs of Assuming the § 404 Permitting Program - Facilitated Discussions (Ann Regn; Stakeholders and Program Staff):**

Ann Regn facilitated a discussion among the stakeholders relative to the costs of assuming the § 404 Permitting Program. Discussions included the following:

- Questions were raised as to the basis of the salary figures used in the estimates and DEQ staff clarified that the salaries were based on DEQ's salary structure, not on the Federal salary structure.
- At least one stakeholder expressed concern that retention of staff is important to the program and suggested that the salary structure may need to be revisited in order to promote better retention of DEQ staff.
- Relative to personnel costs: Did DEQ look at personnel costs for secondary/sister agencies that might also be impacted by changes related to State assumption of the program? Did DEQ look at additional staff that may be required at the Game Department and Historic Resources? Was the assumption made that they would need additional staff? *Staff Response: Those costs and additional staffing needs were not examined in this analysis.*
- Questions were raised as to the positions included in the staffing numbers. DEQ staff noted that the estimates were for 3 or 4 management level employees and the rest would be project managers. There are a couple of technical staff for delineation and enforcement, but the bulk of the staffing estimate is for project managers to move the projects through the process. There is one additional cultural staff position included.
- One stakeholder suggested that there be specific input from the other agencies involved in permit review as to possible additional costs for additional staff that they would require is the State assumed the program for this analysis.
- A representative from DGIF noted that there could be a need for additional staff or a shifting of priorities within the agency depending on the number of additional permits that would be reviewed which would be hard to estimate without knowing what the process would look like.
- A representative from DHR agreed that there might be a need for additional staff or a change in process. DHR reviews a number of Corps permits now so they would need to know what the shift would be and the number of permit reviews that could be affected. DHR now has a programmatic agreement with the Corps which eliminates a large majority of projects from DHR review. Such an agreement requires a federal agency to be involved as well as many stakeholders. The DHR representative noted that whether that would be given to DEQ, which has no track record in compliance with Section 106, is a big issue. DEQ staff noted that the cost estimates included costs for training for delineation, NEPA, Section 106 and T&E. DHR staff advised that DHR does annual training for the Corps for their new personnel. The Corps has been doing 106 for a very long time. With the timeframes that are being discussed, there will be a completely new set of people that will need to be trained. There may be a need at DHR for more personnel to do the needed training and to provide assistance. The Corps has other levels of the Corps, not just the Norfolk District, which they can access for needed assistance. Every federal agency has a Federal Preservation Officer that can provide assistance to them as well. DEQ staff noted that it would be helpful if the other State agencies would work up some projections of what their possible additional staffing and resource needs would be so that information could be included in the report.
- A VDOT representative noted that the permit load is likely to be the same, but it is unclear as to how that permit load will be handled by DEQ and questioned whether the permit process would be similar to that of the Corps. VDOT currently brings

approximately a 100 projects a year to the Corps for review under the Nationwide Permit process. In addition there are 600 to 700 projects that are included in a non-reporting process. If those are brought into the review that will be a huge problem.

- A DHR representative noted that there are approximately 7,000 Corps permits a year. DHR is currently only reviewing under 400 of those permits. There are a number of permits that are programmatically excluded. DHR does not have the authority to grant that to DEQ. There are other federal agencies involved in the process, not just EPA. NEPA and the Advisory Council and Historic Resources all have a role to play in the process.
- VDOT currently has a streamlined permit review processes with the Corps and federal agencies, as well as with DEQ, which probably won't be changed but might be enhanced. There are monthly coordination meetings with all of the State and federal agencies involved in the permitting process.
- There are also timeframe issues that would need to be established that could have an impact on agency resources. Whether the timeframe for responses to requests for comments is different from the existing process could also have an impact on future agency needs.
- DEQ staff noted that the challenge of determining these possible additional agency resource needs is that some of this links into the implementation process. Our broad brush thinking is that somehow DEQ would be able to permit under consistent nationwide permits, which means that we would have to adopt them at the State level. We certainly would want to maintain a State programmatic general permit, even though it might require a slightly different process. We are not planning on making radical changes to the process but some of that has to come out in implementation. We don't know how this will actually unfold at this point in the process.
- One stakeholder suggested that the training costs included in the summary need to be carried out perpetually for every year and not be limited to just the first three years. Training needs to consider keeping staff up to speed on regulatory program changes, court cases, change in directives, etc. It should be included throughout the life of the program.
- A stakeholder noted that the report needs to include recognition of the concern from the regulated community over the possibility of new fees attached to permits. There are no fees currently required. The Corps currently absorbs the costs of the program. There is a paragraph in the summary about costs but there is no reference to the fact that the Corps currently does not charge any fees. The regulated community is concerned over the possibility of fees associated with assumption of the program. A fear was noted that the General Assembly could say that they would just pay half and the remainder would be passed along through fees to the regulated community.
- Stakeholders expressed concern that the figures for salary and benefits set forth in the summary document were an underestimation. Stakeholders expressed concern that DEQ was estimating what appeared to be 40,000 – 45,000 in salary per employee and that such a low estimated salary will affect retention. Stakeholders expressed concern that retention directly impacts consistency of review and expressed that there is a need to retain qualified personnel at the agency. Group members expressed concern that assumption of the program would be a huge burden on the estimated number of personnel

given that there may be as many as 7,000 permits currently being reviewed per year by the Corps. That would mean that at least 16 permits would have to be reviewed per employee per month which stakeholders believed was an unrealistic goal.

- At least one stakeholder questioned the delay in training costs and noted that more training may be needed then is allocated here.
- At least one stakeholder suggested that the costs to other agencies be included in this analysis and that the differentials in salaries need to be considered. The stakeholder noted that the regulated community anticipates an up-tick in permitting activity once the economy is starting to recover and questioned the accuracy of the estimates based on current workload plus 15% when permitting activity is down 40%.
- One stakeholder noted that EPA plays a very different role under an assumed program. EPA oversees the State operation of assumption. One of the issues that EPA raised in the past with respect to assumption was compliance and enforcement. DEQ staff noted that the project managers are both a Project Manager on the permit end as well as on the compliance and enforcement end of the process. Compliance is included in the responsibilities of the 36 additional staff being proposed.
- Questions were raised as to whether EPA would be weighing-in on the content of the report. DEQ staff noted that EPA has a checklist for assumption that contains all of the things that need to be presented to them in order for the State to ask for assumption. DEQ will consider whether to try to get an initial reaction and preliminary feedback from EPA as to whether this level of staffing and funding would meet the requirements contained in the check-list.
- At least one stakeholder expressed the need to include the costs of preparing the application and getting the legislation passed to assume the program in the total cost estimates.
- One stakeholder expressed concern that staffing estimates be sufficient to ensure that mitigation measures and requirements were being followed.
- Stakeholders questioned the estimates for travel costs. DEQ staff noted that if the program is assumed staff will need to be traveling around the State for program activities and also will be traveling to present regulatory changes and to attend training programs.
- Stakeholders questioned the estimates for furniture. DEQ staff noted that these are conservative estimates and contain no rent costs. With the 36 individuals, DEQ staff anticipates that those additional employees could be accommodated in existing offices and facilities. The furniture estimates are based on having to only purchase furniture for half of the 36. The estimates are from the Department of General Services.
- At least one stakeholder expressed concern that if you underestimate the costs of doing this you will not get more money and are likely to get less money than you estimate from the legislature. The stakeholder noted that an underestimation of costs is contrary to the comments at the first meeting that "given adequate funding" this is the right decision. If there is inadequate funding provided, this stakeholder opined that the decision on assumption would not be reversed but the General Assembly would turn to the private industry to make up the difference. This stakeholder suggested that DEQ not be too conservative in its cost estimations because underestimating or estimating on the low side could risk underfunding and it will be unlikely that the legislature will provide more funding than the estimated costs.

- Another stakeholder noted that the salary and benefit costs are the largest other than IT which is as it should be, but if we were looking at this as a business, the multiplier for salary and benefits seems to be low. DEQ staff noted that the numbers used were the averages of the employees currently in those job pay bands within DEQ. The standard State multiplier was used in the calculations. These figures also include pension figures. These figures only include salary and benefits no overhead is included in the estimates. This is the way that these figures are normally presented. Whenever a bill is introduced that needs to be costed out we normally would only base it strictly on salaries and benefits with no overhead included. This is a standardized format for the way fiscal analyses are traditionally generated.
- One stakeholder noted that the question that has been raised is would the General Assembly fully fund this program or try to recoup costs through the use of permit fees? There are currently real costs associated with permitting including consultant fees; legal fees; interest charges; delay costs; etc. Is there a reasonable permitting fee that could be charged that in fact would be cheaper than having to deal with consultants, lawyers and bankers just to get a project through the permitting process?
- Do the IT costs factor in all of the computers and cell phones and associated costs or is it strictly database setup database support, etc.? *Staff Response: All of those factors are included except we don't get cell phones.*
- Stakeholders questioned whether the IT costs include all of the computers and cell phones and associated costs. DEQ staff noted that all of those factors are included except cell phones (which staff does not have). Additionally Staff contacted both Michigan and New Jersey regarding how they are addressing their IT requirements. Both States use their own database, they do not access the Corps database for their permitting programs.
- One stakeholder expressed concern that if DEQ is not going to be able to access the Corps database there will be a tremendous amount of data that will be lost. This stakeholder noted that the State needs to have access to the Corps database and recommended that the cost estimates for doing that be included in these estimates.
- In response to questions about program transition, DEQ staff noted that the Clean Water Act has no provision for phasing into an assumption program. It is either fully on or fully off. The implementation conditions have to be negotiated between the State; EPA and the Corps.
- *In response to questions about the gap between section 10 and section 404 permits, DEQ staff noted that in Michigan and New Jersey, section 10 issues are handled by the Corps plus the State through the 401 certification process and the State handles the section 404 projects.*
- At least one stakeholder noted that there needs to be a strategy for putting together estimates for implementation. These costs need to be identified and incorporated into any cost estimates.
- Stakeholders questions whether the IT requirements and estimates were for a basic information technology system for internal use or an improved system with more transparency and greater tracking abilities. DEQ staff noted that the IT costs that are provided in the summary are for improvements to DEQ's existing program to bring it up closer to the level of the Corps' database. DEQ tried to capture in the IT costs the data and reporting requirements that they would have to EPA under an assumed program. One

of the recommendations made at the last meeting was to have an on-line tracking system; an on-line permit tracker. At this point the assumption is that we would do what was necessary to bring our current system more in-line with what the Corps system currently provides.

- A representative of manufacturers noted that if DEQ was providing a quicker turn-around on the permitting program then a fee would be worthwhile. The regulated community would come out ahead with a quicker turn-around – projects would move ahead quicker. If it is just going to be status-quo or if things follow the trend and DEQ staff continues to shrink as it has over the last few years then assumption of the program would not appear to be worth the costs. If the regulated community is going to get a better value than the current process then it is worth going in that direction and the fees would be justified. If there are not going to be any improvements made to the current process then there is no value to industry at all in moving forward with assumption. We might as well stay with what we have. It works. We wouldn't have the lag-time with the change over between the Corps and DEQ and we wouldn't have to deal with the change over in personnel and the lack of experience. The State does a very good job with what they have – they just don't have a lot any more. This stakeholder suggested that DEQ is way underestimating the entire costs of the program and noted that there is no "fudge factor" included in the estimates that have been provided. Typically any project that industry costs out has a 25 to 30% "fudge factor" built into the estimate. To be conservative in the business world means that you are always adding money to estimates. After further discussion, DEQ staff noted that there appeared to be a *consensus from the group that the estimated costs were too low and that stakeholders recommended adding a 20 to 30% contingency to the current cost estimates.*
- One stakeholder recommended that if the State is going to assume the program then it should be to make the program and process better and not look at just maintaining the status-quo -- permit writers should be provided the tools, like an electronic tracking system, that allow the regulated community to interface with them throughout the process.
- One stakeholder recommended that the report should note that there are only two States that have taken over the program. There have been other States that have considered assumption and rejected it due to costs. The stakeholder noted that, there are indefinable costs to the environment if DEQ takes over the program. It is not just a question of dollars and cents. EPA would retain veto authority. It isn't just a question of one-stop shopping. It is a question of protecting the environment and issuing permits that are going to be consistent the environmental requirements.
- One stakeholder suggested that the three issues before the group were time; costs; and resource protection. The time issue is a huge one – anything that can make it faster would help the regulated community. Resource Protection would probably be the same as it is under the current process. On the cost side, DEQ should look at the budgets for the programs for Michigan and New Jersey. DEQ Staff noted that the annual budget for Michigan is $2.5 to $3.0 Million. DEQ did not have the budget for New Jersey and did not have any cost figures for implementation from either State. DEQ staff was unable to determine the percentage increase in Michigan's budget when they assumed the program because Michigan has had the program for so long there is no one with institutional knowledge to provide that information.

- Michigan's permit load is similar, but not identical, to Virginia's. They have similar percentages of Section 10 waters because of the Great Lakes.
- One stakeholder suggested that if the State is assuming the 404 program it should make something better, especially given the projected costs of assumption. Based on the discussions at the last meeting, it is the 5% of projects that are contentious by nature. It doesn't make a whole lot of sense to spend a lot of money to stay where we are.
- Another stakeholder disagreed that the State and the regulated community would be exactly where they are today if the State assumed the program – at best there would be one less regulatory agency to deal with. One benefit would be the opportunity to streamline the process and modernize the IT process.
- Another stakeholder noted that some of the benefits that the group was discussing are potentially available, whether DEQ assumes the program or not. But, if DEQ assumed the program and the status quo was maintained, there would still be one less person, one less regulator to deal with.
- One stakeholder noted that during the discussions on costs it was stated that DEQ is not factoring any additional space or rent expenses and recommended that the estimates consider DEQ in the future where currently vacant FTE's would be filled and have a desk and consider the space needs under that scenario. *DEQ staff noted that even given those considerations, they believe that they can accommodate the 40 additional staff in the existing facilities.*

  In response to questions regarding the number of permits that would be affected by 404 assumption, DEQ staff noted that for the period that was examined for development of the cost figures the percentage of Section 10, 404 permits is approximately 20%. That means that 80% of the permits would be assumable under the program. The data that DEQ is using represent the number of projects that are not covered under the SPGP.

**ACTION ITEM:** DEQ will provide the stakeholders with the information that was submitted by the Corps regarding permit numbers and types.

- In response to questions about adjacency, a representative from the Corps noted that the Corps has not thought any further about future workloads if the program were assumed. It would depend on how many "wetlands adjacent to Section 10 waters" there are and how much work is in those areas. The Clean Water Act states that the Corps will continue to regulate under Section 404 wetlands adjacent to Section 10 waters, even if they are above high water. The question is where do you draw the line? In New Jersey, they just picked a number like 500 feet as the limit of regulation by the Corps. There might be some contour lines in Virginia that could be used to draw those lines. The Corps would need to go through all of the waterways to draw a line so that there is no confusion over who is regulating what. There are a lot of issues that will need to be resolved should assumption occur. There are a lot of areas that are presumed to be navigable, but navigability determinations are ultimately determined by the courts which can get complicated. With the areas that are presumed to be navigable, the Corps believes that there is evidence to support navigability, but the Corps has not made an official determination. The determination is made in New York by the Division Engineer that a waterway is navigable. The Norfolk District has to make a recommendation to him that a waterway is navigable based on Interstate Commerce and therefore should be so designated. That has not been done for every waterway in Virginia. That is something that would need to be

done.

- Some stakeholders noted that the estimates for "field equipment" appeared low. At least one stakeholder suggested that the figure should be doubled or tripled in order to properly equip DEQ personnel.
- *In response to questions, DEQ staff noted that they asked for the fully burdened costs of the Federal program, but had not received them.* .
- One stakeholder recommended that the costs for each category of the costs table should be carried out throughout the life of the program.

**23. A Closer Look at the Costs of Assuming the § 404 Permitting Program - Facilitated Discussions – Continued (Ann Regn; Stakeholders and Program Staff):**

Following a break, Melanie Davenport reopened the session with a question to the group as to whether they would like to extend the meeting past the currently scheduled 12:30 end time to discuss this topic further and provide more opportunity to hear stakeholder comments. The group decided to continue the meeting.

Bill Norris noted that a number of stakeholders had already had to leave but that they indicated that they would be providing written comments. He requested that those still in attendance to make sure that they made their comments during the remainder of the meeting or they could also provide written comments that will be included in the meeting materials.

The group continued their discussions related to the costs of assuming the § 404 Permitting Program. Their discussions included the following:

- At least one stakeholder suggested that the training costs underestimated training for existing staff and recommended including training for existing staff in the cost estimates and that the training costs be carried forward through the life of the program. At least one stakeholder recommended that costs be added for legal fees, noting that there may be additional enforcement actions and litigation if Virginia assumes the program and that additional staff may be needed in the Office of the Attorney General.
- At least one stakeholder recommended that the report distinguish between the costs of just assuming the program and the costs of assuming the program and making the improvements that stakeholders have mentioned. One example is wetland delineation – there have been applicants who have waited months to get a representative from the Corps to come out to make the delineation and then waited weeks or months to get an official letter. If that is due to resources, i.e., staff, then that is not factored in any of these estimates of costs. This stakeholder noted that it would be a good idea to present a range of costs like: now plus 15%; now plus 40%; and now plus 40% plus some 15 to 20% more to improve the process. The General Assembly needs to understand that you cannot simply get the best system by just replacing the system as it exists today and hoping for the best.

**24. Benefits of Assuming the § 404 Permitting Program – Regardless of Costs – Facilitated Discussions (Ann Regn; Stakeholders and Program Staff):**

The group shifted into a discussion of the potential "benefits" of assuming the 404 program. These discussions included the following:

- One stakeholder expressed his belief that if the State takes over the program and there is no improvement then there is no benefit or at best only incremental benefits. One improvement that could be made is to have an online permit tracking system that would improve transparency of the program.
- Another stakeholder noted that with the current process, when there are disagreements on delineation and one of the regulators is not available then it is difficult to get a resolution. If the program were assumed then one of those parties would be eliminated from the process which would eliminate that part of the disagreements and speed up the process.
- Some stakeholders suggested that assumption of the program would eliminate any disagreements on impacts and mitigation. This could eliminate 3rd party costs from consultants now required to assist in the resolution of disagreements on impacts.
- At least one stakeholder noted that the resolution of "purpose and need" can take a lot of time. There can be less conflict with resolution of the "purpose and need" question when there is only one regulatory body involved, especially when currently there can be an issue with one regulator and not the other.
- DEQ staff noted that there is language in the State rule about "purpose and need". Then you have the 404B guidelines which is EPA's framework for analyzing "purpose and need". Sometimes DEQ's permit writers are looking at it differently than the Corps permit writers. There is in fact a real factual conflict and it triggers time and effort.
- A stakeholder noted that although the NEPA requirement does not go away, if DEQ would assume the program they would be under NEPA, but we would be replacing a two headed Dragon with one head.
- Other stakeholders not that it would be easier to deal with one regulator then two.
- One stakeholder noted that the source of current issues with the process is not that there are two different definitions of "purpose and need" – the source of the problem is getting to the bottom of the issue that an agency representative has in a timely and efficient manner. It is the logistics of getting it done.
- At least one stakeholder suggested that the on-line tracking system that had discussed is part of the group's wish list such that it may not be considered a benefit because the cost of that system is not included in this summary.
- Stakeholders suggested that if the State is going to assume the program then they need to make it better, but you need to include a cost for these improvements in the summary so that the process can be improved – without adequate funding for these "improvement" items the process will not be improved. Stakeholders noted that additional costs would need to be included for the permit tracking system.
- Stakeholders questioned whether the Corps may consider developing an on-line permit tracking program. A representative of the Corps noted that the Corps is currently moving towards the development of an online tracking system similar to what was being discussed. He noted that the Corps also is moving towards an electronic online permit application, this effort is being done at the national level.
- Stakeholder group members noted that the ability to track "where we are on a day-to-day basis with our permit" would be extremely helpful to the consulting community. If

response letters from DHR and DGIF could be uploaded into the system and automatic notifications could be generated that would be very helpful and useful.

- At least one stakeholder noted that if the Corps is moving towards this type of online system then assumption of the program by DEQ and the development of an improved tracking system may not be considered a benefit. A representative from the Corps noted that he would need to look into the anticipated timing of the development and availability of such a system; the Corps has not been able to get additional funds for years.
- A representative from DHR noted that DHR/DCR has an online application for the 106 projects – which the applicant and their consultant can use to track their permit through the process. DMME has a similar system. DMLR has an electronic tracking system but it doesn't communicate with the federal agencies and only minimally with the Corps. DMLR takes the responses from DHR and puts them into their online system and then the Corps can access that data. That is built into the DHR programmatic agreement with the Corps. Not sure that DEQ has factored into their estimates what Northrop Grumman is going to charge them for this type of system.
- One stakeholder suggested that there should be some additional information in the benefits analysis. With every point there is a very legitimate caveat that needs to be considered. All of the items previously listed need discussion points for people to really understand these issues. For the category of "Upgrades", the tracking online component is a potential benefit that could be realized without assumption, but it might not be realized as quickly if there weren't assumption. The streamline issue – it is valid that the regulated community is likely in some cases to have quicker resolution and fewer disputes with only one party in the room, but the caveat needs to be added that the federal government is not out of the picture because EPA has oversight and EPA could be in the room. One issue is that it is dangerous, especially for the General Assembly that wants to see things in black and white, for the report to be written too black and white without having a fuller discussion of the pros and cons of the issue.
- Another stakeholder noted that the report needs to be fleshed out to include more on the cons as well as the benefits. There is a benefit but there is a con of losing institutional knowledge and expertise.
- One stakeholder noted that some projects require a wide range of permits from a number of different agencies and authorities, so in those cases elimination of either DEQ or the Corps from the picture wouldn't make a lot of difference.
- Another stakeholder noted that 90 to 95% of the time the Nationwides and the General Permits process works. It is when you have the need for a streamlined purpose and need resolution when you are in the Individual Permit system for that 5% of projects that are contentious in nature that you run into the problem of dealing with two regulators (DEQ and the Corps). Getting both regulators in the room at the same time is when you run into issues.
- One stakeholder noted that the Corps' staff is evaluated on how well they meet certain timeline requirements, but the Corps has no timelines associated with wetland delineations. The 90 to 95% figure that was thrown out as the parts of the process that work has to deal with the permits. There are other components, like wetland delineation, that are outside of that process and move at their own pace and the frustration with the process arises in those circumstances like when it takes a long time to get wetland

delineations.

- Stakeholder expressed concern that unless adequate staffing and deadlines are incorporated into the process if the program is assumed than DEQ may not be any faster than the Corps at issuing delineations.
- In response to questions about how DEQ's staffing projections compare to the Corps' staffing, DEQ staff noted that the projected 36 additional employees included a few more than the Corps currently has. *For the time period provided, the Corps has 52 technical positions which means that DEQ would have approximately 11 more positions than the Corps. The thought was that the compliance program on the State side would require more staff since the minimum requirements are likely to be greater.*
- One stakeholder noted that with regard to retention and longevity of staff the Corps does a slightly better job than DEQ in the retention of qualified staff. Institutional knowledge is important and right now that knowledge base resides with the Corps. This stakeholder noted that the pay structure at DEQ probably needs to be re-evaluated to be able to retain the institutional knowledge needed for this program and to retain qualified staff longer.
- One stakeholder group member representing a conservation group stated her feeling that the protections of Virginia's wetlands and streams would diminish with an assumed program, because both agencies, the Corps and DEQ, bring their own strengths to the program. Additionally, this stakeholder stated her concern that the General Assembly may be working under a misunderstanding about what assumption of the program would mean and noted that it would not mean that Virginia gets to run the program without oversight from EPA. Finally, the member noted her belief that there has never been a natural resource agency that was not woefully underfunded and her expectation that, if assumed, this program would not be adequately funded and DEQ would not be provided adequate resources to run the program. –
- Another stakeholder group member noted her agreement that the protection of the environment would be diminished and that the summary report needs to be neutral, it needs to be objective and needs to fairly present the pros and cons and reflect what has been said which as was stated earlier that it does not do.
- One stakeholder raised concern about State Water Control Board involvement in permitting decisions, noting that sometimes a citizen board can do strange things. At least with the Corps you don't have this concern or issue.
- One stakeholder suggested that there be some discussion in the report of ways to improve the program aside from assumption, including : Expanding the scope of the SPGP to a larger threshold acreage; Expanding the number of folks who could do the wetland delineation – certified delineators, etc.; and tracking system improvements. Maybe the answer is not to assume the program but to do something to address the issues and problems and improve the program.
- There was a consensus among the Stakeholder Group members present that there are improvements that could be made to the existing program without assumption – though there was no consensus on what those improvements might be.
- One stakeholder noted that there is a difference between the means that staffs are managed within DEQ and the Corps. The Corps is highly decentralized and they give a lot of deference to their staff. At DEQ there is more consistency on how they approach things than at the Corps. The SPGP system and the General Permits have not been the

end of the world, they have worked well. There has not been any damage to the environment on that level. We are getting the decisions quicker; maybe that is the potential benefit. The outcome is not changing that much but the timeline it takes to get to a decision has decreased. That's the benefit that we need to see out of an assumption if it were to occur is a decrease in the time it takes to get to a decision. That is an economic development benefit.

- Another stakeholder expressed disagreement with the simplistic benefits especially as they relate to avoidance and minimization. The flip side of this is the loss of environmental protection and a concern that the resources are not being protected as well for larger projects if we lose the Corps expertise.

**25. Vote of Stakeholders – Do the Costs of Assumption Outweigh the Benefits? (Ann Regn & Stakeholders)**

It was suggested that this might be a good time to revisit the vote that was taken by the stakeholders at the last meeting regarding the question of "Do the Costs of Assumption Outweigh the Benefits?"

Ann Regn asked for a show of hands on the question of: Knowing what you know now "Do the Costs of Assumption Outweigh the Benefits". The result of the show of hands was:

YES – Costs outweigh the Benefits: **18**
NO – Costs outweigh the Benefits: **1**
Need More Information: **4**

**26. Meeting Wrap-up (Ann Regn & Dave Davis):**

Ann Regn closed the meeting with the request for the stakeholders to send their written comments electronically to Bill Norris as soon as possible. It was noted that the stakeholders would be sending their comments after they had a chance to review the information that had been requested of DEQ.

Dave Davis summarized the information that had been requested by the stakeholders and the agency technical support personnel – this included:

- The workload analysis that had been done internally by DEQ;
- The information that was received from the Corps that compared permit load; and
- The fully burdened costs from the Corps – total federal program costs – if it was available
- In addition information on the number of permits that was received from the Corps will also be distributed.

It is anticipated that this information should be available to send out to the stakeholders by the middle to end of next week.

### 27. Meeting Adjournment:

The meeting was adjourned at approximately 12:40 P.M.

# APPENDIX B

## Financial Analysis & Projected Costs

Baseline Scenario:

The § 404 program assumption would be implemented over a 2 to 3 year period. We expect to hire a total of 40 positions at an annual salary and benefits cost of approximately $3,044,000. Staffing costs will ramp up as we implement the program over a multiple year period. The projected salary and benefit amount for each position was made equal to the average salary and benefit amounts for that same type of position and pay band in DEQ. As new positions are filled, initial training costs are projected to occur at a total cost of $,207,900, which will also be spread over a multi-year period, and then ongoing training costs thereafter. The initial training costs were projected by the DEQ Training Manager, who determined which types of initial trainings would be needed for these staff, and then projected the total cost of each type of training. Information technology application development costs are significant with a program of this size and complexity. The total development costs in the first three years are projected to be $3,500,000, but then are projected to decrease as the initial programming needs are met. This projection was determined with the assistance of one of DEQ's information technology specialists, who analyzed the technological impacts that the assumption would make on DEQ's current IT systems. Public notices are estimated to cost $130,000 in the first five years. Public notices were projected by assuming that there will be 12 statewide notices in the first four years of implementation and 2 every year thereafter, as well as 10 regional public notices in the first four years and 2 every year thereafter. Furniture costs were projected to be $170,000. Furniture costs per person were calculated by using Department of General Services' estimates. Currently, DEQ has some furniture on hand, so the projection includes furniture costs for 50% of the new employees. Travel costs are projected to be $186,000 over the first three years, then $92,000 annually thereafter. Travel costs include car leasing as well as gasoline costs for environmental specialists. These costs and implementation schedule are summarized in the table below.

We are projecting a total cost of assumption at $3.4 million in year one, $4.0 million in year two, $3.8 million in year three, $3.4 million in year four, and $3.4 million annually thereafter.

Note that per DEQ's standard for a costs and benefits analysis to the General Assembly, these costs do not include rent or other common (overhead or indirect) costs, as those items are assumed as included in DEQ's base budget. These costs also do not include any type of contingency amount added to these direct costs. These calculations were completed using the standard procedures for cost/benefit and fiscal impact analyses used in DEQ.

## Summary of Estimated Costs by Year - Baseline

| | Estimated Annual Costs - Year 1 | Estimated Annual Costs - Year 2 | Estimated Annual Costs - Year 3 | Estimated Annual Costs - Year 4 | Estimated Annual Costs - Year 5 |
|---|---|---|---|---|---|
| Salaries and Benefits | 1,160,450 | 2,593,890 | 3,044,310 | 3,044,310 | 3,044,310 |
| Information Technology | 2,037,533 | 1,076,103 | 570,688 | 164,238 | 164,238 |
| Furniture | 59,500 | 85,000 | 25,500 | | |
| Training | 62,900 | 100,800 | 44,200 | 49,500 | 49,500 |
| Travel | 20,175 | 73,575 | 92,325 | 92,325 | 92,325 |
| Public Notices | 19,000 | 36,500 | 36,500 | 19,000 | 19,000 |
| Field Equipment | 3,500 | 8,000 | 3,000 | 2,900 | 2,900 |
| Total Estimate | $3,363,058 | $3,973,868 | $3,816,523 | $3,372,273 | $3,372,273 |

The agency has not been tasked with development of a new fee structure to cover any portion of the above noted costs. For purposes of this study we provide the following information concerning fee revenue in comparison to current and projected program costs. The program permit fee revenue over the last three years has dropped from $625,000 in FY 2010 to $334,000 in 2012. We believe this is due to the general economic slowdown in the construction sector. The largest additional workload would be in the form of general permits but it is difficult to estimate revenue because most small impact projects that get this permit are not charged a fee. If we assume a $300 fee for each additional permit from the Corps, at approximately 2,520 new permits per year, then additional revenue would be $756,000 per year. This amount of additional revenue would likely maintain our current 10% to 25% coverage of program costs from fees in the long term. It is important to note that the Corps of Engineers currently does not charge fees for these permits to the regulated community.

Baseline + 15% Scenario

The Stakeholder Group expressed concern that DEQ's cost analysis would be based on the current economic climate, which would leave DEQ with inadequate funding, staffing and resources to manage the program once the economy recovered. Group members suggested that DEQ prepare a range of costs to show cost estimates with a 15-40% "buffer," to account for the anticipated increase in permitting workload associated with a recovering economy. However, DEQ's analysis of the permit workload during calendar year 2012 indicated that permit load growth scenarios of 15% to 20% adequately account for unknowns and reasonably address anticipated base workload increases related to economic recovery. In the Baseline +15%

Scenario below, the number of additional staff increases to 46 from 40. The estimated costs per year under this scenario are:

| | Estimated Annual Costs - Year 1 | Estimated Annual Costs - Year 2 | Estimated Annual Costs - Year 3 | Estimated Annual Costs - Year 4 | Estimated Annual Costs - Year 5 |
|---|---|---|---|---|---|
| Salaries and Benefits | 1,310,590 | 2,969,249 | 3,494,730 | 3,494,730 | 3,494,730 |
| Information Technology | 2,042,895 | 1,087,357 | 581,399 | 173,874 | 173,874 |
| Furniture | 68,000 | 97,750 | 29,750 | | |
| Training | 81,900 | 119,700 | 44,100 | 58,500 | 58,500 |
| Travel | 28,125 | 85,800 | 111,075 | 111,075 | 111,075 |
| Public Notices | 19,000 | 36,500 | 36,500 | 19,000 | 19,000 |
| Field Equipment | 4,500 | 9,500 | 3,500 | 3,500 | 3,500 |
| Total Estimate | $ 3,555,010 | $ 4,405,847 | $ 4,301,054 | $ 3,860,679 | $ 3,860,679 |

Baseline + 20% Scenario

In this scenario, the number of additional staff increases to 48.0. The estimated costs per year under this scenario are:

| | Estimated Annual Costs - Year 1 | Estimated Annual Costs - Year 2 | Estimated Annual Costs - Year 3 | Estimated Annual Costs - Year 4 | Estimated Annual Costs - Year 5 |
|---|---|---|---|---|---|
| Salaries and Benefits | 1,385,660 | 3,119,380 | 3,644,870 | 3,644,870 | 3,644,870 |
| Information Technology | 2,045,576 | 1,091,644 | 584,611 | 177,086 | 177,086 |
| Furniture | 72,250 | 102,000 | 29,750 | | |
| Training | 88,200 | 126,000 | 44,100 | 61,500 | 61,500 |
| Travel | 29,550 | 93,750 | 113,925 | 113,925 | 113,925 |
| Public Notices | 19,000 | 36,500 | 36,500 | 19,000 | 19,000 |
| Field Equipment | 5,000 | 10,000 | 3,500 | 3,700 | 3,700 |
| Total Estimate | $ 3,645,236 | $ 4,579,274 | $ 4,457,256 | $ 4,020,081 | $ 4,020,081 |

# APPENDIX C

## 404 Assumption Staffing Requirements

## 404 Assumption Staffing Requirements

A comparison of permitting and compliance activities completed by the Corps and DEQ staff during the 2010 and 2011 calendar years indicates that DEQ would need approximately 40 additional full-time positions (FTEs) or 76 total FTEs allocated to the Virginia Water Protection (VWP) permit program. Regarding the data received from the Corps, DEQ did not make any independent evaluations on the accuracy and completeness of the Corps' data; we assume that Corps data is as accurate and complete as the circumstances of its preparation allowed.

### Current DEQ Staffing:

The VWP program currently has 36 FTEs allocated to conduct permitting and compliance activities. At the time of this analysis, the VWP program had six technical vacancies (3 permit writers and 3 inspectors). In deriving our staffing estimates, we used calendar years 2010 and 2011 because these years provided a complete data set that was comparable between Corps and DEQ data. This comparison and our subsequent staffing projections became the baseline staffing need, if the Commonwealth were to assume the § 404 program as it is currently administered. The Corps indicated that there was an average of 52 technical positions during the study period.

**Table 1. Existing VWP Staff (as of June 30, 2012)**

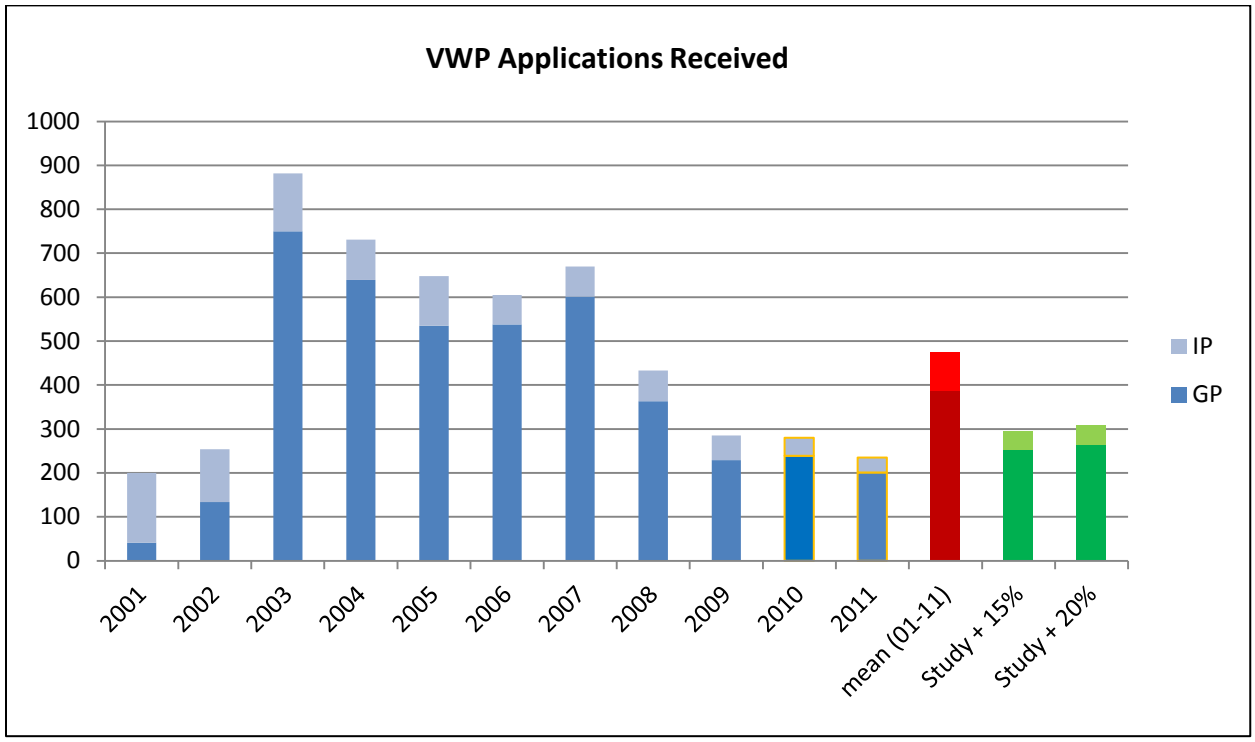
| Type of Staff | VWP Staff Per Region | | | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | CO | CO[1] (FTE) | TRO | TRO (FTE) | PRO | PRO (FTE) | NRO | NRO (FTE) | VRO | VRO (FTE) | SWO | SWO (FTE) | BRO | BRO (FTE) | Total | Total (TFE) |
| Permit Program Manager | 0.75 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 0.33 | 0.33 | 0.13 | 0.13 | 0.33 | 0.33 | 4.54 | 4.79 |
| Permit Writer | 1 | 1 | 5 | 6 | 3 | 4 | 4 | 5 | 1.5 | 1.5 | 1 | 1 | 2 | 2 | 17.5 | 20.5 |
| Compliance Inspector [2] | | 1 | | 1 | | 1 | 1 | 1 | | | | | | | 1 | 4 |
| Admin/Scanner[3] | | | 0.6 | | 0.2 | | 1 | 1 | 1 | 1 | 0.1 | | 1 | 1 | 3.9 | 3 |
| Guidance/Policy Staff | 2 | 2 | | | | | | | | | | | | | 2 | 2 |
| Cultural Resource and Mitigation Support | 2 | 2 | | | | | | | | | | | | | 2 | 2 |
| **Total** | **5.75** | **7** | **6.6** | **8** | **4.2** | **6** | **7** | **8** | **2.83** | **2.83** | **1.23** | **1.13** | **3.33** | **3.33** | 30.94 | 36.29 |

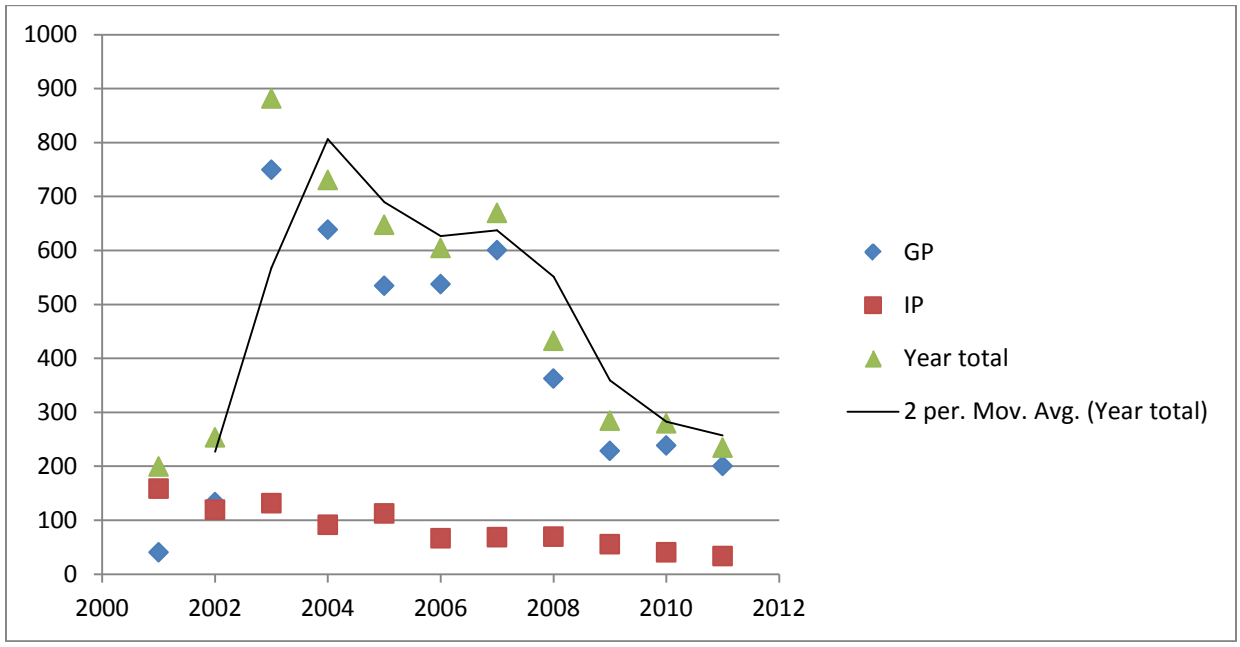
Notes:

1. (FTE)Columns represent the number of FTEs allotted to VWP program on the Organization Charts.
2. Several permit writers assign a portion of time to compliance activities; however, permitting workload takes precedent and these positions are not primarily compliance staff. These positions were not counted as inspectors.
3. One permit writer position in CO is currently being performed by a wage employee, and the support positions in BRO and TRO are also being performed by wage employees.
4. The partial positions are FTEs that have responsibilities other than VWP.

DEQ staff then analyzed our permitting load per year for calendar years 2001 through 2011 to estimate a range of staffing needs based on overall economic factors beyond our control. As the economy recovers DEQ staff anticipates that our permit workload will be approximately 15% higher than the average permit workload for calendar years 2010 and 2011 (which is the baseline

for this study). The graph below projects permit estimates at 15% and 20% higher than the average permit workload for calendar years 2010 and 2011 (which is the baseline for this study).




**Additional Staffing Requirements:** The number of additional staff needed was calculated by comparing the number of tasks completed by the Corps to similar tasks completed by DEQ.

Additional staff was added as necessary to account for tasks not included in the workload comparison.

A summary of the 76 FTEs that would be required to implement the VWP and § 404 programs is provided in Table 3 below with a narrative explanation following Table 3. DEQ used the estimated time to complete each task provided by the Corps during a similar workload comparison in 2006. The Corps provided no data on the geographical distribution of workload, so additional DEQ staff were allocated to DEQ regional offices based on the relative portion of the DEQ permitting workload identified during the study period (calendar years 2010 and 2011; the baseline data set). The results of the workload comparison are provided in Table 2 below.

| **Table 2** | Corps Total | Corps 404 (assumable)[2] | DEQ | Additional Work | Staff Hours per Activity[3] | Additional Staff Needed[4] |
|---|---|---|---|---|---|---|
| **Permitting** | | | | | | |
| Delineation Confirmations and Pre-Application[1] | 4133 | 3265 | 490 | 2775 | 5 | 5 |
| Individual Permits | 107 | 84 | 67 | 0 | 100 | 0 |
| General Permits[5] | 3701 | 2906 | 386 | 2520 | 15 | 12 |
| Permitting FTEs | | | | | | 17 |
| **Compliance and Enforcement** | | | | | | |
| Inspections[6] | 739 | 739 | 1273 | 0 | 6 | 2 |
| Enforcement Referrals / Cases that require additional supervision)[7] | 66 | 60 | 39 | 21 | 53 | 2 |
| Informal resolutions (voluntary compliance, no long-term monitoring/action required) | 182 | 142 | 0 | 0 | 24 | 0.3 (Approximate) |
| Compliance FTEs | | | | | | 4 |
| **ESTIMATED NEW FTES** | | | | | | 21 |

**NOTES**

1 - Includes delineations, pre-app SV, and does not differentiate between § 10 and 404. Since approximately 80% of the general permits are assumable, DEQ estimated that we would be responsible for an equivalent percentage of delineation confirmations. DEQ staff participated in 490 pre-applications or delineation confirmations.

2 - Assumable refers to the portion of the workload that can be allocated to State. This does not include the § 10 permitting requirements.

3 - Average Corp processing time, average is weighted for combined items

4 - Based on 2688 hrs/FTE for the 2 year study period (calendar years 2010 and 2011):

**Work Hour Calculation:**
*Based on an employee with less than 5 years of State service*
40 hours x 52 weeks = 2080 Gross work hours available per year
4 hours x 24 pay periods 94 minimum annual leave
1 annually x 32 hours 32 Family Personal leave
1 annually x 64 hours 64 Personal sick leave
12 holidays x 8 hours 96 State holiday
total FTE hours 1792
Estimate that 1/4 of the available hours spent on administrative matters, meeting training etc.;
**Therefore**
1792 hours x 0.75 = 1344 per fte, maximum/year

5 - General permits include NWP, RP and SPGP, average time is weighted, 5296 hours saved from subtracting processing NPR, SPGP and JPA inspections from staff need.

6 - This assumes that all inspections were 404 inspections, but it is likely that approximately 80% of inspections are either 10/404 inspections or 404 inspections (This is based on the fact that approximately 20% of their permits issued were § 10 permits).

7 - This is the # of DEQ cases referred to enforcement, and what the Corps has identified as "Further Action / Monitoring Required".

| **Table 3** | CO | TRO | PRO | NRO | VRO | SWO | BRO | **Overall FTEs** |
|---|---|---|---|---|---|---|---|---|
| *1. Permit Program Managers* | | | | | 1 | 1 | 1 | **3** |
| *2. Delineations* | 1 | 1 | 1 | 1 | 0 | 0 | 1 | **5** |
| *3. Permit Writers* | 2 | 2 | 2 | 4 | 1 | 2 | 1 | **14** |
| *4. Inspectors* | | | | | 1 | 1 | | **2** |
| *5. Administrative Support* | 1 | 1 | 1 | | | 1 | | **4** |
| *6. Enforcement* | 1 | 1 | 1 | | | | | **3** |
| *7. Mitigation and Policy* | 3 | | | | | | | **3** |
| *8. DEQ Administration* | 3 | | | | | | | **3** |
| *9. Natural Resource Agencies* | | | | | | | | **3** |
| *Total New FTEs* | 11 | 5 | 5 | 5 | 3 | 5 | 3 | **40** |
| | | | | | | | | |
| ***Current FTEs*** | **7** | **8** | **6** | **8** | **3** | **1** | **3** | **36** |
| ***Overall FTEs*** | **18** | **13** | **11** | **13** | **6** | **6** | **6** | **76** |

### *1. Program Managers*

Currently, DEQ's Valley Regional Office (VRO), Southwest Regional Office, (SWO), and Blue Ridge Regional Office (BRRO) have a partial FTE serving as VWP Permitting and Compliance Program Manager. We assumed that every regional office would require a full management FTE allocated to supervise additional workload and staff. This results in the need for 3 FTEs, as shown in Table 3 above.

### *2. Delineations*

Currently DEQ defers to the Corps determination of wetland boundaries and stream channels that fall under the authority of both programs. If the § 404 program is assumed, we anticipate that DEQ would complete the confirmation of all of the § 404 delineations. Corps staff completed 4133 delineations during the 2010 and 2011 calendar years. However, Corps data does not differentiate what portion of the completed delineation actions were § 404 wetland confirmations, § 10 wetland confirmations, or pre-application visits that did not result in a permit. Since approximately 80% of the Corps' permits are assumable, we estimated that DEQ would be responsible for an equivalent percentage of delineation confirmations. Because the time to complete delineation confirmations can vary significantly, the Corps provided DEQ with variable processing times, where approximately 80% of delineation take 4 hours, 19% take 8 hours, and 1% take 16 hours; this results in an average delineation confirmation processing time of 5 hours per confirmation. Further, DEQ staff participated in 490 delineation activities during the 2010 and 2011 calendar years, including pre-applications; therefore, these were subtracted from the assumable workload. The total estimated staff needed for delineations is 5 FTEs, as shown in Table 3 above.

***3. Permits***

*Individual Permits*

Currently, both the Corps and DEQ separately review and issue permits on the majority of projects requiring individual permits. The Corps and DEQ processes and timeframes are similar, and because DEQ's notification processes include additional agencies and citizens, staff does not anticipate a notable increase in staff time to process these individual permits.

*General Permits*

General permits would likely encompass the majority of the assumed § 404 workload from the Corps. The Corps reported 2906 general permits, which include nationwide permits, regional permits, letters of permission, and State programmatic general permits for calendar years 2010 and 2011. The Corps' average processing time is 15 hours. DEQ staff processed 386 general permits, and approximately 5,296 hours of DEQ time spent processing No Permit Required (NPR) letters for nationwide and regional permits and additional SPGPs were subtracted from the assumable workload. The workload comparison resulted in the need for 12 FTEs, as shown in Table 3 above. An additional two FTEs were added to the staffing requirement to account for anticipated changes in the Corps and VWP permitting requirements of the coal mining industry. The total estimated FTEs for permitting is 14.

***4. Inspectors***

The Corps reported 739 inspections and DEQ staff conducted 1273 inspections during calendar years 2010 and 2011. Corps data included § 10 and § 404 permit inspections; therefore, the assumable number of inspections is less than 739. Since DEQ's current inspection rate is 42% higher than the Corps, we do not anticipate the need for additional staff to match the Corps' current inspection rate. DEQ staff assumed that EPA would place performance requirements on assumed § 404 programs, which would likely require an inspection rate higher than the Corps' current inspection rate. Presently, the VWP Program has three compliance inspector vacancies Central Office (CO), Piedmont Regional Office (PRO), and Tidewater Regional Office (TRO). We anticipate that filling the existing three vacancies and adding an additional FTE to Valley Regional Office (VRO) and SWO would cover the additional compliance responsibilities that EPA may require. The total new FTEs needed for inspections is 2, as shown in Table 3 above.

***5. Administrative***

The additional permit and delineation workload will result in increased VWP staff time for Enterprise Content Management (ECM) filing requirements, data entry, file retention and other administrative activities. CO, TRO, PRO and SWO would require technical support positions to handle the increase in ECM filing associated with permitting and compliance. Support positions are not proposed in VRO and BRRO because we anticipate that the technical staff will be able to handle additional administrative burden. The total estimated FTEs for technical support is 4, as shown in Table 3 above.

***6. Enforcement***

Filling the three currently vacant compliance inspector positions and adding two additional inspectors would increase enforcement cases. A portion of compliance staff's workload will

involve informal resolution; however, additional cases will be referred for formal enforcement actions. Currently, about 18% of cases with violations go to enforcement. At this rate, two enforcement staff are needed to handle the additional volume of an assumed § 404 program. Based on feedback from the Stakeholder Group, an additional assistant attorney general to provide legal support to the VWP program is also anticipated. The total estimated FTEs for enforcement is 3, as shown in Table 3 above.

***7. Mitigation and Policy***

The number of permits processed and the processing times provided by the Corps includes the time necessary to complete Historic Properties coordination, Federal Agency coordination, and the mitigation review, so the additional FTEs required for this review are included in the permit staffing estimates. The Corps has each project manager (equivalent to a DEQ permit writer) oversee wetland mitigation banks within his or her assigned territory. Currently, DEQ has one centralized FTE to manage mitigation banks. If the Corps' duties were assumed, DEQ would continue to centralize the review, approval and compliance of mitigation banks and would require an additional FTE. Two additional Central Office staff would also be required to negotiate and develop procedures, policies and guidance relating to the assumption process. The total estimated FTEs for Mitigation and Policy is 3, as shown in Table 3 above.

***8. DEQ Administration***

Assumption of the 404 Program would require development of data collection and reporting tools which would require one additional Information Technology (IT) position. An additional financial (accounts receivable) position will be needed to process increased billing and collections that will be generated by the increased permit influx under an assumed 404 program. Staff also anticipates that a human resource specialist would be required to assist in recruitment, hiring and human resource support for new FTEs associated with assumption. The total FTEs needed for DEQ Administration is 3, as shown in Table 3 above.

9. ***Other State Agencies***

The initial staffing estimates for DEQ are based on the premise that DEQ staff would take over all the functions currently carried out by the USACE. This should minimize the need for additional resources at DCR, DHR, and DGIF. However, in developing a memorandum of agreement with EPA, DEQ may be required to consult with the other State Natural Resources agencies at a higher level than is currently required of the Corps. In this case, some additional responsibility would be shifted to those agencies lessening the staffing requirements at DEQ. Until that agreement is finalized, the distribution of required staffing among the agencies cannot be stated with certainty. To provide for a margin of safety, we added three additional FTEs to the estimated staffing requirements. DEQ believes this adequately represents the staffing needed for Natural Resources agencies with the understanding that distribution among them would be determined later. The total FTEs to account for potential additional Natural Resource Agencies staffing needs is 3, as shown in Table 3.

# APPENDIX D

## Acronyms

**Acronyms and abbreviations used in 404 Assumption Materials**

| | |
|---|---|
| CFR | Code of Federal Regulations |
| Corps | U.S. Army Corps of Engineers |
| CWA | Federal Clean Water Act |
| CZMA | Coastal Zone Management Act |
| DEQ | Virginia Department of Environmental Quality |
| ECOS | Environmental Council of the States |
| EPA | U.S. Environmental Protection Agency |
| ESA | Federal Endangered Species Act |
| FTE | Full Time Employee |
| HJ 243 | House Joint Resolution 243 |
| IT | Information Technology |
| MOA | Memorandum of Agreement |
| NEPA | National Environmental Protection Act |
| NHPA | National Historic Preservation Act |
| NPDES | National Pollutant Discharge Elimination System |
| (S)PGP | (State) Programmatic General Permit (or SPGP) |
| SWANCC | *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* |
| USFWS | U.S. Fish and Wildlife Service |
| USM | Unified Stream Methodology |
| VDOT | Virginia Department of Transportation |
| § 401 | Section 401 of the Federal Clean Water Act |
| § 404 | Section 404 of the Federal Clean Water Act |
| § 10 | Section 10 of the Rivers and Harbors Appropriation Act |

# APPENDIX E

## Environmental Council of the States (ECOS)
## &
## The Association of State Wetland Managers (ASWM)

## Section 404 Assumption Benefits Reference Materials

Resolution Number 08-3
Approved April 14, 2008
New Orleans, LA

Reaffirmed March 29, 2011
Arlington, VA

As certified by
R. Steven Brown
Executive Director

## STATE DELEGATION OF CLEAN WATER ACT SECTION 404 PERMIT PROGRAM

WHEREAS, states have the ability to assume jurisdiction over Section 404 permit programs under the Clean Water Act but in only two cases have sought and assumed the program; and

WHEREAS, states' goals are to maintain wetland protection, achieve consistency in program administration, and streamline the federal permit process; and

WHEREAS, states who assume the federal Section 404 permitting program are prohibited from receiving federal funding for implementation; and

WHEREAS, states that develop state wetland permit programs using federal U.S. EPA wetlands development grants are not eligible for U.S. EPA wetland grants to implement their state wetlands permit programs.

NOW, THEREFORE, BE IT RESOLVED THAT THE ENVIRONMENTAL COUNCIL OF THE STATES:

Supports delegation of Section 404 responsibilities to states that demonstrate a robust commitment and capacity to protect wetlands;

Encourages U.S. EPA to develop clear guidelines and processes for state assumption of Section 404 of the Clean Water Act that will encourage states to apply for and assume regulatory responsibility over this important natural resource program;

Supports U.S. Congressional action to authorize and appropriate adequate funding for states that assume the Section 404 permitting program and to broaden the eligibility of the existing U.S. EPA wetland grant program for both development and implementation activities; and

Supports a simplified and more flexible process for state assumption of the Section 404 Permit Program, including partial assumption of program responsibilities, in order to improve effectiveness and provide more efficient and effective permitting for applicants while maintaining protection of wetlands in the United States.

# Clean Water Act Section 404 Program Assumption

## A Handbook for States and Tribes

**August 2011**

*Prepared by*
*The Association of State Wetland Managers, Inc. and*
*The Environmental Council of the States*

*MDEQ photo*

# Section 404 Program Assumption
# A Handbook for States and Tribes

*Prepared by the Association of State Wetland Managers*
*and*
*the Environmental Council of the States*

*August 2011*

***This handbook was prepared by the Association of State Wetland Managers in cooperation with an interagency workgroup convened by the Environmental Council of the States (ECOS) to encourage state/tribal assumption of the Clean Water Act Section 404 Program. Our thanks to staff of the Environmental Protection Agency (EPA) and other state, tribal and federal workgroup participants. Please note that any reference to a "state" program applies equally to tribes.***

## EXECUTIVE SUMMARY

State, tribal and federal resource agencies are facing increased pressure to reduce the cost of government, and to minimize regulatory costs imposed on businesses and the general public, while protecting important wetlands and other aquatic resources that remain under significant development pressure. At this time in our history the need for wetland ecosystem services—including flood storage, storm attenuation, and provision of migratory corridors for wildlife—is greater than ever in light of changing climatic conditions. Government agencies must also balance the cost and challenge of protecting other freshwater resources —for drinking water and protection of human health, natural habitat, water management, and a range of public uses.

In order to protect water resources while containing costs, it is essential that different levels of government share the work of managing wetlands and other waters. State, tribal and federal agencies are continuing to seek approaches to avoid duplication of effort and to improve the efficiency of permit programs, making the best use of the strengths of each agency to realize shared resource management goals. ASWM and ECOS have developed this handbook in the interest of encouraging a collaborative approach to wetland management by state or tribal and federal agencies.

The U.S. Congress has provided a mechanism for state/tribal and federal cooperation in the Clean Water Act Section 404 program (§404) since 1977. In the process known as §404 program assumption, a state or tribe may request to "administer its own individual and general permit program" in place of the federal dredge and fill permit program. In order to qualify for this provision, the state or tribal program must meet requirements that assure a level of resource protection that is equivalent to that provided by the federal agencies. Congress anticipated that this process would encourage a sharing of responsibility among states, tribes and the federal government.

*This publication was developed under Cooperative Agreement No. WD83418001-1 awarded by the U.S. Environmental Protection Agency. EPA made comments and suggestions on the document intended to improve the scientific analysis and technical accuracy of the document. However, the views expressed in this document are solely those of ASWM and ECOS, and EPA does not endorse any products or commercial services mentioned in this publication.*

In spite of the promise and apparent advantages of §404 program assumption, only two states—Michigan and New Jersey—have requested and received approval for a state §404 program. The primary reasons for this are reported to be a strict requirement for consistency with federal law, setting a relatively high bar for permitting and enforcement, combined with a lack of dedicated federal funding to support state programs. However, states and tribes have demonstrated a willingness to manage wetlands within their boundaries, and have developed a variety of alternative approaches to working with federal agencies. The purpose of this handbook is to provide information to support those states and tribes willing to consider the step of full §404 program assumption in order to provide the maximum level of interagency cooperation and efficiency in their dredge and fill permit programs.

Benefits of program assumption There are multiple incentives for a state/tribe to assume administration of the §404 program. Among these,

- Elimination of a high percentage of duplication in state/tribal and federal permitting programs
- Reduced costs for permit applicants, resulting from reduced duplication, as well as often faster state/tribal permit processes
- More effective resource management at the landscape/watershed level, drawing on localized expertise and integration of wetland management with other state or tribal land use management and natural resource programs
- Incorporation of state or tribal goals and policies into the overall permit process, and
- Improved consistency and stability in the regulation of dredge and fill activities across multiple levels of government.

Challenges and potential obstacles A tribe or state that is considering §404 program assumption will need to weigh the clear benefits of this cooperative approach with a number of obstacles and challenges, including

- The need to meet §404 requirements with a parallel state or tribal program that regulates a wide range of waters – lakes, streams and wetlands – with stringent regulatory criteria
- Provision of a compliance and enforcement program consistent with the federal program
- Financial cost to the state or tribe
- Necessity of broad public and political support for this shared approach.

A state or tribe that is interested in pursuing §404 assumption will need to develop a full description of its planned program, undertake a legal comparison of state/tribal and federal regulations, take steps to amend state/tribal laws or regulations, identify program funding, and enter into cooperative agreements with both the EPA and the U.S. Army Corps of Engineers (Corps), and finally to submit an application for assumption in an application to the EPA Regional Administrator. This handbook provides additional discussion of each of these steps.

Moving forward After weighing the benefits and obstacles to §404 program assumption, a state or tribe may decide to proceed with development of an application to the EPA, or find it more advantageous to pursue other steps, such as development of a 401 certification program, or a (State) Programmatic General Permit — (PGP or SPGP) — in cooperation with the Corps. Regardless of the capabilities and interests of a given state or tribe, increased coordination and sharing of responsibility will increase the effectiveness and efficiency of dredge and fill regulations.

## OVERVIEW OF SECTION 404 PROGRAM ASSUMPTION

**The federal Section 404 Program.** §404 of the Federal Clean Water Act (CWA) defines a permitting program to regulate placement of dredged or fill material in the waters of the United States. This is the primary federal authority regulating the physical alteration of wetlands, as well as other waters of the United States, and complements the National Pollutant Discharge Elimination System (NPDES program), which regulates the discharge of pollutants into waters of the United States. The §404 program is jointly administered by the EPA and the Corps.

**State/tribal assumption.** In 1977, the U.S. Congress formally recognized the potential for and desirability of a major state/tribal role in management of dredge and fill activities, including administration of the §404 program. Congress recognized that many states had already established parallel permitting programs (resulting in duplicative state and federal permit requirements), and that the traditional role of the states/tribes in land use management provides states/tribes with a particularly effective basis for wetland management. However, Congress also emphasized the need to retain Corps control over navigation in interstate waters.

The resulting provisions of §404 allow a state or tribe to administer its own regulatory program in lieu of the Corps permit program for most waters, if approved by the EPA, and with oversight by the EPA. Congress prohibited assumption of the program in certain waters as defined in §404(g)(1) of the CWA—including waters which are or could be used to transport interstate and foreign commerce, waters subject to the ebb and flow of the tide, and wetlands adjacent to these waters (e.g. tidal waters, the Great Lakes and major river systems). The Corps retains §404 jurisdiction over these waters.

In the simplest terms, the assumption process authorizes states or tribes to assume greater responsibility for dredge and fill activities in waters of the United States. In practice, a state/tribal §404 program is a close partnership between state or tribal and federal agencies. Under a state/tribal §404 program,

- The state or tribe agrees to conduct its own permit program in accordance with the requirements of the CWA and associated regulations. This means that the state or tribe may impose more stringent requirements, but not less stringent requirements (40 CFR 233.1(d)). Permits issued by an approved state/tribal program provide the necessary authorization under §404. The Corps suspends processing of federal permits (including Nationwide or Regional General Permits) in state/tribal §404 assumed waters. The state or tribe may adopt Nationwide Permits, or may develop its own General Permit categories for its program.

  The state/tribe also assumes primary responsibility for enforcement of the CWA. An annual report of program activities is provided to the EPA.

- The EPA directly reviews permit applications defined in advance in a Memorandum of Agreement (MOA) with EPA, and may object to issuance of a permit where federal guidelines are not met, or if the permit is subject to an interstate dispute. The EPA review also provides for coordination with other federal programs, including the Corps, U.S. Fish and Wildlife Service (USFWS) and National Marine Fisheries Service (NMFS). Input from the EPA helps to ensure that baseline §404 requirements are consistently enforced on a national basis. A state/tribe cannot issue a permit under §404 if EPA objects to issuance of the permit and the state has not taken steps required by the EPA Regional Administrator to eliminate the objection.

  In addition, the EPA reviews the state's annual program performance, and provides federal technical assistance. EPA also retains the right to take enforcement action on any §404 violation, although the primary responsibility for enforcement rests with the state/tribal §404 program.

- The Corps retains jurisdiction over waters which are, or could be, used as a means to transport interstate and foreign commerce, all waters subject to the ebb and flow of the tide, and wetlands adjacent to these waters (e.g. tidal waters, the Great Lakes and major river systems). This does not preclude operation of a state/tribal program in such waters, but such state permits do not provide §404 authorization. For a full description of the waters over which the Corp retains jurisdiction, please see "MOA with the Secretary of the Army" in the Special Topics section.

These roles and responsibilities are discussed in greater detail below.

Combining the work of state/tribal and federal agencies into a §404 partnership eliminates a significant amount of state/tribal and federal duplication —minimizing the regulatory burden— while taking advantages of the strengths of each level of government. State/tribal specific needs and policies are more directly addressed, without sacrificing national standards, interstate concerns, or federal technical expertise. At the same time, the §404 program regulations maintain a "level playing field" among the states and tribes, and to ensure protection of interstate water resources.

**Basic requirements for state/tribal assumption of the §404 Program**

The overriding requirement for assumption is that the state or tribe have the authority to provide at least the same level of aquatic resource protection as the federal agencies. Only then can federal permitting be suspended in favor of the state/tribal program.

> ***"The conferees wish to emphasize that such a State program is one which is established under State law and which functions in lieu of the federal program. It is not a delegation of Federal authority."***
>
> ***- Legislative History of the CWA of 1977– Conference Report – page 104***

Requirements for assumption of §404 are detailed in the EPA's Section 404 State Program Regulations at **40 CFR Part 233**[1]. An approved state or tribal program must have in place – in state/tribal laws and regulations – provisions that address a number of requirements, including

- ***Jurisdiction over all waters of the United States, including wetlands, other than waters where the Corps retains jurisdiction (e.g. the New Jersey program does not include tidal wetlands, and Michigan's program does not include Great Lakes coastal waters);***
- ***Authority to regulate all activities that are regulated under federal law. A state/tribe cannot exempt activities that are not exempt under the CWA;***
- ***Permitting standards and procedures that will be at least as stringent as the federal permit program, and that will ensure consistency with the federal permitting criteria (including the § 404(b)(1) Guidelines and other requirements);***
- ***Compliance and enforcement authority including the ability to enforce permit conditions, and to address violations with penalty levels that are at least comparable to federal fines and penalties;***
- ***Program funding and staffing sufficient to implement and enforce the program.***

There is no provision for partial assumption of the program; that is, a state/tribe cannot assume authority for only certain categories of activities or certain categories of waters. However, it is not required that a state/tribe operate a permitting program in waters where the Corps retains jurisdiction. Nor is a state required to have authority over lands held in trust for tribes (Indian Country).

[1] A list of legal references and sources is provided at the end of this document.

**How it Works: Federal Oversight & the Role of the EPA**

Following approval of a state or tribal program by EPA, primary responsibility for permitting and enforcement in assumable waters is transferred to the state/tribe. The role of the EPA also changes; prior to assumption, the EPA reviews public notices and permits issued by the Corps, and provides comments to the Corps. In a state/tribal §404 program, EPA reviews public notices and permit applications received by the state/tribe, and provides comments to the state or tribe. The EPA is also responsible for programmatic oversight—for reviewing annual reports submitted by the state/tribe, and evaluating any changes in state/tribal or federal laws and regulations to ensure that program consistency is maintained.

While EPA has the authority to review any application processed by the state/tribe, federal regulations allow EPA to waive review of some categories of permits (***40 CFR §233.51***). However, EPA cannot waive review of permits such as those that may affect threatened or endangered species, draft general permits, discharges near public water intakes, etc. EPA and the state/tribe define the categories of projects subject to direct review by EPA at the time of program assumption in the MOA. As the program matures, as has been the case in Michigan and New Jersey, the level of federal oversight may decrease. In Michigan, EPA typically provides direct comments on about 2% of all applications received in normal year.

The detailed process for EPA review of state/tribal §404 program permit applications is spelled out in federal law and regulations ***(Section 404(j); 40 CFR §233.50).*** Generally,

- The state or tribe is required to send EPA a copy of the public notice for any complete permit application received by the state except where EPA has waived review in the MOA.

- EPA in turn provides these permit applications to the Corps, the USFWS, and (in coastal waters) the NMFS for review[2]. These agencies are given 50 days to provide comments to EPA.

- EPA must provide comments to the state/tribe within 90 days of its receipt of the permit application. These comments incorporate comments from the other federal agencies.

- In the event that EPA objects to the proposed project —typically by finding that some aspect of the project is not consistent with the 404(b)(1) Guidelines—then the state/tribe cannot issue a permit carrying §404 authority unless or until federal comments are resolved. This is similar to EPA's authority to raise concerns with or veto Corps permits. In most instances, federal concerns are resolved as a result of modification of the project by the applicant; provision of clarifying information by the applicant (e.g. additional information regarding alternatives or project impacts); or by agreement on conditions to be added to the permit (e.g. mitigation requirements).

[2] In practice, the state/tribe may provide applications directly to other federal resource agencies to facilitate the review process.

- There is a time limit for resolution of federal issues. Once EPA has sent a letter of objection, all issues must be resolved within a 90 day period. After this, the EPA cannot withdraw the objection to the permit (although the applicant may reapply).

- If the state/tribe does not satisfy EPA's objections or requirement for a permit condition or does not deny the permit, then processing of the §404 permit reverts to the Corps. The applicant may seek federal authority by filing a new application with the Corps. Should the Corps deny the permit, the applicant may appeal through the federal process. The state may, in some circumstances, issue a permit under state law in spite of an EPA objection (e.g. as the result of a legal appeal in state court) – but in this instance the state permit would not provide any authority under §404.

Some state legislators, tribal councils, or other policy makers may express concern regarding this level of federal oversight, in particular the authority of the EPA to block a state/tribal decision regarding issuance of a §404 permit. It has been suggested by some that EPA oversight be limited to review of the state program as a whole. However, the current framework provides several important functions:

- Direct coordination between state/tribal and federal staff on specific projects helps to maintain communication and consistency with federal requirements based on a case-by-case review. Understanding of the federal perspective carries over to other projects that are not directly scrutinized by the federal agencies.

- Federal review of certain types of permit applications provides for necessary coordination with other federal regulations (e.g. potential impacts to listed species, or to hazardous waste sites). If there was no provision for federal review and comment, an alternative mechanism would be needed to address the requirements of federal resource programs. Coordination with other federal programs is discussed under the Special Topics section.

- Federal input ensures that the concerns of adjacent (upstream, downstream) states or tribes are addressed.

- Federal comments and technical assistance often support state/tribal decisions on projects with large impacts.

Given that state/tribal regulations must be in accordance with federal requirements, and that EPA relies heavily on information gathered by the states, disagreements between state and federal reviewers are uncommon. In Michigan, where tens of thousands of permits have been issued since program assumption in 1984, there have only been 8 situations in which the state issued a permit over the objection of EPA – resulting in reversion of §404 processing to the Corp. In the vast majority of these cases, issuance of a permit was the result of a legal appeal of the state's action. In these instances, where a state permit is issued by order of a court or an administrative review process, reversion of §404 processing to the Corps provides the applicant with an avenue to pursue a parallel review and appeal through the federal system. In New Jersey, which

assumed the program in 1994, there has been one permit that reverted to the Corps for processing.

Alternate options for state/tribal federal coordination. Many states and tribes play a significant role in the regulation of dredge and fill activities in wetlands and other waters, but do not assume administration of §404. State/tribal roles may range from review of federal actions under the §401 Water Quality Certification Process and/or state Coastal Zone Management programs, to administration of a separate state/tribal permit program, to a high level of coordination and responsibility for permit review under an (S)PGP issued by Corps district offices. These types of programs may serve as steps to full assumption, or may represent a decision by the state/tribe regarding the desired level of participation. While this handbook is focused on §404 assumption, the value of other approaches is also recognized, and consideration of assumption may lead a state or tribe to a different option.

*In New Jersey prior to §404 program assumption, wetlands were regulated at the federal, state, county and local levels. In the state legislation that supported program assumption, many water regulations were consolidated in one level of government and one agency, reducing duplication.*

*While this approach provides significant streamlining of the regulatory process, some parties may be concerned with a loss of local control.*

## THE PROs AND CONs OF STATE OR TRIBAL §404 ASSUMPTION

State/tribal administration of the §404 program provides distinct benefits in terms of regulatory streamlining, resource protection, and integration with other state/tribal resource management programs. Along with these benefits, the state accepts added responsibility, finance administration of the program, and must be willing to work in partnership with the federal resource agencies. This section will discuss some of the major pros and cons that should be taken into account by a state or tribe that is considering this action.

### Benefits of state §404 program assumption

Regulatory streamlining. The most apparent benefit of state/tribal §404 program administration is the reduced duplication between state/tribal and federal permit programs, and overall streamlining of the regulatory process. Many states have established comprehensive regulatory programs to protect the integrity of state waters and wetlands —often in coordination with other land and water management approaches (e.g. floodplain management, zoning and other land use regulations). If state/tribal regulations are consistent with federal requirements, then parallel state and federal permits are duplicative and wasteful of government time and resources.

The total cost for wetland permits issued to transportation agencies, local government agencies, as well private industries can be significantly reduced by reducing duplication of state/tribal and federal permit requirements. Elimination of duplicative permit requirements reduces the

regulatory burden on the public, and as a result support for wetland and aquatic resource protection may increase. The CWA and EPA's assumption regulations are structured to ensure opportunity for federal input on projects and coordination with related federal programs. However, it is expected that most routine permitting decisions will be made independently by the state or tribe.

In addition to the elimination of duplicate permits, state/tribal assumption streamlines regulations in the following ways:

- Reduced time for review of regulated activities. Many state/tribal permit programs can make regulatory decisions in a more timely manner than the federal program – a significant factor for the business community.

- State/tribal administration of §404 replaces the §401 water quality certification process. Where a §404 permit is issued by the state or tribe under state/tribal law, then §401 certification is not required (i.e. there is no federal action). This does not change the essential water quality requirements under §404 – the state/tribal program must still ensure compliance with state/tribal water quality standards in conformance with the 404(b)(1) guidelines. However, a separate review process is unnecessary.

- State/tribal assumption supports and encourages full integration with other state/tribal regulatory review. Permitting decisions may be integrated with a wide range of other state/tribal requirements, ranging from Coastal Zone consistency to floodplain regulations, decisions regarding hydropower projects, or state/tribal protection of endangered species or habitat.

- Improved coordination with other state/federal programs. For example, coordination with state/tribal transportation programs or construction programs may be facilitated.

- Improved coordination and consistency in states/tribes with multiple Corps districts. Based on the experience of Michigan and New Jersey, assumption of the §404 program may result in consolidation of remaining Corps permit activities into a single district, or at least reduce the number of districts active in the state. Administration of the §404 program by the state/tribe will improve consistency across the state/Indian Country.

Improved resource protection. Although various agencies and organizations may be concerned that state/tribal assumption could result in a loss of federal protection under the Clean Water Act, a review of EPA's state §404 program assumption regulations makes it clear that federal standards must be maintained under a state/tribal administered program. Administration of a program at the state or tribal level of government actually has the potential to improve protection or management of resources – particularly those subject to cumulative smaller impacts—for a variety of reasons.

- Increased staff levels. State/tribal programs typically make use of more staff in more localized offices than programs operated from Corps districts. The public often considers state staff to be more accessible than federal staff.
- Local resource knowledge. State/tribal resource managers frequently have extensive knowledge of local resource values, condition and issues. They may be aware of the presence of locally rare resources, or conditions that threaten those resources. State/tribal staff also typically work closely with local units of government, including agencies responsible for overall land use and development, and with related state/tribal programs that manage fish, wildlife and water resources.
- Regulations are tailored to address specific policies and needs of state and tribes. Water management policies vary across the nation – for example, protection of riparian areas in an arid western landscape differs significantly from management of vast tidal wetland resources in southern states, or forested northern wetlands. State/tribal §404 programs maintain basic national goals, while tailoring regulations to make sense and work effectively and efficiently within the local or regional context.
- Potentially broader regulation under state or tribal jurisdiction. In some states and tribes, regulated waters are defined more broadly than federal jurisdiction. A combined state/federal program may therefore provide more comprehensive protection for isolated wetlands and other unregulated waters that are important for protection and management of state/tribal water resources and habitat. State or tribal/ federal programs can also integrate regulation of other activities, such as drainage.
- Integration with other state/tribal management of resource management and land use. As state/tribal and federal wetland programs have matured, it has become apparent that wetland protection and management is frequently most effective in the context of broader resource protection—especially consideration of watershed level functions and values. The loss of public benefits provided by wetlands becomes more apparent when considering cumulative losses of functions and values on a watershed scale.

  State, tribal and local government agencies operate numerous programs to address water quantity and water quality issues, to encourage protection of wildlife habitat corridors and greenspace, and to address other local values. The § 404(b)(1) Guidelines require consideration of these same issues. State/tribal administration of the §404 regulatory program can support state/tribal watershed programs, while avoiding state and federal duplication in the review of wetland permit applications.

*In Wisconsin, the state's dredge and fill permit program is coordinated with lake shoreline protection through special state zoning provisions.*

*Oregon protects water resources as one component of the statewide land use planning program.*

*In New Jersey, state regulations recognize the importance of protection buffer zones around wetlands as one component of regulation.*

Other benefits. States and tribes will likely identify a number of other positive benefits for the agency and the public. Examples include

- Public acceptance. Many complaints about wetland regulation are based on permit procedures, rather than on the need for wetland protection. To the extent that wetland regulation is made more efficient, less duplicative, and more specific to the state/tribe, resistance to regulation is reduced.

- Access to state/tribal appeal processes and courts. The program requirements for public input are discussed under special topics. However, in many states/tribes the public – including both permit applicants and citizens who may be impacted by a proposed project – may have more ready access to appeals (including administrative appeals or state/tribal courts) than is perceived to be available in federal permit programs.

- Program stability. Although state/tribal and federal programs are both subject to changes in law and policy, the desire to maintain state or tribal and federal consistency can buffer these changes. As long as the state/tribe is committed to program administration, amendments that would result in withdrawal of state/tribal authorization are less likely. At the same time, changes in federal law and policy will impact the state or tribe only to the extent that state/tribal laws are amended accordingly. As a result, state/tribal administered programs have tended to be more stable, and less affected by individual legal decisions or procedural modifications.

- Consistency in permit decisions. Eliminating issuance of duplicative permits from the state or tribe and the Corps (often from multiple Corps district offices) will reduce inconsistencies in permit decisions or conditions from the perspective of the applicant.

**Potential obstacles and disadvantages**

The fact that only two states (Michigan and New Jersey) have assumed the §404 program since 1977 is a reflection of the challenges associated with this process. States/tribes should be aware of the following concerns or potential barriers when they seek §404 program approval.[3]

Need to demonstrate jurisdiction over all waters of the United States. In order to administer the §404 program, a state or tribe must – at a minimum – have regulations in place that provide jurisdiction over all waters of the United States (other than those waters retained by the Corps under

*New Jersey adopted the 1989 Federal manual as the standard to identify the extent of wetlands. Since this manual is conservative in defining the extent of wetlands, it remains acceptable under the state assumed §404 Program. Consequently, New Jersey has not been subject to changes in delineation techniques over the past decade.*

[3] The EPA presented a more detailed review of potential barriers to assumption to ASWM and Society of Wetland Scientists members. This powerpoint presentation is available through the ASWM Section 404 assumption webpage, under Wetland Programs.

§404(g), and, for states, lands held in trust for the tribes). The scope of federal jurisdiction is very broad, including most wetlands, lakes, streams and tributaries, and tidal waters as established by regulation and implemented consistent with U.S. Supreme Court decisions in SWANCC and Rapanos.

If the jurisdiction of a state/tribal program is limited, e.g. if the state/tribe does not regulate small wetlands, tributary streams, or some other category of regulated waters, state or tribal law would need to be amended prior to program assumption.

Need to demonstrate consistency between state/tribal and federal regulations. State/tribal regulatory authority must include all activities regulated under §404. The state/tribal program must be consistent with the §404(b)(1) Guidelines and all other parts of the federal program. Some states have found that their existing permit exemptions exceed what is allowed under the Clean Water Act. Closing these gaps may prove to be a significant political challenge, even though the assumption program provides overall regulatory streamlining.

When a state or tribe requests approval to administer the §404 program, the EPA will thoroughly compare state and federal regulatory standards. States/tribes are allowed a degree of flexibility in the structure of the state or tribal program, language, and policies, but ultimately the "no less stringent than federal requirements" standard must be applied. This issue is discussed in more detail in the section on Special Topics. At a minimum, the state/tribe should anticipate that a detailed legal evaluation will be required, with the assistance of legal counsel.

It should also be noted that the state/tribe must *maintain* federal consistency. Changes in state/tribal law or regulation – whether arising from the state legislature, tribal council, or the courts—must be reported to EPA and evaluated for consistency. The state or tribe will also be expected to be responsive to future changes in *federal* law or regulations, with parallel changes in state/tribal provisions as needed. For example, promulgation of federal regulations defining §404 program mitigation requirements in 2008 in turn required a fresh evaluation of parallel state standards in Michigan and New Jersey. Some state lawmakers object to this influence on state regulations, although in Michigan and New Jersey it has generally been accepted given the overall benefit to the state.

Potentially high percentage of waters that must remain under Corps jurisdiction. For some states/tribes – particularly coastal states – the extent of jurisdiction that would be retained by the Corps is itself an impediment to program assumption. In states/tribes where jurisdiction over a high percentage of waters would be retained by the Corps, assumption may be seen as less beneficial. In Michigan and New Jersey, program benefits were viewed as outweighing this limitation.

Financial cost.

- Initial evaluation and development of a state-tribal program. The initial cost of program assumption, which includes development of a full application, modifications to the state/tribal program to achieve consistency, development of procedures for coordination with federal agencies, and educating the public regarding the change in state/tribal and federal roles, can also be significant. EPA has estimated that states spend an average of $225,000 when investigating the option to assume the §404 program. Program development (but not administrative) costs may be partially offset through EPA Wetland Program Development Grants.

- Operation of state/tribal §404 program. There is no dedicated source of funding for administration of state/tribal §404 programs. A state may allocate a portion of CWA Section 106 water program funds to the state/tribal wetland program, but in reality this source is already severely constrained by the needs of other programs. The cost of compliance and enforcement should not be underestimated, as it may add significantly to an existing program.

*When the Commonwealth of Virginia considered assumption of the §404 program, a number of issues were considered. However, the anticipated cost of the program was such that further consideration was ended.*

*Virginia estimated that in order to provide additional services similar to those provided by the Corps – including verification of wetland delineation – the annual budget for the state program would increase by $5-6 million.*

It should be noted that many states and tribes already expend funds operating a state permit program or §401 certification program. For these states, the added cost of state assumption may not be significant, depending upon the scope of the current program.

Political will & public desires. Multiple interests groups from both sides of the political spectrum may have serious concerns about the impact of state/tribal program assumption. Environmental or conservation groups may initially view a state/tribal program as less protective than the federal program. The regulated public may see assumption as an expansion of overall permit requirements. For state legislators and tribal councils, cost of the regulatory program may be the primary concern.

The state/tribe will need to gauge public support, and initial public understanding of the program. As policy makers, permit applicants, and interested citizens gain knowledge of how §404 program assumption alters the division of responsibility for wetland management among state/tribal and federal agencies, support may increase. When all parties understand the dynamics of the proposed change, then the overall cost to the state, including the cost of staffing the state/tribal program and the relative cost in time and fees for permit applicants, must be weighed against public desires regarding resource protection programs. Each state/tribe is advised to openly weigh state/tribal and federal roles, and to determine which approach to wetland management best matches programmatic as well as public goals and support.

### *How does the Section 404 program differ from Section 402?*

Many state and tribes are familiar with the regulation of discharges through the National Pollution Discharge Elimination System (NPDES Program) under §402 of the Clean Water Act. Although there are similarities between the §402 and §404 programs, there are also distinct differences.

| §402 (NPDES) | §404 |
|---|---|
| Regulates the ongoing discharge of pollutants to waters of the U.S., setting pollution limits for each 5 year period. | Regulates placement of dredge or fill material in wetlands, lakes and streams. The permit is typically in effect only until changes are completed, but shall not exceed a 5 year period. |
| Permit limits may be modified in future based on monitoring data. | Changes are typically permanent. |
| Permit applicants are typically businesses or municipal facilities that are familiar with permit requirements. | High percentage of permit applicants are individual landowners who have limited understanding of environmental regulations. |
| Regulated discharges are typically to public waters. | Regulated activities in wetlands are often located on private land. |
| Public notice is typically in the form of a draft permit, including limits set by agency. | Public notice is typically issued upon receipt of a complete application, seeking input on the proposed project from all interested parties. |
| Compliance relies heavily on monitoring and reporting by the permit holder. | Violations may be reported by observations of numerous individuals; resolution may require restoration of the damaged site. |
| Administration of the program by a state or tribe may be phased in over time. A state or tribe may request approval to administer only some of the discharge categories. | Partial administration of the program by a state or tribe is not allowed; the state must simultaneously assume administration of all components of the §404 program. |
| No dedicated source of funding; however, typically funded in part by federal §106 funds. | No dedicated source of federal funding. While §106 funds could be used, these funds are typically committed to other essential programs. |

## GETTING ORGANIZED

A full consideration of §404 program assumption will require technical input from program managers, as well as legal assistance, in order to evaluate implications for state/tribal resource protection, related state/tribal policies, and the regulated public. This may require months or years to complete. Therefore, it is recommended that a state or tribe begin with consideration of the broad requirements of the §404 program, how well these requirements mesh with state/tribal goals, and the extent to which equivalent state/tribal programs are already in place. Then if the state/tribe wishes to proceed with assumption, a more detailed legal assessment will be required.

Keep in mind that materials developed to help a state/tribe make a decision regarding assumption, such as a legal comparison of state/tribal and federal authorities, will also be a component of the state or tribe's formal application for assumption if it decides to proceed. Therefore, the basic requirements for an application for assumption should be reviewed at the outset to avoid repeating a step. Wetland Program Development grants can be applied for to help fund the work needed to fully consider and prepare for state or tribal assumption of §404.

While the circumstances of each state or tribe will be unique, the state/tribe may wish to begin with the following considerations.

### *Define state/tribal goals: what is the benefit to the state or tribe? Why is assumption being considered at this time?*

A state or tribe may be motivated to consider program assumption for a variety of reasons—to reduce duplication with federal programs, increase efficiency, and improve business climate; to improve resource management through increased integration with state/tribal programs; or to increase the emphasis on wetlands of particular importance to the state/tribe, including wetlands with regional significance. Provided that the state/tribe's purpose in considering assumption includes maintenance of a level of aquatic resource protection and management at least equal to that established by the federal program, state/tribal administration of the §404 program may be useful in achieving these goals.

On occasion, §404 program assumption is proposed as a means of limiting federal regulation, or reducing federal involvement in state/tribal resource management, without balancing goals for resource protection and management. For example, some states/tribes have inquired about §404 program assumption primarily to facilitate permitting for specific highway or development projects. If the overriding goal is limited to a single purpose, or is primarily to reduce regulation, it is less likely that the state or tribe will be able to implement a successful §404 program, or to coordinate with federal agencies to the degree necessary. A state/tribe in this position may wish to consider other options to expand the state/tribal role, reduce duplication of effort, and improve coordination with federal agencies, short of full §404 program assumption.

***Is there public support for comprehensive administration of a dredge and fill permit program by the state or tribe?***

In addition to resource protection goals, a state or tribe must either have – or be willing to develop – a comprehensive permitting and enforcement program that ensures compliance with federal standards. The political will for development - and continuation—of this program should be assessed, taking into account support from the public and private sector. A wide range of interests may support state/tribal level regulations for different reasons. Conservation and environmental agencies and organizations may understand the benefits of a more localized program that is integrated with other state/tribal programs while maintaining federal standards, or may fear loss of resource protection. Business and development interests may understand the benefit of more expedited, and less duplicative regulation, or may oppose an expansion of the state or tribe's role. The interests of multiple stakeholders should be considered in terms of long-term program support.

***Inventory existing state/tribal statutes and regulations: are basic program requirements met, or is there support for amendment of the current program?***

Does the state or tribe have an adequate permit program in place under *state* law, providing the appropriate state/tribal agency with the authority to issue or deny permits, and authority to enforce regulations? Undertake an initial side-by-side comparison of state/tribal and federal:

- ***Jurisdiction*** over waters of the United States, including wetlands. Does the state/tribe have jurisdiction over all assumable waters?
- ***Authority to regulate*** all actions regulated under §404.
- ***Exemptions.*** State/tribal exemptions cannot be broader than federal exemptions.
- ***Permitting standards.*** A state/tribe cannot issue a §404 permit that does not provide the same level of protection as the 404(b)(1) Guidelines and other federal regulations.
- ***Compliance and enforcement.*** A state/tribal program must have authority to enforce compliance with permits, and to address violations of permitting requirements. This includes the ability to assess appropriate fines and penalties, and to provide for public participation in the compliance program.

The state or tribe's authority to administer a permit program may rest on both primary statutes such as a statewide (nontidal) wetland law, and related authorities – e.g. floodplain regulations, coastal zone regulations, shoreline zoning requirements, dam safety laws, and so on. For example,

- ***The scope of jurisdiction*** over waters and wetlands may be defined in state/tribal water quality standards, in specific dredge and fill statutes or regulations, in broader water authorities, or in state/tribal land use regulations (e.g. authority to regulate shorelines)

- ***Compliance and enforcement requirements*** may be found in multiple state/tribal regulatory authorities, in administrative procedure requirements, or in other state or tribal laws.

Each state/tribal agency that will implement the program must be authorized to make use of all necessary authorities. It should be assumed that assistance from in-house counsel, or the state Attorney General or Tribal Attorney, will be needed to identify all authorities in a final page-by-page assessment. This assessment, and certification of authority by the Attorney General/Tribal Attorney, will be one of the key components of an application for §404 program assumption.

***Identify gaps: what additional regulations, staffing, funding, or enforcement authority would the state/tribe need to assume the §404 program?***

If the state or tribe does not currently have permitting authority needed to provide the same level of resource protection as federal law, then it will have to develop or revise its regulations to be consistent with and at least as stringent as federal law. At this stage, if not before, it is advisable to evaluate public support for the change, and to work closely with the EPA to determine as specifically as possible what changes would bridge the gap.

Staffing and financial resources. The extent of funding and staff resources needed to sustain a state or tribal §404 program should be estimated, and sources of potential funding identified. An application for program assumption will require both an annual budget, and a workload analysis defining staffing needs[4]. Additional information regarding program costs is included in the Special Topics section.

If a state or tribe already administers a comprehensive permitting and enforcement program, then the *added* cost of coordinating with EPA under a state/tribal §404 program may be minimal. In Michigan, one full-time position is dedicated to coordination with EPA and program reporting, and the time needed for federal coordination is estimated to require the equivalent of three additional permitting staff statewide. By comparison, New Jersey requires less than one full-time position to coordinate with EPA. For programs that must expand permitting requirements or enforcement actions, a significant new amount of funding may be necessary.

***Develop a strategy: what is the best approach to meeting state or tribal goals given the requirements of the federal program and limits on the state/tribal program? Is it advisable to seek program assumption, or are other program options a better first step?***

Following a review of the program requirements and an assessment of its current status, the state or tribe will make a preliminary decision about program direction, and the most logical means of improving state/tribal wetland protection and management.

- ***If the state or tribe determines – based on discussions with EPA - that it has an established regulatory program that is essentially consistent with federal §404 program requirements, it may decide to proceed with the assumption process.*** The state may

[4] The Association of State and Interstate Water Pollution Control Administrators (ASIWPCA) developed a *State Water Quality Management Resource Model* in 2001 that may assist a state or tribe in analyzing workload requirements (***add citation***).

then outline a strategy to proceed with development an application for assumption that is likely to include the following actions.

- A stakeholder process that identifies the concerns of all interest groups, and provides an ongoing source of information to the public
- Amendment of state/tribal regulations as needed. The timeframe for legal amendments or rulemaking will in turn dictate the timeline for assumption
- Further definition of funding and confirmation of the availability of funds in coordination with the state/tribal budget process
- Discussions with all other impacted state, tribal, federal and local agencies
- Development of supporting materials such as staff guidelines and permit application forms, and a means of documenting permit decisions
- Training staff in new procedures and requirements
- Notification of the public of the shift in permitting responsibility
- Full documentation of the state/tribal program as needed for the application for assumption.

- ***If the state or tribe does not currently have the basic legal capacity to assume administration of the §404 program, but has support for increasing responsibility for wetland protection, it may take steps to build the needed capacity.*** Numerous possibilities are available, depending upon the status of the state/tribal program. The state may wish to consider the following.

  - Building support for the state/tribal program through establishment of a stakeholder group to assist in definition of an appropriate course of action, and to further educate stakeholders regarding state/tribal administration of §404
  - Coordination with EPA to further define changes that are needed for program assumption, and to inform the federal agencies of the state or tribe's long-term plans
  - Increase state or tribal responsibility relative to §404 permitting. If the state/tribe does not currently have a process for coordinating regulatory review with the Corps, possible development of an (S)PGP, or review of §404 permit applications through an expanded §401 Water Quality Certification Process. These programs may provide the state/tribe with useful experience and a greater understanding of the federal program, and/or provide an opportunity to demonstrate and document state/tribal capabilities.
  - Pursuing modifications of state/tribal regulations as needed to meet federal requirements.

- ***If public support for an increased state regulatory role is lacking, the state/tribe may wish to build its wetland program using other approaches.***

  - Focus on a wetland outreach program to build public understanding of wetland functions and values, and the role of regulation. Assist policy makers in understanding approaches for streamlining state/tribal and federal regulations.

- Development of a more limited (S)PGP to gradually build capacity and experience, consistent with existing state authorities
- Development of the state/tribal wetland program through non-regulatory approaches, such as assessment of wetland condition, mapping, and public education to build state/tribal expertise while supporting effective wetland protection and management.

## APPLICATION REQUIREMENTS

The *final* step in the process for approval of a state or tribal §404 program is initiated by formal submittal of a detailed description of the state or tribe's program to the Regional Administrator of the EPA, with a request for approval of the program from the Governor of the State or Tribal Chair. This request must include the following.

*Primary requirements:*

- *A letter from the Governor of the State or Tribal Chair, requesting program approval and formally transmitting the request to EPA.*
- *A complete program description.*
- *A statement by the Attorney General or Tribal Attorney that the laws and regulations of the state/tribe provide adequate legal authority to carry out the program and to meet the applicable requirements of federal law. That is, the appropriate state/tribal agency has authority to review permit applications, and to issue permits to regulate dredge and fill activities in assumable water, as well as to enforce regulations for dredge and fill activities in waters of the United States under the state or tribe's jurisdiction.*
- *A Memorandum of Agreement with the Regional Administrator.*
- *A Memorandum of Agreement with the Secretary [of the Army].*
- *Copies of all applicable state/tribal statutes and regulations, including those governing applicable state/tribal administrative procedures.*

*Reference: 40 CFR §233, Subpart B.*

Letter from Governor or Tribal Chair requesting approval. Once EPA receives a complete package and request for assumption from the state governor or tribal chair, it must determine whether to approve the state/tribal program within 120 days[5]. This schedule in practical terms

[5] This 120 day time frame may be extended if the Administrator and Governor/Tribal Chair agree.

means that all elements of the state or tribal program should be in place prior to program submittal, and agreement must have been reached with the EPA Regional Administrator and the Corps District Engineer as to how the program would be operated if approved.

The program description must include a detailed discussion of the scope and structure of the state or tribal regulatory program. These include

- A description of the scope and structure of the state/tribal program. This includes the extent of state/tribal jurisdiction; activities regulated, permit exemptions, permit review criteria and program coordination;
- State or tribal procedures for permitting, administrative and judicial review, and program operation;
- A description of the organizational structure of the state/tribal agency or agencies that will administer the program;
- A workload analysis including a description of staff and financial resources;
- Copies of permit application forms, permit forms and reporting forms;
- A description of state/tribal compliance and enforcement programs, and means of coordination with the EPA and the Corps;
- A description of waters where the Corps will retain jurisdiction; and
- A description of best management practices that will be used to satisfy requirements in the §404 program exemptions for the construction of farm, forest and temporary mining roads.

**Note that when completed, the program description may essentially serve as an operating manual for the state or tribal program, and as such will be useful not only in approval of the program, but as a reference during program administration.**

A state or tribe may find it useful to compare its permit process and requirements with the permits issued by the Corps (including Nationwide General Permits), to help determine whether its program will meet federal requirements. Although specific processes may vary, the overall scope of permit application review and the basic type of permit issued must ensure that wetlands and other aquatic resources are protected in accordance with federal standards. For example, the state might determine whether any activities authorized under a state or tribal general permit process are given more intense scrutiny and individual public notice under the Corps program.

The statement of the Attorney General or Tribal Attorney will include a detailed comparison of state/tribal and federal authorities, which will also be a useful ongoing reference for the state or tribe. This legal documentation must also address specific issues such as state takings law and jurisdiction over Indian lands. Note that the Attorney General/Tribal Attorney's statement is based on laws and regulations in effect at the time of signing; that is, state/tribal law must be modified as necessary to qualify for §404 program assumption before the final request for assumption is submitted. In Michigan's experience, EPA has twice requested that the basic statement by the Attorney General be updated following major changes in the state program, e.g. reorganization of state agencies.

Memoranda of Agreement (MOAs) with the Corps and with EPA must be signed prior to a formal request for program approval. These agreements will become effective upon approval of the state or tribal program. The content of these agreements is discussed below under Special Topics. MOAs should be negotiated well in advance of the expected date of the program submittal to allow adequate time for administrative review and signature at both the state/tribal and federal level. Following program approval, these documents may be amended from time to time by the parties.

The state or tribe may also find it helpful to enter into MOAs with other state/tribal agencies where more than one agency holds responsibility for components of program operation, or with other federal agencies – in particular the USFWS. While such agreements are not a mandatory component of the program submittal, the state or tribe must document in some manner how it will coordinate among agencies.

Public review and comment Following submittal, the EPA must publish notice of the state or tribe's application in the *Federal Register*. The EPA will provide for a public hearing in the state. The state/ tribe should be prepared for this review – both through ongoing discussions with interest groups, and through preparation of explanatory or supporting materials.

## SPECIAL TOPICS

### Interpreting "No Less Stringent Than"

*Primary requirements:*

- *States must have the authority to issue permits which "apply, and assure compliance with, any applicable requirements of this section, including, but not limited to, the guidelines established under section (b)(1) of this section, and sections 301 and 403 of this Act…"* (CWA Section 404(h)(1)(A)(i))
- *"Any approved State Program shall, at all times, be conducted in accordance with the requirements of the [Clean Water] Act and of this Part. While States may impose more stringent requirements, they may not impose any less stringent requirements for any purpose".* (40 CFR §233.1 (d))

- *"No permit shall be issued by the Director [of the State Agency] in the following circumstances: (a) When permit does not comply with the requirements of the Act or the regulations… including the Section 404(b)(1) Guidelines…".* (40 CFR §233.20)

The essential requirement that state/tribal programs be no less stringent than federal programs appears fairly straightforward. However, based on the states' experience to date, differences of opinion may arise regarding the specific requirements of a state or tribal program as compared to federal law.

In large part, this results from the difficulty of directly comparing the language of two different regulations. Even where state or tribal law is drafted with the intent of meeting federal requirements, it is unlikely that the format and wording will be identical. For any party who is concerned with how a regulation may be interpreted in the future by regulatory agencies or the courts, differences in language can raise questions.

The state or tribe may need to supply additional explanatory material to demonstrate how its laws and regulations are interpreted and applied in a manner that is consistent with and "no less stringent than" federal standards. Legal expertise will be needed to compare state/tribal and federal requirements, and to engage in discussions with EPA staff to ensure mutual understanding of both state/tribal and federal programs.

Comparison of state/tribal and federal standards is made more difficult by the fact that many decision points in wetland permit programs require a degree of professional judgment. For example, the 404(b)(1) Guidelines prohibit issuance of a permit if the proposed discharge, "*will cause or contribute to significant degradation of waters of the United States*." The federal guidelines detail factors that should be considered, and require not only professional expertise, but consideration of comments received from others during the public comment period. During an application for §404 program assumption, the federal agencies may ask to review state/tribal guidance documents or legal decisions that demonstrate how state/tribal laws are interpreted as compared to federal requirements. Thus, program experience is very helpful in documenting state or tribal approaches.

Finally, it is essential to understand that the basic foundations of parallel state and federal regulations will differ – even though regulatory goals may be fully shared. The CWA relies heavily on the authority of the federal government to regulate interstate navigation and interstate commerce, along with other federal authorities. By contrast, states/tribes regulate resources within their borders based on the constitution and laws of the state, including land use authorities, water rights (riparian or appropriation), the duty to protect public trust resources, and other public health and welfare authorities, as well as police powers.

One option for limiting these consistency issues is to adopt the 404(b)(1) Guidelines by reference into state/tribal regulations. However, this is not a requirement for program assumption.

| **State – Federal Consistency: three examples from Michigan's §404 Program**[6] | | |
|---|---|---|
| Federal provision | Parallel state provision | Decision on consistency |
| **Is a state exemption consistent with this federal exemption?**<br><br>*"The following activities are exempt from Section 404 permit requirements… Normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, and harvesting for the production of food, fiber, and forest products… To fall under this exemption, the activities…must be part of an established (ongoing) operation". [Excerpt from 40CFR §232.3(c)]* | **Original state language:**<br><br>*"The following uses are allowed in a wetland without a permit…Farming, horticulture, silviculture, lumbering, and ranching activities including plowing, irrigation, irrigation ditching, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products…"* | State language and local requirements may differ to an extent, but the exemption cannot be broader than the §404 exemption.<br><br>• EPA questioned whether "lumbering" and "horticulture" were covered by the federal exemption. Based on additional information from the state, explaining how horticulture and lumbering fit within the federal exemption, it was determined that this state provision <u>is</u> acceptable.<br><br>• EPA also objected to the fact that the state exemption does not include the word "normal" and <u>does not</u> expressly limit the exemption to established operations, even though this is how the Michigan has interpreted its exemption. An amendment to state law to add "established" is being sought. |

[6] These examples are drawn from a review of Michigan's program more than a decade after program assumption. This informal review was intended to determine whether state regulations were still consistent with federal requirements after multiple amendments of both programs. Please note that the federal review considered significantly more detailed state and federal regulatory language than is summarized here.

| | | |
|---|---|---|
| **Can state language with a different legal foundation be consistent with federal review criteria?**<br><br>*"…no discharge of dredged or fill material shall be permitted <u>which will cause or contribute to the significant degradation of the waters of the United States</u>…. ….effects contributing to significant degradation include… significant adverse effects… on human health and welfare… on life stages of aquatic life and other wildlife… on aquatic ecosystem diversity, productivity and stability… on recreational, aesthetic, and economic values". [Excerpt from 404(b)(1) guidelines]* | **State language reflecting concern with riparian property rights and public trust issues:**<br><br>*[For inland lakes and streams]… "The department shall issue a permit if it finds that the … <u>project will not adversely affect the public trust or riparian rights</u>. … the department shall consider the effect …upon the inland lake or stream and upon waters from which and into which its waters flow and uses of all such waters, including… recreation, fish and wildlife, aesthetics, local government, agriculture, commerce and industry. <u>The department shall not grant a permit if the project….will unlawfully impair or destroy any of the waters or other natural resources of the state.</u> This part does not modify the rights and responsibilities of riparian owners". [Note: applies to inland lakes and streams – Michigan has separate regulations for wetlands.]* | The state's basic criteria for issuance of a permit to impact inland lakes and streams were found to be consistent with the requirements of the 404(b)(1) Guidelines.<br><br>[Note that EPA did not object to state language regarding the underlying state emphasis on riparian rights and protection of public trust. State and federal language were found to be consistent because the state law provides protection of the resource that is at least as stringent as federal law.] |
| **Must a state law be modified to reflect changes in a federal law or regulations, if the state requirement is at least as stringent as the new requirement?**<br><br>*"The mitigation banking instrument may allow for initial debiting of a percentage of the total credits projected at mitigation bank maturity…"* | **State regulation, based on long established policy:**<br><br>*"The department shall not authorize the use of credits from a mitigation bank in advance of initial restoration or creation of wetlands in the bank…"* | A potential mitigation banker challenged Michigan's rule prohibiting advance mitigation credits after promulgation of the federal rule. EPA determined, after an internal legal review, that the state language reflects an acceptable difference in state policy, providing protection of the resource at least as stringent as the federal program. The state provides mitigation banking credits consistent with federal regulations, but on a different release schedule. |

## Federal jurisdiction and assumable waters

Federal jurisdiction under §404 extends to all "waters of the United States" as defined in the Clean Water Act (**40 CFR §232.2**). Very generally, waters of the United States include marine and tidal waters, lakes, streams and their tributaries, and wetlands adjacent to all of these waters.

For purposes of §404 program assumption, it is important to know what subset of the waters of the United States are not open to state/tribal assumption. By law, the Corps retains jurisdiction over waters that are, or could be used to transport interstate or foreign commerce, all waters subject to the ebb and flow of the tide, and wetlands adjacent to these waters. Examples include tidal waters, large river systems, and the Great Lakes. Thus, these waters are regulated by the Corps under both §404 and Section 10 of the Rivers and Harbors Act of 1899. The Corps also retains jurisdiction over wetlands adjacent to such waters. All other waters of the United States *must* be under the jurisdiction of the state or tribe that assumes administration of §404. "Partial" assumption is not allowed.[7]

The state or tribe may have *broader* jurisdiction – including for example some isolated wetlands that are not regulated under federal law. Here, permits issued by the state or tribe are not subject to federal regulations. If the state or tribe also has jurisdiction over waters over which the Corps retains jurisdiction, coordination with the Corps is recommended. In Michigan, the Corps and the Michigan Department of Environmental Quality (MDEQ) use a joint permit application form. All permit applications are sent to the MDEQ, which forwards applications that also require Corps authorization to the Detroit District.

The state/tribe may define the method used to delineate wetlands, provided that it results in regulation of all assumable waters. New Jersey adopted the 1989 federal manual. Michigan used its own delineation manual for many years, but recently adopted the Corps 1987 manual together with appropriate Regional Supplements.

## Compliance with other Federal laws (NEPA, ESA, etc.)

Permits issued under a state or tribal §404 program are ***state*** permits issued under ***state*** law. For this reason, the provisions of other federal laws that apply to federal permit actions – such as NEPA and Section 7 of the Endangered Species Act – are not applicable. However, the §404 assumption regulations define alternative mechanisms that address many of the environmental goals of related federal programs.

- Review under the National Environmental Policy Act (NEPA) may still be required for projects that make use of federal funding – e.g. transportation, HUD – in order to satisfy the requirements of the funding agency. In addition, many states/tribes have laws that are similar in scope to NEPA. Finally, state/tribal programs must comply with the §404(b)(1) Guidelines, which address some issues covered by parallel NEPA (e.g. consideration of alternatives).

[7] A state is not required to have jurisdiction over Indian Country.

- Threatened and Endangered Species. Under a state/tribal program, direct consultation with the USFWS under the federal Endangered Species Act is not triggered. However, protection of federally listed species is ensured by alternative mechanisms. First, the EPA must review all applications that have a reasonable potential for affecting federally listed species, and in this review coordinates with the USFWS, as well as the NMFS and Corps as applicable. A state cannot issue a permit that carries §404 authority if the EPA objects to issuance of a permit.

  Finally, a state permit must ensure compliance with the 404(b)(1) Guidelines, which prohibit issuance of a permit if it would jeopardize the continued existence of a listed threatened or endangered species or result in the likelihood of the destruction or adverse modification of critical habitat, unless an exemption has been granted by the Endangered Species Committee. **(40 CFR 230.10(b)(3))**

  In Michigan, the state screens permits for potential impacts to federally listed species in cooperation with the state nongame wildlife program, which administers the state threatened and endangered species act. If a proposal is found to have a reasonable potential for impacts to a listed species, a public notice is subject to review by EPA and the USFWS. For minor projects that do not normally require a public notice, the screening process is still followed early in the review of the application, and provisions are made for review by the federal agencies.

  *The State of Oregon seriously considered §404 program assumption on two different occasions. Although both ends of the political spectrum initially had reservations, the State was able to articulate the benefits of assumption. Ultimately, however, the state was unable to overcome the need for extensive coordination regarding federally listed species – including adandromous fish.*

  New Jersey developed a separate MOA with the EPA and USFWS outlining a coordinated review process for applications that may affect federally listed species, and also coordinates with the USFWS early in the permit application process.

  In some states, the need for coordination under the ESA has proven to be a significant impediment to state program assumption. In Oregon, for example, the extent of anadromous fish habitat protected under the ESA is extensive – limiting the potential efficiency of a state program. Florida also recognized the need for quite extensive coordination to protect federal listed species early in its consideration of assumption. This was not the sole barrier to assumption in either state, but it is advisable to investigate the extent of coordination required early in the process of evaluating state program options.

- Coordination under the National Historic Preservation Act is typically carried out in coordination with the State Historic Preservation Office. In both Michigan and New Jersey, proposals are screened through a computer system for proximity to known historic or archaeological sites. EPA cannot waive review of permits involving discharges within sites identified or proposed under the National Historic Preservation Act. **(40 CFR 233.52(b)(6))**

*Some states – e.g. Kentucky, have initially established a task force to consider the pros and cons of wetland assumption. Although Kentucky ultimately decided against assumption at that time, the task force process built public understanding of and support for alternative approaches to state-federal cooperation.*

*In Wisconsin, the state legislature played a major role in evaluating the option to assume the §404 Program.*

Direct review of permit applications and coordination with federal agencies also ensures protection of federally designated wild and scenic rivers, national parks and reserves, and similar sites. The NNFS may review public notices in coastal states and comment through EPA; however the NMFS has waived review of all applications in Michigan. Coordination with state coastal zone management programs is achieved directly through state CZM programs. In short, protection of specially designated federal resources is ensured under a state program, but often through different mechanisms. Attention should be paid to state/tribal and federal coordination.

**Gaining and Sustaining Public Support**

State and tribal agencies are aware of the need for public support to improve programs to meet federal standards, and to accept the ongoing cost of program administration. Opportunities for public comment are included in the process of applying for federal approval of a state/tribal program – including both hearings and public notices. Normally, the state or tribe will have engaged a variety of interest groups in weighing options for state-federal coordination well before the formal application for assumption.

Various interest groups may express a wide variety of legitimate concerns, and misconceptions, regarding state/tribal assumption. During public review, the following questions and concerns are common.

- *What is the purpose of state/tribal program assumption?*
- *Why should the state consider the additional burden of administering the federal program?*
- *Will the state's water resources be adequately protected?*
- *Why does EPA have an oversight role, including the ability to object to an individual permit?*

**Funding Considerations**

The ongoing cost of a state/tribal §404 program is one of the primary considerations in making a decision on program assumption. In addition, states and tribes should be aware of the initial cost of developing a request for program assumption and initial implementation. States have reportedly spent on the average of $225,000 to investigate assumption (EPA 2008). Federal financial assistance for assumption planning is available through Wetland Program Development Grants – the EPA has provided this assistance to six of the nine states that have fully considered assumption to date.

Annual costs for ongoing administration of a §404 program will obviously vary from state to state (or tribe to tribe) depending upon the size of the state/tribe and extent of regulated waters (lakes, streams, and wetlands) within the state or tribe, among other factors. Kentucky compared program costs among states as a component of its investigation of assumption. The following estimates include both state §404 programs and other mature state programs:

| State | Annual cost | FTEs | |
|---|---|---|---|
| New Jersey | $3 million | 42 | (State Assumed §404) |
| Michigan | $7 million | 86 | (State Assumed §404) |
| Wisconsin | $3.5 million | 27 | (State program/RGP) |
| Tennessee | $1 million | 16 | (State program) |
| Maryland | $2.4 million | 40 | (SPGP) |
| est. to assume 404 | + $2 million | + 23 FTEs | |

In weighing program costs and benefits, the following may be considered:

- *What is the additional cost of program assumption?*
  If the state/tribe has a broad existing program, or already coordinates with the Corps through a general permit process, the additional cost of §404 administration may be minimal.

- *Does the financial benefit to the public offset the cost to the state or tribe?*
  To the extent that operation of a combined state/tribal - federal program is more timely and efficient than separate programs, the overall cost to the regulated public may be significantly reduced. It may be difficult to adequately calculate these savings, but business groups in both Michigan and New Jersey have demonstrated a willingness to support program costs in part through increased permit fees to gain an increase in efficiency.

*The Kentucky Division of Water received $250,000 through an EPA State Program Development Grant to investigate §404 program assumption. Funds supported the work of a stakeholder task force, staff legal review and similar tasks.*

- *How would a state administered program be funded?*
  There is currently no dedicated source of federal funding for state or tribal §404 program administration. States and tribes are technically allowed to make use of CWA §106 water program funds for operation of a §404 program, but in reality may not be able to shift these limited funds from other programs. State/tribal general program funding, permit fees, and other special sources of state/tribal funding (e.g. special license plates, bottle deposits, etc.) are typically used to finance program operation.

  Ongoing administration of a comprehensive state/tribal dredge and fill program – covering all state/tribal waters – is a costly enterprise. In Michigan's experience, the cost of program compliance and enforcement was initially underestimated. While there are a range of acceptable means of resolving an enforcement issue – e.g. voluntary site restoration, after-the-fact permitting for projects that meet permit standards, and out of court settlements – an ongoing enforcement action can be much more time consuming than review of a typical permit application. Legal action associated with some cases may not be resolved for a number of years. Moreover, while permit fees may cover a significant portion of the cost of reviewing permit applications, these funds may not be available for enforcement actions. Therefore, the state/tribe should fully evaluate the financial and staff resources needed to address all permitting and enforcement needs on an ongoing basis.

## Memorandum of Agreement between the state/tribal agencies and EPA Regional Administrator

*Primary Requirements:*

- *Defines state and federal responsibilities for §404 program administration and enforcement, including all state agencies with program responsibility*
- *Defines categories of permit applications for which EPA will waive federal review*
- *Establishes a schedule for reporting and submittal of other information to EPA*
- *Addresses state and federal responsibilities for compliance monitoring and enforcement*
- *Provides for modification of the MOA*

*Reference: 40 CFR §233.13* ***Memorandum of agreement with Regional Administrator***
*40 CFR §233.51* ***Waiver of review***

A Memorandum of Agreement, signed by the Director of the state or tribal program and the EPA Regional Administrator, is one of the primary requirements of the state/tribe's request for program assumption, and the application is incomplete without a signed agreement. This agreement must include, at a minimum, the elements outlined above, and will take effect upon program approval.

Essentially, the state/tribe agrees to administer the §404 program in a manner that is in accordance with the requirements of federal laws and regulations. These include a prohibition of §404 permit issuance by the state when the permit is not in compliance with the §404(b)(1) Guidelines or other regulations, and when the EPA has objected to issuance of a permit and the objection has not been resolved.

One particularly important component of the MOA is the section that defines waiver of permit application review by EPA. The Clean Water Act begins with the premise that EPA may be allowed to review and comment on all §404 permit applications, but that also allows EPA to waive review of all be a select set of categories (e.g. projects that jeopardize federally listed threatened or endangered species, draft general permits, and a number of others).[8] In Michigan, EPA waives review of all but about 1 – 2% of all applications. For categories where direct EPA review is waived, the state reviews applications and makes a decision without federal review (although permit information must be summarized and submitted annually to EPA). The categories of applications subject to federal approval should be defined as clearly and specifically as possible to avoid procedural challenges.

***Definition of continued Corps jurisdiction***

The extent of Corps jurisdiction over wetlands should be defined in an MOA based on an agreed upon criterion. This may be done utilizing maps, by defining a distance from Corps- regulated waters within which the Corps will retain jurisdiction over adjacent wetlands, or by using other readily available information.

Michigan's program relies to an extent on a case by case determination by the Corps, which can result in delays and uncertainty from the perspective of the permit applicant. In New Jersey, the Corps retains jurisdiction over wetland that are within 1000 feet of tidal or interstate waters, as documented in their MOA.

It is also advisable to clearly describe state/tribal and federal roles in compliance and enforcement. Although the state/tribe assumes primary responsibility for compliance and enforcement, the EPA may also assert its enforcement authority – this may be particularly helpful in the instance of a violation that impacts the waters of more than one state or tribe, or a major violation. The state/tribal and federal agencies should determine how and under what circumstances information regarding violations should be provided to the EPA (other than in an annual report).

## Memorandum of Agreement with the Secretary of the Army Corps of Engineers

*Primary Requirements:*

- *Describes waters that remain under the jurisdiction of the Corps of Engineers following approval of the state program.*
- *Establishes procedure of transfer of pending applications and other materials to the state following program approval.*
- *Defines any general permits issued by the Corps that will be transferred to the state, and a processing for transferring information regarding general permits.*

*Reference: 40CFR §233.14* ***Memorandum of Agreement with the Secretary***

[8] See 40 CFR 233.51 for a list of categories that must be reviewed by EPA.

A signed MOA between the state/tribe and the Corps (typically through the District Engineer) is a required component of the state/tribe's request for §404 program assumption. This agreement will include the following critical components. First, it will identify waters – and adjacent wetlands – where the Corps will retain jurisdiction for purposes of §404. §404 prohibits transfer of the program to a state or tribe in "waters that are presently used, or are susceptible to use in their natural condition… as a means to transport interstate or foreign commerce… including wetlands adjacent thereto." **(CWA Section 404 (g)(1)).** It is suggested that waters which remain under Corps jurisdiction be listed and identified as specifically as possible to avoid case-by-case determinations after state assumption. This is important in order to avoid delays in processing of applications once they are received. It may be easier to define the upstream extent of jurisdiction over major river systems than over adjacent wetlands.

Secondly, the MOA between the state or tribe and the Corps must define procedures for transfer of the program – including pending applications - to the state upon program approval. At this point, the Corps will suspend processing of permit applications in waters identified under the state/tribal program. In theory, the §404 program authority is fully transferred to the state/tribe at a single point in time; at an agreed upon date following program approval, the state/tribal program is initiated and the Corps program is suspended. As a practical matter, the state and the Corps should agree on a schedule for program transfer that recognizes the practicality of action on nearly complete permit reviews by Corps staff, and completion of ongoing federal enforcement actions. In Michigan, the state administered a pilot program for several months prior to full assumption, under federal supervision, and permit files were transferred to the state during this period. States or tribes that have been actively administering a permit program under an (S)PGP may also find it somewhat simpler to transition to state permit processing. An outreach program – explaining the change in permit processing authorities – should be a significant component of the transition period, but is not required under the federal regulations.

Joint jurisdiction Given that a state or tribe may also continue to regulate tidal, coastal, or other waters where §404 jurisdiction is retained by the Corps, the state/tribal-Corps MOA may also include procedures for interagency coordination in such waters. This portion of the agreement may include provisions for a joint permit application process (retaining separate permitting), coordination of review to avoid conflicting permit requirements, coordination of mitigation banks and similar issues.

### Public Participation

One area of uncertainty, or in need of clarification, is what opportunities for public participation does a state/tribe need to provide for in an assumed §404 Program.

States/tribes must provide public notice of and comment on permit applications, draft general permits, potential major modifications of issued permits, public hearings, and issuance of an emergency permit. In addition, states/tribes must allow for and consider requests for public hearings. [40 CFR §233.32, §233.33]

With respect to enforcement matters, a state/tribe must provide for public participation in the State enforcement process by providing either:

1) Authority which allows for a citizen with an interest in or may be adversely affected by an action with a right of intervention in any civil or administrative action or,
2) Assuring that the state/tribal agency or enforcement authority will:
    a. Investigate and provide written responses to all citizen complaints submitted regarding states/tribal procedures
    b. Not oppose intervention by any citizen when allowed by statute, rule or regulation and
    c. Publish notice of and provide at least 30 days for public comment on any proposed settlement of an enforcement action. [40 CFR §233.41(e)]

In general, ASWM believes that third parties typically have greater ability to challenge a decision under a state/tribal §404 program because they maintain access to the federal courts for some purposes, while potentially gaining access to state/tribal civil or administrative processes, as well as informal interaction with the state or tribal agencies. However, this issue may need to be addressed on a case-by-case basis when a state/tribe is considering assumption.

### Tribal Issues

In addition to the statutory and regulatory requirements listed above (and at CWA §404 (g)-(l) and 40 CFR 233), tribes must meet a few additional conditions as a result of their unique status and relationship with the federal government.

- Eligibility Tribes seeking assumption must meet the eligibility requirements under §518 of the CWA (**40 CFR 233.60-62**). These include
    - The tribe is recognized by the Secretary of the Interior
    - The tribe has a governing body carrying out substantial governmental duties and powers
    - The functions to be exercised by the tribe pertain to the management and protection of water resources under their jurisdiction
    - The Administrator believes the tribe is capable of administering the §404 program in accordance with the act.
- Enforcement Authority In general, tribes must meet the same criteria for enforcement as states, however, when tribal enforcement authority does not exist or is precluded from asserting criminal enforcement authority (e.g., for actions against non--tribal members or fines over $5000), tribes need to refer the criminal enforcement matters to EPA and/or the Corps as outlined in the appropriate MOAs (**40 CFR 233.41(f)**).

It is recommended that the tribe work closely with EPA and the Corps early in their pursuit of §404 to identify waters under the tribe's jurisdiction as well as the tribal waters over which the Corps will retain §404 jurisdiction.

**Detailed timeline for review and approval of state/tribal application for §404 program assumption**

Procedures for the approval of a state or tribal program by EPA are detailed at **40 CFR §233.15**. This regulation details the 120 day review period that is defined in §404(h) of the Clean Water Act. Specifically:

**Day 1** **Date of receipt of a complete state/tribal program application.** Note: upon receipt of the application, EPA has **30 days** to determine whether the application is complete.

After determining that the state/tribal application is complete, the RA will publish notice of the application in the ***Federal Register.***

**Day 10** **Deadline for submittal of application to other federal agencies.** The EPA Regional Administrator (RA) will provide copies of the state or tribe's submission to the Corps, USFWS, and NMFS (both headquarters and regional offices).

**Day 30±** **Approximate time frame for public hearing.** The RA shall provide for a public hearing, within the state/tribe, not less than **30 days after** the notice is published in the ***Federal Register***.

**Day 75±** **Approximate time frame for public comment.** The ***Federal Register*** notice must provide a comment period of at least **45 days**.

**Day 90** **Deadline for comments to EPA from other federal agencies.**

**Day 120** **Deadline for EPA decision on the application.** Within 120 days of receipt of a complete application, the RA must either approve or disapprove the application, based on whether or not the state/tribal program fulfills the requirements of the CWA. The RA will also respond to comments received. The EPA Assistant Administrator for Water, the Office of General Counsel, and the Assistant Administrator for the Office of Enforcement and Compliance Assurance will provide concurrence on the decision.

If the RA approves the state/tribal program, s/he shall notify the state/tribe and the Corps of the decision, and publish notice in the ***Federal Register***. The state/tribal program will not become effective until publication of this notice or until the date specified in the *Federal Register.*

If the RA disapproves the state/tribal program application, the RA shall notify the state or tribe of the reasons for disapproval, and revisions needed to gain approval. **If the state or tribe submits a revised plan, the 120 day review process begins again.**

**Day 120+** The state/tribe and EPA may extend the review period by agreement.

## LEGAL AND TECHNICAL REFERENCES

**Federal law and regulations** may be found on line in standard legal references.

- Federal regulations: http://www.gpoaccess.gov/fr/index.html
- Library of Congress – legislative information: http://thomas.loc.gov/
- EPA laws and regulations: http://www.epa.gov/lawsregs/regulations/index.html

| **IMPORTANT LAWS AND REGULATIONS RELATED TO §404 PROGRAM ASSUMPTION** | |
|---|---|
| Clean Water Act, Section 404(g) – (l) | Legal authority for state/tribal assumption of the §404 program, and basic requirements |
| 40 CFR Part 230 | **Guidelines for the Specification of Disposal Sites for Dredged and Fill Material.** These are the 404 program Section (b)(1) Guidelines – the detailed definition of criteria for permit application review. A state/tribal program must provide a level of resource protection that is at least as stringent as these standards. Subpart J details mitigation requirements. |
| 40 CFR Part 232 | **§404 Program Definitions; Exempt Activities not Requiring §404 Permit.** Program definitions apply both the federal and state/tribal administered programs. State/tribal program exemptions cannot be broader than federal exemptions. |
| 40 CFR Part 233 | **§404 State Program Regulations** These regulations detail the requirements for approval of a state/tribal §404 program, program operation, federal oversight, and related issues. |
| Jurisdictional guidance memo<br><br>*Federal Register,* June 8, 2007, page 31824 | **EPA/Corps Memorandum Re: *Clean Water Act Jurisdiction Following the U.S. Supreme Court Decision in Rapanos v. United States"*** This June 5, 2007 provides guidance on determining the scope of federal jurisdiction over waters of the U.S. |
| Proposed new jurisdictional guidance<br><br>*Federal Register,* May 22, 2011 | **EPA and Army Corps of Engineers *Draft Guidance on Identifying Waters Protected by the Clean Water Act*** *[Released April 27, 2011 for public review and comment.]* |

## Links to helpful information

**Association of State Wetland Managers**

- 404 Assumption Web Pages: http://aswm.org/wetland-programs/s-404-assumption
- Descriptions of state programs**:** http://www.aswm.org/state-summaries
- Program funding**:** http://aswm.org/wetland-programs/funding

**Environmental Council of the States**

- General information: www.ecos.org

**Environmental Protection Agency – information on state assumption**

- State assumption: http://water.epa.gov/type/wetlands/outreach/fact23.cfm
- Funding for core state/tribal wetland programs**:** http://water.epa.gov/grants_funding/wetlands/cefintro.cfm#whatEPA 401 wiki
- Proposed Clean Water Act Guidance**:** http://water.epa.gov/lawsregs/guidance/wetlands/CWAwaters.cfm

**U.S. Army Corps of Engineers**

- Corps of Engineers regulatory information**:** http://www.usace.army.mil/CECW/Pages/cecwo_reg.aspx

**University of North Carolina – sustainable funding for wetland programs**

- http://www.efc.unc.edu/projects/wetlands/

## List of Acronyms and abbreviations

| | |
|---|---|
| ASWM | Association of State Wetland Managers |
| CFR | Code of Federal Regulations |
| Corps | U.S. Army Corps of Engineers |
| CWA | Federal Clean Water Act |
| CZMA | Coastal Zone Management Act |
| ECOS | Environmental Council of the States |
| EPA | U.S. Environmental Protection Agency |
| ESA | Federal Endangered Species Act |
| NEPA | National Environmental Protection Act |
| NMFS | National Marine Fisheries Service |
| NPDES | National Pollutant Discharge Elimination System |
| RA | Regional Administrator (of EPA) |
| (S)PGP | (State) Programmatic General Permit |
| SWS | Society of Wetland Scientists |
| USFWS | U.S. Fish and Wildlife Service |
| | |
| §401 | Section 401 of the Federal Clean Water Act |
| §404 | Section 404 of the Federal Clean Water Act |
| Section 10 | Section 10 of the Rivers and Harbors Act |

# APPENDIX F

## Corp's Narrative Description
## of the
## Section 10 RHA Navigable Waters of Virginia

NAVIGABLE WATERS OF THE UNITED STATES
(Section 10 of the Rivers and Harbors Act)

Revised March 5, 2010: It amends the old list to address certain waterways that are known to support interstate commerce (and/or are tidal) but that were not previously listed (Dismal Swamp and A&C Canals, North Landing River, Northwest River, and Back Bay).

By regulation, all tidal* waterbodies are considered to be navigable. In addition, the following rivers and streams in Virginia have had final determinations made of their navigability or non-navigability:

| WATERWAY | DETERMINATION | LIMITS | DATE |
|---|---|---|---|
| Blackwater Riv. (trib. of Nottoway) | Navigable | From its mouth to State Route 620 Bridge (River Mile 42.9) | 18 Aug 81 |
| Carter Run | Navigable | From confluence with Rapp. Riv. to Cliffs Mills (2.2 mi.) | 14 Aug 81 |
| Clinch River | Navigable | From Va. line to confl. w/ Indian Creek (Riv. Mi. 322.7) | 16 Feb 81 |
| Hazel Run | Navigable | From confl. w/ Rapp. Riv. to Castle Mills (19.8 mi.) | 14 Aug 81 |
| North Fork Holston River | Navigable | From Va. line to Rt. 16 @ Chatham Hill (Riv. Mi. 109) | 30 Nov 79 |
| Middle Fork Holston River | Navigable | From confl. w/ South Fork to Rt. 11 @ Seven Mile (Riv. Mi. 32.2) | 16 Feb 81 |
| South Fork Holston River | Navigable | From Va. line to Loves Mill Dam (Riv. Mi. 93.8) | 16 Feb 81 |
| Jackson River | Navigable | From its mouth to the confluence with Back Creek (River Mi. 55) | Feb 78 |
| Levisa Fork | Navigable | From Va. line to confl. w/ Dismal Creek (Riv. Mi. 151) | 1 Nov 77 |

| | | | |
|---|---|---|---|
| Maury River | Navigable | From its mouth to Cedar Grove (River Mi. 32.8) | 19 Nov 74 |
| Meherrin River | Non-Navigable | Entire portion in Virginia | 14 Aug 81 |
| New River | Navigable | Entire Virginia portion | N/A (Comb. of court case and FERC ruling) |
| North Anna River | Non-Navigable | Entire | 20 Mar 80 |
| Nottoway River | Navigable | From mouth to Route 634 Bridge (Riv. Mi. 46.9) | 18 Aug 81 |
| Pound River | Navigable | From Russell Fork to and incl. Flannagan Reservoir | 7 Nov 77 |
| Powell River | Navigable | From Va. line to confl.. w/ South Fork (Riv. Mi. 178.1) | 5 Feb 80 |
| North Fork Powell River | Navigable | From confl.. w/ Powell to Sandlick Bridge (R. M. 7.2) | 5 Feb 80 |
| Rappahannock River | Navigable | From mouth to Blackwell's Warehouse (53.9 mi. above Fredericksburg) | 14 Aug 81 |
| Rockfish River | Navigable | From confl. w/ James Riv. to Howardsville (0.6 mi.) | 13 Aug 81 |
| Russell Fork | Navigable | From Va. line to Russell Prater Creek (Riv. Mi. 24.6) (at town of Haysi) | 1 Nov 77 |

The following rivers and streams have been studied, but official determinations have not (yet) been made. Based on these studies, the following assumptions are used for administrative purposes:

| WATERWAY | ASSUMPTION | LIMIT |
|---|---|---|
| Appomattox River | Navigable | From confl. w/ James to Planters |

| | | |
|---|---|---|
| | | Town (132 mi., at end of Rt. 638 in Buck'ham Co., near App./P.E. Co. line |
| Banister River | Navigable | From Kerr Reservoir to Rt. 642 bridge @ Meadville |
| Blackwater River (trib. of Roanoke) | Navigable | From Smith Mountain Lake to a point approx. 1.25 mi. below N&W railroad bridge, located on USGS Redwood Quad |
| Catawba Creek (trib. of James) | Non-Navigable | Entire |
| County Line Creek (trib of Dan River) | Navigable | Entire portion in Va. |
| Cowpasture River | Navigable | From confl. w/ James to confl. w/ Simpson Creek (6 mi.) |
| Craig Creek | Navigable | From confl. w/ James to confl. w/ Johns Creek @ New Castle (48 mi.) |
| Dan River | Navigable | From Kerr Reservoir (Buggs Island Lake) throughout Va. except for upper reaches west of Martinsville |
| Deep Creek (Trib. of Appomattox) | Navigable | From confl. w/ Appomattox River, 5 mi. upstream to Rt. 153 bridge |
| Dunlap Creek (trib of James) | Non-Navigable | Entire |
| Hardware River | Navigable | From confl. w/ James to Rt. 20 bridge (19 mi.) |
| James River | Navigable | Entire |
| Mattaponi River | Navigable | From confl. w/ York River to Guinea Bridge (nearest existing landmark is Rt. 722 bridge @ Milford) |
| North and South Mayo Rivers | Non-Navigable | Entire Virginia portions |

(tribs. of Dan River)

| | | |
|---|---|---|
| Pamunkey River | Navigable | Entire |
| Pigg River (trib. of Roanoke) | Non-Navigable | Entire |
| Potomac River | Navigable | Entire Virginia portion |
| Potts Creek (trib. of James) | Non-Navigable | Entire |
| Rapidan River | Non-Navigable | Entire |
| Roanoke River (Staunton River) | Navigable | From Va. line to confl. of North and South Forks |
| North Fork Roanoke River | Navigable | From confl. w/ South Fork to confl. w/ Bradshaw Creek (2.8 mi.) |
| South Fork Roanoke River | Navigable | From confl. w/ North Fork to Rt. 11/460 bridge (2.4 mi.) |
| Seneca Creek | Navigable | From confl. w/ Roanoke to Rt. 633 bridge @ Marysville in Campbell Co. |
| Shenandoah River | Navigable | Entire Virginia portion |
| South Fork Shenandoah River | Navigable | From confl. w/ Shenandoah to confl. w/ South River @ Port Republic |
| Slate River (trib. of James) | Non-Navigable | Entire |
| Smith River | Navigable | From Va. line up to and including Philpott Reservoir |
| South Anna River | Non-Navigable | Entire |
| Tinker Creek | Navigable | From confl. w/ Roanoke to Rt. 460 bridge (1.8 mi.) |
| Tye River | Navigable | From confl. w/ James to Rt. 56/680 bridge @ Massies Mill (26.1 mi.) |

| | | |
|---|---|---|
| Willis River (trib. of James) | Non-Navigable | Entire |

The following waterbodies have not been officially declared navigable and have not been studied strictly for the purpose of determining their navigability. Based on their being parts of the Atlantic Intracoastal Waterway, and their apparent past and/or present usage in interstate commercial navigation, the following assumptions are used for administrative purposes:

| WATERWAY | ASSUMPTION | LIMIT |
|---|---|---|
| Dismal Swamp Canal | Navigable | Entire |
| Albemarle & Chesapeake Canal | Navigable | Entire |
| North Landing River | Navigable | Entire |

* Back Bay (Virginia Beach) and the Northwest River (Chesapeake) are coastal waterbodies that are considered navigable waters of the United States. Per 33 CFR 329.12(a)(2), their shoreward limit of jurisdiction (of Section 10 of the Rivers and Harbors Act) is “the line on the shore reached by the plane of mean (average) high water.” Since the precise elevation of mean high water is difficult to determine in these waterways due to the attenuation of lunar tides and the presence of wind tides, for administrative purposes it is assumed to be equal to the mean high water elevation of the nearby Atlantic Ocean (currently 0.92 feet (0.281 meters) NAVD 88). This assumption will also be used to determine the shoreward limit of Section 10 jurisdiction in tributaries of Back Bay and the Northwest River.

# APPENDIX G

## Stakeholders' Comments on the

## Final Draft Report

HUNTON& WILLIAMS

HUNTON & WILLIAMS LLP
RIVERFRONT PLAZA, EAST TOWER
951 EAST BYRD STREET
RICHMOND, VIRGINIA 23219-4074

TEL 804 • 788 • 8200
FAX 804 • 788 • 8218

ANDREA W. WORTZEL
DIRECT DIAL: 804 • 788 • 8425
EMAIL: awortzel@hunton.com

FILE NO: 54233.000002

November 14, 2012

**Via E-Mail**
**william.norris@deq.virginia.gov**

William Norris
Department of Environmental Quality
Office of Regulatory Affairs
P.O. Box 1105
Richmond, VA 23218

Re: Draft Study of the Costs and Benefits of
State Assumption of the Federal 404 Clean Water Act Permitting Program

Dear Bill:

I am writing on behalf of the Virginia Manufacturers Association ("VMA") in response to the request for comment on the Draft Study of the Costs and Benefits of State Assumption of the Federal 404 Clean Water Act Permitting Program, circulated by electronic mail on November 6, 2012. VMA has been represented on the study committee by Mark Davis.

As a general matter, VMA agrees with the conclusions of the report, and the summary of the discussions at the stakeholder meetings. At this point in time, the costs associated with DEQ assuming the 404 permitting program outweigh the benefits. The report should recognize that the identified benefits will only be achieved if the costs are fully addressed. None of the identified benefits will occur if adequate funding and training are not provided.

From VMA's perspective, the benefit of DEQ assuming responsibility for the 404 permitting process is a streamlined permitting process that ensures more timely permit issuance. A necessary component of this is having sufficient, adequately trained staff for the program. VMA is concerned that DEQ may have underestimated the cost of assumption because it did not fully consider the loss of Corps staff expertise and the level of training (including on-the-job experience) that may be necessary before that expertise is restored. VMA also worries that, in order to fund the new program, other high priority programs at DEQ may suffer.

HUNTON& WILLIAMS



If adequate funding is not provided, VMA is concerned that the costs of assumption of the program would be passed on to permittees. Industrial permittees have seen significant increases in permit fees. Passing on the costs to the regulated community is not an acceptable outcome of this process, especially when the stakeholder group was unable to identify any clear need to change or improve the current permitting process.

For all of these reasons, VMA agrees with the conclusions of DEQ's report, and would support an alternative approach to full assumption, such as the expansion of the State Programmatic General Permit program.

VMA appreciates the opportunity to participate on the stakeholder group, and to submit these comments.

Sincerely,

Andrea Wortzel

Andrea W. Wortzel

cc: VMA Water Subcommittee

## Norris, William (DEQ)

**From:** Matthews, Barry (VDH)
**Sent:** Wednesday, November 07, 2012 3:42 PM
**To:** Norris, William (DEQ)
**Subject:** RE: Draft of 404 Assumption Feasibility Study 2012

No comments from VDH-ODW.

Thanks

***Barry E. Matthews, P.G.***
Department of Health
James Madison Building
Office of Drinking Water, Room 621
Construction Assistance, Planning and Policy
109 Governor Street
Richmond, VA 23219
804 864-7515 (w)
804 864-7520 (fax)
barry.matthews@vdh.virginia.gov

**From:** Norris, William (DEQ)
**Sent:** Tuesday, November 06, 2012 5:32 PM
**To:** Norris, William (DEQ)
**Subject:** Draft of 404 Assumption Feasibility Study 2012
**Importance:** High

**TO: MEMBERS OF THE COSTS AND BENEFITS OF STATE ASSUMPTION OF THE FEDERAL 404 CLEAN WATER ACT PERMITTING PROGRAM STAKEHOLDER ADVISORY GROUP**

Attached for your review; consideration and comment is the "Draft of the 404 Assumption Feasibility Study 2012", prepared pursuant to House Joint Resolution 243.

Please provide your comments on this draft study document via return email or by mail to my attention at Virginia Department of Environmental Quality, Office of Regulatory Affairs, P.O. Box 1105, Richmond, VA 23218 no later than Close of Business on Wednesday , November 14, 2012.

Thanks you for your participation as a member of the stakeholder group and thank you in advance for your time and your comments on this draft document.

Please contact me if you have any questions.

Thanks,

Bill Norris

November 14, 2012

Mr. William Norris
Virginia Department of Environmental Quality
Office of Regulatory Affairs,
P.O. Box 1105
Richmond, VA 23218

Dear Mr. Norris,
The VAWP would like to thank the VDEQ for providing us with the opportunity to participate in the Stakeholder Advisory Group discussions regarding the study of the cost benefits of State Assumption of the 404 Program. We have reviewed the draft study report provided for our review on November 6th, 2012, and overall we find it to be generally well written and objective in tone. It also appears to relatively accurately reflect the content and context of the issues and concerns that were discussed during the workgroup meetings on June 21st and August 30th. One issue/concern that we feel is still in question is the issue of the study report's estimate of the cost of implementing and operating the program. Many of the stakeholder advisory group members felt that the study's estimates of the costs were underestimated, and may even be severely underestimated. It does not appear that there has been any substantive revision to the cost estimates since the initial draft estimates were provided. Underestimation of the start up and operating costs represents a serious concern because it affects many of the issues that were discussed throughout the Stakeholder advisory group meetings. It is very difficult to imagine that a program that costs the Corps $7.3 million per year to operate could be operated on less than half of that amount by the state. It also appears that the state is still assuming that qualified experienced staff could be hired (and retained) at salary levels that are well below the salary levels of equivalent positions at the Corps or in the private sector. The VAWP is also still concerned regarding the issue of stability and consistency of funding for the program. The draft study report does not provide any additional insight into how that might be achieved, but without dedicated funding, the program would be sure to face serious challenges.

Regardless of the cost estimate concerns, the VAWP generally concurs with the majority of the stakeholder advisory group's conclusions that the costs of state 404 Assumption significantly outweigh the potential benefits. It appears that current inefficiencies in the joint state and federal permitting process that may be driving some of the interest in a state 404 Program Assumption can likely be addressed through additional revisions to the state and Corps permitting processes at considerably less cost, and with far fewer potentially negative effects, than would be required to assume the program.

Again, we thank you for the opportunity to participate and comment.

Sincerely,

Robin L. Bedenbaugh

Robin Bedenbaugh
On Behalf of the Board of the Virginia Association of Wetland Professionals

Cc: VAWP Archives

## Norris, William (DEQ)

**From:** Chris Miller [cmiller@pecva.org]
**Sent:** Wednesday, November 14, 2012 5:03 PM
**To:** Norris, William (DEQ)
**Cc:** Holmes, Daniel; Bingol, Gem
**Subject:** PEC Comments on Draft 404 Assumption Feasibility Study

TO: William Norris at william.norris@deq.virginia.gov
RE: Draft 404 Assumption Feasibility Study 2012

The Piedmont Environmental Council appreciates the opportunity to provide comments on the 2012 Feasibility Study of the costs and benefits to Virginia for State Assumption of the Federal Section 404 Clean Water Act Permitting Program pursuant to House Joint Resolution 243.

We have had the honor of participating in the Section 404 Assumption Stakeholder Committee where we heard the many stakeholder perspectives on this issue. Our position is similar to that of the majority of stakeholders: The costs of assumption outweigh the benefits for Virginia. This is apparently the same reason that most states have not moved forward to take on this regulatory responsibility. We commend the report for outlining an estimate of the costs. We are concerned that Department of Environmental Quality has testified in Congress in support of assumption when it will result in a net increase in the costs to the Commonwealth at a time when there are additional cuts being made to DEQ's budget.

Furthermore, most stakeholders value the role of the Army Corps of Engineers and the expertise of its personnel. Concerns about the potential for over-lapping review between the Corps and DEQ are more focused on the need for coordination and timely review, which will still be an issue for most permits after assumption.

There are some important details that need more clarity in the final Study report so that lawmakers have adequate information with which to evaluate this issue in the coming session. This would include:

**A listing of all waters and adjoining wetlands that the Corps assumes to be navigable and would retain oversight authority--**
The full listing and map will help lawmakers see exactly which waters would be involved in assumption, as well as those areas where the Corps would retain jurisdiction. Since partial assumption is not possible, this continuing joint responsibility means that the State will expend significant time and money as well as the complexity of conforming legislative and regulatory authority for a relatively small subset of wetland areas.

**A more detailed explanation of the statutory changes to Virginia law required for assumption--**
Virginia must demonstrate that it has authority equivalent to Federal authority across the various elements of the program, which would involve many changes to the Virginia Code and to relevant regulations to demonstrate adequacy;

**A more complete analysis of additional state funding needed for wetlands assumption--**
This would specifically detail the cost of ensuring that resource and advisory agencies have what they need to provide appropriate support functions, per Page 71 of Appendix C. The current cost estimates appear to be limited to DEQ's costs.

Thank you again for this opportunity for input. We are glad to answer any questions.

Sincerely,

Christopher G. Miller
President
Piedmont Environmental Council

45 Horner Street
Warrenton, Va. 20186
540-347-2334

## Norris, William (DEQ)

**From:** Nicole Rovner [nrovner@TNC.ORG]
**Sent:** Friday, November 09, 2012 3:45 PM
**To:** Norris, William (DEQ)
**Subject:** RE: Draft of 404 Assumption Feasibility Study 2012

This report looks okay to us, Bill. Hope you're well.

**Nikki Rovner**
*Director of State Government Relations*

nrovner@tnc.org
(804) 644-5800 Ext. 121 (Office)
(804) 314-9234 (Mobile)

**nature.org**

**The Nature Conservancy**
**Virginia Chapter**

530 East Main Street
Suite 800
Richmond, VA 23219


**From:** Norris, William (DEQ) [mailto:William.Norris@deq.virginia.gov]
**Sent:** Tuesday, November 06, 2012 5:32 PM
**To:** Norris, William (DEQ)
**Subject:** Draft of 404 Assumption Feasibility Study 2012
**Importance:** High

**TO: MEMBERS OF THE COSTS AND BENEFITS OF STATE ASSUMPTION OF THE FEDERAL 404 CLEAN WATER ACT PERMITTING PROGRAM STAKEHOLDER ADVISORY GROUP**

Attached for your review; consideration and comment is the "Draft of the 404 Assumption Feasibility Study 2012", prepared pursuant to House Joint Resolution 243.

Please provide your comments on this draft study document via return email or by mail to my attention at Virginia Department of Environmental Quality, Office of Regulatory Affairs, P.O. Box 1105, Richmond, VA 23218 no later than Close of Business on Wednesday , November 14, 2012.

Thanks you for your participation as a member of the stakeholder group and thank you in advance for your time and your comments on this draft document.

Please contact me if you have any questions.

Thanks,

Bill Norris

## Norris, William (DEQ)

**From:** John Carlock [jcarlock@hrpdcva.gov]
**Sent:** Friday, November 16, 2012 1:02 PM
**To:** Norris, William (DEQ)
**Subject:** RE: Draft of 404 Assumption Feasibility Study 2012

Bill,
Thanks for your efforts to guide the Stakeholder Group and prepare this report. Based on my review of the report and the minutes of the two Stakeholder Group meetings, the report appears to be well-done and accurately reflect the discussions of the Group.
As I have expressed previously, I am not convinced that the benefits of 404 assumption by the Commonwealth outweigh the costs. My read of the report is that the Stakeholder Group, while noting a number of potential benefits associated with assumption, has the same view. I concur with the conclusion that further expansion and refinement of the SPGP may provide many of the benefits that are desired and might be achieved through assumption but at a lower cost. That would also retain many of the benefits identified by retention of the current system.
Again, I appreciate the opportunity to have participated, albeit remotely, in this important process. If you have any questions or if I can provide anything further, please give me a call.
John

**John M. Carlock, AICP**
**Deputy Executive Director**
Hampton Roads Planning District Commission
723 Woodlake Drive
Chesapeake, Virginia 23320
Phone: 757-420-8300 |fax: 757-523-4881
e-mail: jcarlock@hrpdcva.gov
www.hrpdcva.gov

---

**From:** Norris, William (DEQ) [mailto:William.Norris@deq.virginia.gov]
**Sent:** Tuesday, November 06, 2012 5:32 PM
**To:** Norris, William (DEQ)
**Subject:** Draft of 404 Assumption Feasibility Study 2012
**Importance:** High

**TO: MEMBERS OF THE COSTS AND BENEFITS OF STATE ASSUMPTION OF THE FEDERAL 404 CLEAN WATER ACT PERMITTING PROGRAM STAKEHOLDER ADVISORY GROUP**

Attached for your review; consideration and comment is the "Draft of the 404 Assumption Feasibility Study 2012", prepared pursuant to House Joint Resolution 243.

Please provide your comments on this draft study document via return email or by mail to my attention at Virginia Department of Environmental Quality, Office of Regulatory Affairs, P.O. Box 1105, Richmond, VA 23218 no later than Close of Business on Wednesday , November 14, 2012.

Thanks you for your participation as a member of the stakeholder group and thank you in advance for your time and your comments on this draft document.

Please contact me if you have any questions.

Thanks,

Bill Norris

## Norris, William (DEQ)

**From:** Mike Toalson [MLToalson@hbav.com]
**Sent:** Wednesday, November 07, 2012 12:08 PM
**To:** Norris, William (DEQ)
**Subject:** RE: Draft of 404 Assumption Feasibility Study 2012

Thanks Bill.

Michael L. Toalson
Chief Executive Officer
HBA of Virginia

---

**From:** Norris, William (DEQ) [mailto:William.Norris@deq.virginia.gov]
**Sent:** Tuesday, November 06, 2012 5:32 PM
**To:** Norris, William (DEQ)
**Subject:** Draft of 404 Assumption Feasibility Study 2012
**Importance:** High

**TO: MEMBERS OF THE COSTS AND BENEFITS OF STATE ASSUMPTION OF THE FEDERAL 404 CLEAN WATER ACT PERMITTING PROGRAM STAKEHOLDER ADVISORY GROUP**

Attached for your review; consideration and comment is the "Draft of the 404 Assumption Feasibility Study 2012", prepared pursuant to House Joint Resolution 243.

Please provide your comments on this draft study document via return email or by mail to my attention at Virginia Department of Environmental Quality, Office of Regulatory Affairs, P.O. Box 1105, Richmond, VA 23218 no later than Close of Business on Wednesday , November 14, 2012.

Thanks you for your participation as a member of the stakeholder group and thank you in advance for your time and your comments on this draft document.

Please contact me if you have any questions.

Thanks,

Bill Norris

November 13, 2012

Mr. William Norris
Virginia Department of Environmental Quality
Via Email: William.Norris@deq.virginia.gov

Reference: Proposed 404 Assumption

Dear Mr. Norris:

ECS Mid-Atlantic, LLC (ECS) appreciates the opportunity to provide you and your staff with our formal comments to the Study of the Costs and Benefits of State Assumption of the Federal Section 404 Clean Water Act Permitting Program as drafted by your office. The comments outlined and discussed herein are meant to supplement those items discussed during the two work sessions held earlier this year.

While the enclosed represents our concerns, we would welcome the opportunity to work cooperatively with DEQ on the proposed assumption.

There is an inherent issue with House Joint Resolution 243 (HJ 243) which is spring-boarded us into exploring DEQ's assumption of the 404 Permitting Program. This Resolution makes specific references to an issue encountered by a permit applicant and it seems that they were provided inadequate or incorrect advice by their consultant with regards to the specific issues surrounding their site. This does not represent a systemic issue with the structure and efficacy of the existing 404 Permitting Program, but moreover a private issue which should have been handled by the permit applicant and regulators.

The current 404 Permitting Program was discussed *ad nauseam* in Stakeholder Workgroup sessions held earlier this year. The resultant decision was that there are typically no issues with the efficacy of the General or Nationwide Permitting systems, but there should be some systemic changes made to the Individual Permitting system to increase efficiency, as these are often the most complicated and contentious types of permit applications. Based on the proposed assumption, there is nothing proposed to remedy the Individual Permitting system.

While there are certain benefits to DEQ's assumption of the 404 Permitting Program (Program), it is our opinion that the costs (both monetary and other) far outweigh the benefits. A significant unknown in this process is whether or not the Environmental Protection Agency (EPA) would approve Virginia's assumption of the Program. As discussed in the work sessions, this is a lengthy process which would require significant effort and time from DEQ personnel (and others) which could be focused elsewhere.

Of significant importance would be the loss of knowledge, both systemic and of the history of individual properties and technical expertise of the existing U.S. Army Corps of Engineers (USACE) staff.

As a consulting firm, one of ECS' primary concerns is the temporal delays which may be incurred if DEQ were to assume the Program. The transition to DEQ would be slow and painstaking and getting DEQ staff property equipped, trained and ready to efficiently review permit actions would take several years. At best, three years from now we have the same level of efficiency we have now. There is no guaranteed source of funding for this Assumption which gives us great pause for concern. As the Commonwealth is currently in an economic bind, it seems irresponsible to allocate approximately $3.1 million per year towards assuming a Program that already works effectively and efficiently. As discussed in the Stakeholder meetings, we feel that DEQ has grossly underestimated the fiscal costs of assumption of the Program by as much as 50% initially and thereafter. The training and equipment costs combined work out to be $1,243 per new employee which will not adequately cover half of the training necessary to qualify them to review wetland delineations in the field or permit applications that are submitted.

It is likely that DEQ assumption of the Program would lead to an increase in permit application fees to cover the costs of assumption which would cause an undue burden on permit applicants. Additionally, DEQ assumption could lead to new permit application fees where none currently exist (i.e.: Nationwide Permit Applications).

It is our opinion that DEQ would not be adequately funded or staffed to assume the Program which would lead to significant delays in obtaining permit approval. Further, the loss of knowledge from the existing USACE regulators would be a detriment to the regulated community. The amount of training and expertise necessary to effectively run this type of Program far exceeds that which DEQ is currently qualified to handle and would not be fully qualified to handle until many years from now.

ECS would welcome the opportunity to further discuss our comments on the proposed assumption of the Program along with those provided by others. We look forward to continued discussions with you and your staff. If you have any questions or would like additional information on the basis of our comments, please feel free to contact us at any time at 703-471-8400.

Sincerely,

**ECS MID-ATLANTIC, LLC**

Avi M. Sareen, PWS, PWD
Senior Wetland Scientist
ASareen@ecslimited.com

C:\Users\ASareen\Documents\DEQ Comments 11-13-12.doc

COMMONWEALTH of VIRGINIA

Douglas W. Domenech
Secretary of Natural Resources

**Department of Historic Resources**
2801 Kensington Avenue, Richmond, Virginia 23221

Kathleen S. Kilpatrick
Director

Tel: (804) 367-2323
Fax: (804) 367-2391
TDD: (804) 367-2386
www.dhr.virginia.gov

November 14, 2012

William K. Norris
Virginia Department of Environmental Quality
629 East Main Street
P.O. Box 1105
Richmond, VA 23218

**RE: Comments on *Study of the Costs and Benefits of State Assumption of the Federal §404 Clean Water Act Permitting Program* Draft Report**

Dear Mr. Norris:

Thank you for providing DHR with a draft of the report referenced above and affording us with another opportunity to provide our written comments. It is obvious from reading the report that a great deal of care and effort went into its preparation. The task of distilling the wide range of thoughts and comments received both during and after the summer stakeholder meetings into the current document must have been very challenging. Following our own reading of the draft, it is our feeling that this report provides a very accurate portrayal of the major discussion threads, the overall tone, and the conclusions reached during the stakeholder meetings. You and your very capable staff should be commended for these efforts.

With the draft study now available for review and comment, DHR would like to take this opportunity to restate and clarify a few of the points made in our original letter of September 17.

First, the U.S. Environmental Protection Agency's (EPA) approval of the Commonwealth of Virginia assuming the §404 permitting program is subject to Section 106 of the National Historic Preservation Act. The Advisory Council on Historic Preservation (ACHP), the federal agency with oversight of Section 106, has stated in the Preamble to its revised regulations governing the 106 process (Federal Register Vol. 69, No. 128) that:

> *…it is the opinion of the ACHP that the Federal agency approval and /or funding of such State delegated programs does require Section 106 compliance by the Federal agency, as such programs are "undertakings" receiving Federal approval and/or Federal funding. Accordingly, Federal agencies need to comply with their Section 106 responsibilities regarding such programs before an approval and/or funding decision on them. … Due to the inherent difficulties in prospectively foreseeing the effects of such programs on historic properties at the time of the program approval and/or funding, the ACHP believes that Section 106 compliance in those*

Administrative Services
10 Courthouse Ave.
Petersburg, VA 23803
Tel: (804) 862-6416
Fax: (804) 862-6196

Capital Region Office
2801 Kensington Ave.
Richmond, VA 23221
Tel: (804) 367-2323
Fax: (804) 367-2391

Tidewater Region Office
14415 Old Courthouse Way
2nd Floor
Newport News, VA 23608
Tel: (757) 886-2807
Fax: (757) 886-2808

Western Region Office
962 Kime Lane
Salem, VA 24153
Tel: (540) 387-5428
Fax: (540) 387-5446

Northern Region Office
5357 Main Street
P.O. Box 519
Stephens City, VA 22655
Tel: (540) 868-7029
Fax: (540) 868-7033

> *situations should be undertaken pursuant to a program alternative per 36 CFR §800.14. For example, that section of the regulations provides that "Programmatic Agreements" may be used…*

If assumption occurs, the Department of Environmental Quality (DEQ) would be taking the role of a federal agency within the Section 106 process. While Section 106 does not mandate preservation of historic properties, it does require the agency to give meaningful consideration to alternatives that would minimize or avoid impacts to historic properties. This consideration is accomplished through a process of consultation with the State Historic Preservation Office (SHPO: in Virginia, the Department of Historic Resources), Indian tribes, local governments, other consulting parties and the general public.

The DEQ would be required to meet the responsibilities of a federal agency under Section 106 as outlined in an authorizing programmatic agreement (PA). This PA must be developed through a public participation process involving the EPA, the Corps, the ACHP, DHR, and any other identified stakeholders. As stated in our earlier letter, DHR remains committed to assisting the DEQ in developing such an agreement.

Another point of clarification lies in the following statement found on Page 4 of the report. The statement reads, "Virginia's current State Programmatic General Permit (SPGP) has helped to reduce duplicative permitting processes. Virginia's SPGP has reduced regulatory duplication for projects that qualify for the SPGP, but there is still a "two-stop shopping" experience for the regulated community for projects that are beyond the SPGP thresholds of 1.0 acre of wetland impacts and 2000 linear feet of stream impacts." In practice, the identification of historic properties within a given SPGP project area also triggers the need for consultation with the Corps as well as the DEQ. Stipulation II within the current SPGP PA states that additional historic properties review and coordination is not necessary only if all of the following four criteria are met:

- The SHPO's online database indicates that there are no known historic resources or properties that might be eligible for the National Register of Historic Places (NRHP) are located within the project site; or previously identified historic resources that are located within the project area have been determined not eligible for NRHP by the SHPO; and
- The project area has been determined to not have a high probability to contain archaeological resources by the DEQ-Cultural Resources Specialist (DEQ CRS); and
- The SHPO's online database indicates that the project area is not located within the vicinity of any known historic properties that may be direct or indirectly affected by the undertaking; and
- The DEQ CRS, in consultation with the DEQ project manager, determines the project site is less than 20 acres.

As stated in DEQ's report to the Office of the Governor, given the lack of a viable and sustainable funding source, if wholesale assumption of the §404 permitting program is not feasible, expansion of the SPGP thresholds might prove to be a reasonable alternative. Under the stipulations of the current SPGP PA, as stated above, expansion of the SPGP thresholds could increase the potential for historic properties within the project area and, accordingly, increase the involvement of the Corps in the SPGP process. If expansion of the SPGP thresholds is the alternative chosen over full assumption, a viable solution may be to introduce, as many stakeholders have suggested, an online project tracking system which would help to improve coordination between project applicants, the DEQ, the Corps, and other interested regulatory agencies.

Finally, DHR would like to clarify a statement that appears in Appendix C (Section 9, Page 71). This section reads, in part, "DHR, DGIF, and DCR submitted comments to DEQ that they will need additional staff to handle the increased workload associated with §404 assumption." The narrative goes on to state that "DHR estimates that eleven (11) additional cultural resources staff is needed to handle the increased workload…". We wish to clarify here that DHR is recommending that DEQ take on an additional 11 employees in order handle the added responsibilities of cultural resource coordination with §404 assumption. This arrangement would be similar to that of the Virginia Department of Transportation's current cultural resources staff. If full assumption does occur, DHR may need to hire additional staff as well, depending on the increase of permit applications over current levels submitted for our review.

Once again, DHR appreciates the opportunity to provide our input as the DEQ concludes its §404 assumption investigations. As stated in our September letter, whatever the outcome of the process, DHR stands ready to be a collaborative partner with DEQ to develop a thorough and efficient program to protect the state's natural and cultural resources.

Sincerely,

Julie Langan, Director
Resource Services & Review

Administrative Services
10 Courthouse Ave.
Petersburg, VA 23803
Tel: (804) 862-6416
Fax: (804) 862-6196

Capital Region Office
2801 Kensington Ave.
Richmond, VA 23221
Tel: (804) 367-2323
Fax: (804) 367-2391

Tidewater Region Office
14415 Old Courthouse Way
2nd Floor
Newport News, VA 23608
Tel: (757) 886-2807
Fax: (757) 886-2808

Western Region Office
962 Kime Lane
Salem, VA 24153
Tel: (540) 387-5428
Fax: (540) 387-5446

Northern Region Office
5357 Main Street
P.O. Box 519
Stephens City, VA 22655
Tel: (540) 868-7029
Fax: (540) 868-7033

## Norris, William (DEQ)

**From:** Hypes, Rene (DCR)
**Sent:** Wednesday, November 07, 2012 9:03 AM
**To:** Norris, William (DEQ)
**Cc:** Smith, Thomas (DCR)
**Subject:** RE: Draft of 404 Assumption Feasibility Study 2012

Bill,

At a quick glance of the report, I want to clarify the estimate of staff and funding needed to address the projected workload increase with state assumption of the Federal 404 Clean Water Act Permitting Program was provided for the DCR-Division of Natural Heritage and not for the entire agency. If there is a need for overall agency numbers please let me know and I can try to provide them by Nov.14th.

René

S. Rene' Hypes
Project Review Coordinator
DCR-DNH
217 Governor Street
Richmond, Virginia 23219
804-371-2708 (phone)
804-371-2674 (fax)
rene.hypes@dcr.virginia.gov


**Conserving VA's Biodiversity through Inventory, Protection and Stewardship**
www.dcr.virginia.gov/natural_heritage
Virginia Natural Heritage Program on Facebook

---

**From:** Norris, William (DEQ)
**Sent:** Tuesday, November 06, 2012 5:32 PM
**To:** Norris, William (DEQ)
**Subject:** Draft of 404 Assumption Feasibility Study 2012
**Importance:** High

**TO: MEMBERS OF THE COSTS AND BENEFITS OF STATE ASSUMPTION OF THE FEDERAL 404 CLEAN WATER ACT PERMITTING PROGRAM STAKEHOLDER ADVISORY GROUP**

Attached for your review; consideration and comment is the "Draft of the 404 Assumption Feasibility Study 2012", prepared pursuant to House Joint Resolution 243.

Please provide your comments on this draft study document via return email or by mail to my attention at Virginia Department of Environmental Quality, Office of Regulatory Affairs, P.O. Box 1105, Richmond, VA 23218 no later than Close of Business on Wednesday , November 14, 2012.

Thanks you for your participation as a member of the stakeholder group and thank you in advance for your time and your comments on this draft document.

Please contact me if you have any questions.

Thanks,

Bill Norris

**Norris, William (DEQ)**

**From:** Walker, Tom NAO [William.T.Walker@usace.army.mil]
**Sent:** Wednesday, November 14, 2012 6:33 PM
**To:** Norris, William (DEQ)
**Subject:** RE: Draft of 404 Assumption Feasibility Study 2012 (UNCLASSIFIED)

Classification: UNCLASSIFIED
Caveats: NONE

Bill,

Following are a few technical comments.

1) According to CWA Section 404 part (g)(1), a state may administer its own program for discharges into all waters except traditionally navigable waters and their adjacent wetlands. In NJ and Mich. The Corps retains both RHA Section 10 and CWA Section 404 authority in these waters.

2) I, as a Corps representative, would be more appropriately listed in appendix A Under "Technical Support" rather than Stakeholder.

3) Top of Page 38 - Should read "In New Jersey, typically retains Section 404 authority on wetlands within 500 feet of traditionally navigable waters."

4) Through the document, consider referring to the Corps in a single manner. Currently use ACOE in some places and CORPS in other.

5) Page 54 in comment by "a representative from the Corps", Third sentence should read "The Clean Water Act states that the CORPS will continue to regulate..."

Thanks
Tom

-----Original Message-----
From: Norris, William (DEQ) [mailto:William.Norris@deq.virginia.gov]
Sent: Tuesday, November 06, 2012 5:32 PM
To: Norris, William (DEQ)
Subject: [WARNING: MESSAGE ENCRYPTED]Draft of 404 Assumption Feasibility Study 2012
Importance: High

TO: MEMBERS OF THE COSTS AND BENEFITS OF STATE ASSUMPTION OF THE FEDERAL 404 CLEAN WATER ACT PERMITTING PROGRAM STAKEHOLDER ADVISORY GROUP

Attached for your review; consideration and comment is the "Draft of the 404 Assumption Feasibility Study 2012", prepared pursuant to House Joint Resolution 243.

Please provide your comments on this draft study document via return email or by mail to my attention at Virginia Department of Environmental Quality, Office of Regulatory Affairs, P.O. Box 1105, Richmond, VA 23218 no later than Close of Business on Wednesday , November 14, 2012.

Thanks you for your participation as a member of the stakeholder group and thank you in advance for your time and your comments on this draft document.

Please contact me if you have any questions.

Thanks,

Bill Norris

Classification: UNCLASSIFIED
Caveats: NONE

## Norris, William (DEQ)

**From:** Ann Jennings - ext. 301 [AJennings@cbf.org]
**Sent:** Wednesday, November 14, 2012 3:45 PM
**To:** Norris, William (DEQ)
**Cc:** Ann Jennings - ext. 301
**Subject:** FW: Draft of 404 Assumption Feasibility Study 2012
**Attachments:** wetland assumption EPA role 2007 doc.pdf

**Importance:** High

Dear Bill,

On behalf of the Chesapeake Bay Foundation (CBF), I offer the following comments on the draft "Study of the Costs and Benefits of State Assumption of the Federal § 404 Clean Water Act Permitting Program" (Study). We appreciate the opportunity provided by the Department of Environmental Quality (DEQ) to participate in the stakeholder discussions and note that those discussions, overwhelmingly, concluded that state assumption is not the preferred alternative for managing an efficient and effective wetlands protection program.

To ensure that the Virginia General Assembly and the public are fully informed of the implications of state assumption, we believe additional detail in the final Study report is warranted. First, CBF recommends that the final Study report include a listing of all waters that the U.S. Army Corps of Engineers (Corps) determined or assumes to be navigable waters of the United States pursuant to Section 10 of the Rivers and Harbors Act. As discussed during the Study, for these waters and their adjoining wetlands, the Corps would retain oversight authority. The following link provides a listing of those waters: http://www.nao.usace.army.mil/Portals/31/docs/regulatory/guidance/section_10_determinations.pdf

Furthermore, CBF requests that DEQ include in the final Study report a more detailed explanation of statutory changes to Virginia law necessary for assumption of the federal § 404 Clean Water Act (CWA) Permitting Program. Attached to this email is a document that CBF recently located in our files; the document was provided to stakeholders reviewing the issue of assumption in 2007 at a DEQ meeting August 23, 2007. We cannot confirm at this time whether or not this is an exhaustive list of all necessary statutory changes so we recommend either updating the list or including it in the final Study report with an indication that the list was prepared in 2007.

CBF also recommends that the body of the Study report include a more complete picture of the additional state funding needed for wetlands assumption. The draft Study report includes detailed information on additional staffing and funding needs for DEQ; however, additional staffing and funding needs for resource and advisory agencies is provided only in an appendix. CBF requests that DEQ modify the final Study report to include the information found on Page 71 of Appendix C, regarding increased staffing needs at the Virginia Departments of Historic Resources, Conservation and Recreation, and Game and Inland Fisheries, in the body of the main Study report, rather than relegated it to an appendix.

Finally, CBF recommends that the report also reference, and include in an appendix, the detailed information provided at the end of this email, entitled "EPA'S Ongoing Oversight of the CWA § 404 Program after State Assumption." This regards the heightened role of the Environmental Protection Agency (EPA) in review of an assumed program, including oversight of regulatory matters and permit decisions under a state assumed program. While the draft Study report references this aspect of state assumption, it does not provide sufficient detail on the matter.

We thank you for this opportunity to review the draft Study report. If you have any questions regarding these recommendations, please contact me at (804) 780-1392.

Sincerely,

Ann F. Jennings
Virginia Executive Director
Chesapeake Bay Foundation
1108 East Main Street, Suite 1600
Richmond, VA 23219-3539
(804) 780-1392
ajennings@cbf.org

## EPA'S ONGOING OVERSIGHT OF THE CWA § 404 PROGRAM AFTER STATE ASSUMPTION

A state may assume control of the wetlands program under Clean Water Act (CWA) § 404, provided the state program meets specified requirements. After the program is transferred, EPA maintains close involvement in the state's administration of the program to ensure that it conforms to CWA requirements. Some of the aspects of ongoing EPA involvement are as follows:

**EPA must review and may object to all significant state permit actions. 40 CFR § 233.50**

- State must send EPA a copy of the public notice for any complete permit applications, a copy of any draft general permit, notice of every significant action taken by the State agency related to permit, and a copy of every issued permit.

- EPA provides these materials to the United States Army Corps of Engineers, the Fish and Wildlife Service, and the National Marine Fishery Service, which have 50 days within which to provide comments to the EPA. EPA has the final decision among these agencies on whether to comment, object or to require permit conditions

- If EPA concludes that the state's materials are not adequate to determine whether the permit application or draft general permit meets CWA requirements, EPA may require the state to forward the entire record of the state proceedings, or other information, including a supplemental application.

- EPA may provide comments, objections, or recommendations, and the actions that must be taken to eliminate any objections.

- The state may not issue any permit if EPA has given notice it intends to comment upon, object to, or make recommendations with respect to a permit application, draft general permit, and it may not issue the permit without having taken the steps required by the EPA to eliminate the objection (unless EPA withdraws its objection or requirement).

**State must provide annual reports to EPA. 40 CFR § 233.52**

- State must annually provide EPA a draft report evaluating the State's administration of its program, identifying problems, and making recommendations for resolution: assessing the State's permit program

on the State's regulated waters; identifying areas of particular concern; specifying the number and nature of permits issued, modified, and denied; the number of violations, enforcement actions, suspected unauthorized activities, actions taken; and other matters.

- The State must make the draft annual report available for public inspection.

- EPA must review the draft and provide comments, questions, and/or requests for additional evaluation and/or information

- The State must then incorporate and/or respond to EPA's comments, and transmit the final report to EPA.

- EPA must publish the notice of availability of the final annual report.

**EPA may withdrawal a nonconforming program. 40 CFR § 233.53**

- A state may voluntarily transfer program authorities to the EPA.

- EPA may withdraw program approval when a state program no longer complies with program requirements and the state fails to take corrective action. Such circumstances include the following:

    - The state's legal authority no longer meets federal requirements, including situations when the state fails to promulgate or enact necessary new authorities and any actions by a state legislature or court striking down or limiting necessary state authorities.

    - The state program fails to comply with federal program requirements, including by failing to issue permits, issuing nonconforming permits, failing to comply with public participation requirements, failing to act on violations of permits or other program requirements; failing to seek adequate enforcement penalties or to collect administrative fines when imposed, and failing to implement alternative enforcement methods approved by EPA.

---

**From:** Norris, William (DEQ) [mailto:William.Norris@deq.virginia.gov]
**Sent:** Tuesday, November 06, 2012 5:32 PM
**To:** Norris, William (DEQ)
**Subject:** Draft of 404 Assumption Feasibility Study 2012
**Importance:** High

**TO: MEMBERS OF THE COSTS AND BENEFITS OF STATE ASSUMPTION OF THE FEDERAL 404 CLEAN WATER ACT PERMITTING PROGRAM STAKEHOLDER ADVISORY GROUP**

Attached for your review; consideration and comment is the "Draft of the 404 Assumption Feasibility Study 2012", prepared pursuant to House Joint Resolution 243.

Please provide your comments on this draft study document via return email or by mail to my attention at Virginia Department of Environmental Quality, Office of Regulatory Affairs, P.O. Box 1105, Richmond, VA 23218 no later than Close of Business on Wednesday , November 14, 2012.

Thanks you for your participation as a member of the stakeholder group and thank you in advance for your time and your comments on this draft document.

Please contact me if you have any questions.

Thanks,

Bill Norris

Southern Environmental Law Center

201 West Main Street, Suite 14
Charlottesville, VA 22902-5065
434-977-4090
Fax 434-977-1483
SouthernEnvironment.org

14 November 2012

William K. Norris, Environmental Specialist II
Regulatory Analyst, Office of Regulatory Affairs
VA Department of Environmental Quality
629 E. Main Street
Richmond, VA 23219

Re: SELC Comments on DEQ Revised Draft Task Force Report on Wetlands Assumption

Dear Mr. Norris,

Thank you for the opportunity to comment on the revised draft report regarding the costs and benefits of assuming the § 404 Clean Water Act program and to participate as a stakeholder representative on the task force.

**Section 404 Assumption Is Not Needed**

Page 3 of the draft states:

> "Two overarching themes emerged from the Stakeholder Group meetings. One theme is that the regulated community is largely content with the existing federal and State wetland programmatic structure, aside from some minor improvements that were suggested. Secondly, when polled, the majority of the members of the Stakeholder Group believed that the costs of assuming the § 404 program outweigh the potential benefits of assumption."

The two statements quoted above should appear at the very beginning of the report (but with some modification to the second sentence) since these statements are critical to any assessment of the merits of pursuing assumption. That these statements currently appear after the recitation of the general or theoretical benefits of assumption creates the mistaken impression that assumption is needed or desired in Virginia. The relevant inquiry is how the 404 program is actually functioning in Virginia, and the statements on page 3 confirm that the current system is working well in Virginia from industry's perspective.

As noted, the second sentence needs to be modified because it is inaccurate to state that the "*majority*" believed the costs outweighed the benefits. Rather, at the end of the last stakeholder meeting, only *one* person indicated that the benefits *could* outweigh the costs. Further, he added the significant caveat that whether this would be the case would depend on, among other things, full funding of the program, which he did not believe would occur. Thus, at

a minimum, the sentence should be revised to state that all but one of the representatives believed that the costs outweighed the benefits.[1]

On page 3, the report correctly indicates that some stakeholders believed that the only acceptable assumption scenario would be in the event significant improvements, albeit largely unidentified, were made in every aspect of the program. However, DEQ's further assertion that it "believes these goals could be met with an adequately funded State program" is meaningless. No "goals" have been defined and none of the stakeholders believed that adequate funding is realistic for a transfer of the status quo, let alone for "significant improvements."

On page 8, DEQ states that "some" stakeholder representatives "expressed concern about what they perceived as a lack of 'need' for State assumption." Use of the word "some" suggests that those who expressed this view were in the minority. In fact the lack of need was a consistent theme underlying industry's perspective that the program is working well in all but a very small percentage of the applications.

*Costs of Assumption Are Understated*

Page 3 of the report indicates the estimated cost to DEQ of assumption. DEQ in Appendix B refers to cost estimates provided by the Department of Historic Resources, Department of Conservation and Recreation (DCR), and Department of Game and Inland Fisheries (App. B at 71). However, DEQ expressly states in the Appendix that these figures were *not* included in the cost estimates for assumption presented in the report (page 72). This is a major shortcoming in DEQ's analysis, rendering the cost estimates set forth on page 3 and elsewhere in the report incomplete and misleading. Instead, the costs of assumption to other agencies should be set forth prominently in the body of the report. We also continue to believe, based on the views of industry representatives, that DEQ has underestimated the increased costs DEQ would incur, as we stated in our 17 September 2012 comments on the initial draft report.

On page 3 of the report, DEQ admits that financing the program through fee funding "above the current level is not viable." Dave Paylor acknowledged during the previous assumption study in 2006-07, even before the economic downturn in 2008, that DEQ did not have sufficient funds then to monitor for compliance; likewise DEQ acknowledged at the stakeholder meeting on 30 August that it continues to be insufficiently funded to carry out its responsibilities for compliance and enforcement, two elements critical to the protection of our natural resources.

Two additional developments since the last stakeholder meeting in August underscore the fact that it is completely unrealistic to count on adequate funding from the General Assembly for assumption. First, the 8 November 2012 memorandum from the Governor's Office to agency heads acknowledges the "immense pressure on the Commonwealth's finances," and, as a result, directs agencies heads to prepare a savings strategy for FY 2014 to cut 4% of each agency's legislative general fund appropriation. Second, the recent recommendation from the Secretary of

[1] The report indicates that 4 people needed more information. I do not recall anyone making this statement during the polling at the second meeting. Regardless, the report should reflect that only one stakeholder member indicated, with significant caveats, that benefits might outweigh the costs.

Natural Resources for stormwater authority to be transferred from DCR to DEQ will also absorb additional DEQ resources. As noted in our earlier comments, without adequate and consistent funding, any perceived benefits to industry from assumption would be nullified. More important, without sufficient funding, DEQ's ability to protect the resources would also be significantly diminished without adequate funding. DEQ should acknowledge more prominently in the report these fundamental consequences.[2]

The draft report also fails to adequately account for the loss of the expertise and knowledge of the Corps staff, characterizing such loss as "short-term." (Page 1). The loss of their expertise, which has built up over decades, would continue to be felt over a much longer period than just the "short term."

*Benefits of Assumption Are Overstated*

The statement on page 1 that assumption provides a way for States to "realize enhanced water resource protection" is also not based on the experiences here in Virginia. Virginia's non-tidal wetlands law, in covering "isolated" wetlands, is broader than the jurisdictional reach of § 404. In such instances, Virginia's program does offer enhanced resource protection. However, Virginia's non-tidal wetlands program will remain in place whether or not assumption is pursued.

On page 6, the draft report refers to perceived benefits of assumption set forth in HJ 243. However, as was discussed in the stakeholder meetings, these perceptions do not reflect reality. Significant benefits to industry, such as streamlining the process, and improved coordination and communication with the Corps, have already been achieved with the 2007 changes to the program. The broadened SPGP program eliminated duplication for projects impacting up to an acre of wetlands, contributing to overall industry satisfaction with the dual permitting program.

It is also worth noting that the primary focus of the resolution was on potential benefits for industry and not enhanced resource protection. In addition, the report (as well as discussions at the stakeholder meetings) repeatedly refers to the notion of "one-stop shopping or permitting." This ingrained terminology creates the unfortunate perception that the main priority is to issue permits and serve the "regulated community," with protection of the resource as a secondary objective. As DEQ notes in the draft report (page 4), the fundamental objective of the Clean Water Act "is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." The report should include a section acknowledging and affirming the substantial benefits for resource protection that flow from the dual permitting program.

*Continued Role of the Corps and EPA in Wetlands Permitting and Protection*

The draft acknowledges that the Corps would still have authority under Section 10 of the Rivers and Harbors Act over navigable waters and adjacent wetlands, and that EPA would have continued oversight over section 404 permits. The report should elaborate on these points to

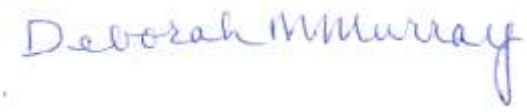
[2] The draft report refers on two occasions to a remark that resource agencies are "woefully underfunded." This suggests that such view was limited to one or two of the stakeholder representatives; rather the facts, as represented by DEQ itself, show consistent underfunding. The situation can only be exacerbated with the potential budget cuts.

provide a clearer picture of what assumption would and would not do. With respect to the Corps, the report should include information such as a map showing the geographic overlap of the two provisions, or a list of those waters that the Corps has determined or assumed to be covered under Section 10 of the Rivers and Harbors Act. As additional information, the U.S. Fish and Wildlife Service's report on the National Wetlands Inventory for wetlands from Maine to Virginia indicates that Virginia and Maryland rank at the top of the list for numbers tidal wetland acres because of the Chesapeake Bay and its tidal wetlands. See U.S. Fish and Wildlife Service: Wetlands of the Northeast: Results of the National Wetlands Inventory (April 2010), available at http://library.fws.gov/Wetlands/NEWetlands_Final_Report.pdf. This overlap in jurisdiction under sections 404 of the Clean Water Act and section 10 of the Rivers and Harbors Act means that assumption cannot eliminate the need for both state and federal authorities for a significant amount of wetlands (especially in the coastal plain).

EPA will also retain significant oversight of section 404 permit issuance if assumption were to occur. The report should make clear the scope and breadth of such authority. For example, with the exception of those categories for which EPA has waived review, all permits must be submitted to EPA. EPA may object to a permit if EPA determines that the proposed permit is the subject of an interstate dispute or does not comply with the Clean Water Act or the binding § 404(b)(1) Guidelines. 40 C.F.R. § 233.50 (e). If EPA objects to a permit, DEQ may not issue the permit unless EPA withdraws its objection. In addition, EPA cannot waive review for certain categories of discharges, including, among others, discharge with reasonable potential for affecting endangered or threatened species as determined by the U.S. Fish and Wildlife Service. *See* 40 C.F.R. § 233.51(b).

Finally, the report should elaborate on the numerous legislative changes that would be necessary for Virginia to assume the program. During the last study of assumption in 2006-07, DEQ prepared a document listing the statutory changes to make Virginia law comparable to federal law for purposed of § 404 assumption. Such document, as amended if necessary, should be included as a attachment to the report.

Sincerely yours,



Deborah M. Murray
Senior Attorney

# Statutory Changes to Make Virginia Law Comparable to Federal Law for Purposes of Assumption of the § 404 Permitting Program

Under the Clean Water Act, in order for a state to assume the § 404 permitting program, its law must be comparable to federal law. EPA interprets this to mean that the state law must be at least as stringent in every respect as federal law. The following summarizes key issues identified by EPA that *may* need to be addressed to make Virginia law comparable. The following is not the final list of regulatory and statutory amendments that may be required to assume the § 404 permitting program. It should be noted that the Virginia Water Protection Program Statute will be recodified into a new article effective July 1, 2007 per HB2539. While the code citations will change, the substance of the code will not.

- Amend § 62.1-44.15:5.D and regulations to delete exemptions that are not part of the federal exemptions under the Clean Water Act, including: regulation over impacts to tidal wetlands under the Virginia Marine Resource Commission's jurisdiction, exemptions to septic tank discharges under the Virginia Department of Health's jurisdiction, impacts to isolated wetlands of minimal ecological value, normal residential gardening, lawn and landscape maintenance, and other similar activities which are incidental to an occupant's ongoing residential use of property and of minimal ecological impact. (NOTE: these exemptions can be replaced by general permits to achieve the same result.)

- Amend the code and regulations to include a prohibition to issuing permits if the discharge of dredged or fill material will violate (a) the 404(b)(1) guidelines promulgated by EPA, (b) other states' water quality standards, (c) the Endangered Species Act, and (d) the Historic Resources Act. (NOTE: This is consistent with how the program is currently implemented. Virginia's regulations already require the use of the 404(b)(1) guidelines. The determination of compliance with the federal Acts listed would remain with the federal agencies currently charged with administering these programs.)

- Amend the code and regulations to more specifically reference the 404(b)(1) guideline provisions, including the rebuttal presumption that upland alternative sites exist.

- Ensure that permit issuance timelines allow time for federal review if needed for the Endangered Species Act and Historic Resources Act.

- Require the State Water Control Board to include information on the evaluation factors for permit issuance as part of the public notice.

- Add definitions of "noxious and deleterious substances" and "single and complete project" to the regulations.

- Amend § 62.1-44.29 to allow for citizen suits to enforce the assumed 404 permitting program.

- Amend § 62.1-44.15 to conform to federal enforcement Clean Water Act enforcement authorities. This may include deleting limitations on use of administrative penalty authority,

clarification that the administrative enforcement authority under (8a) and (8b) is not limited to present violations (it can include past violations), and including opportunity for the public to participate in administrative penalty cases.

- Amend criminal penalty provisions for knowing criminal violations to make the penalty double that of negligent criminal violations under § 62.1-44.32(b). Currently, the maximum monetary penalty for a negligent violation $32,500 and the maximum monetary penalty for a knowing violation is $50,000.