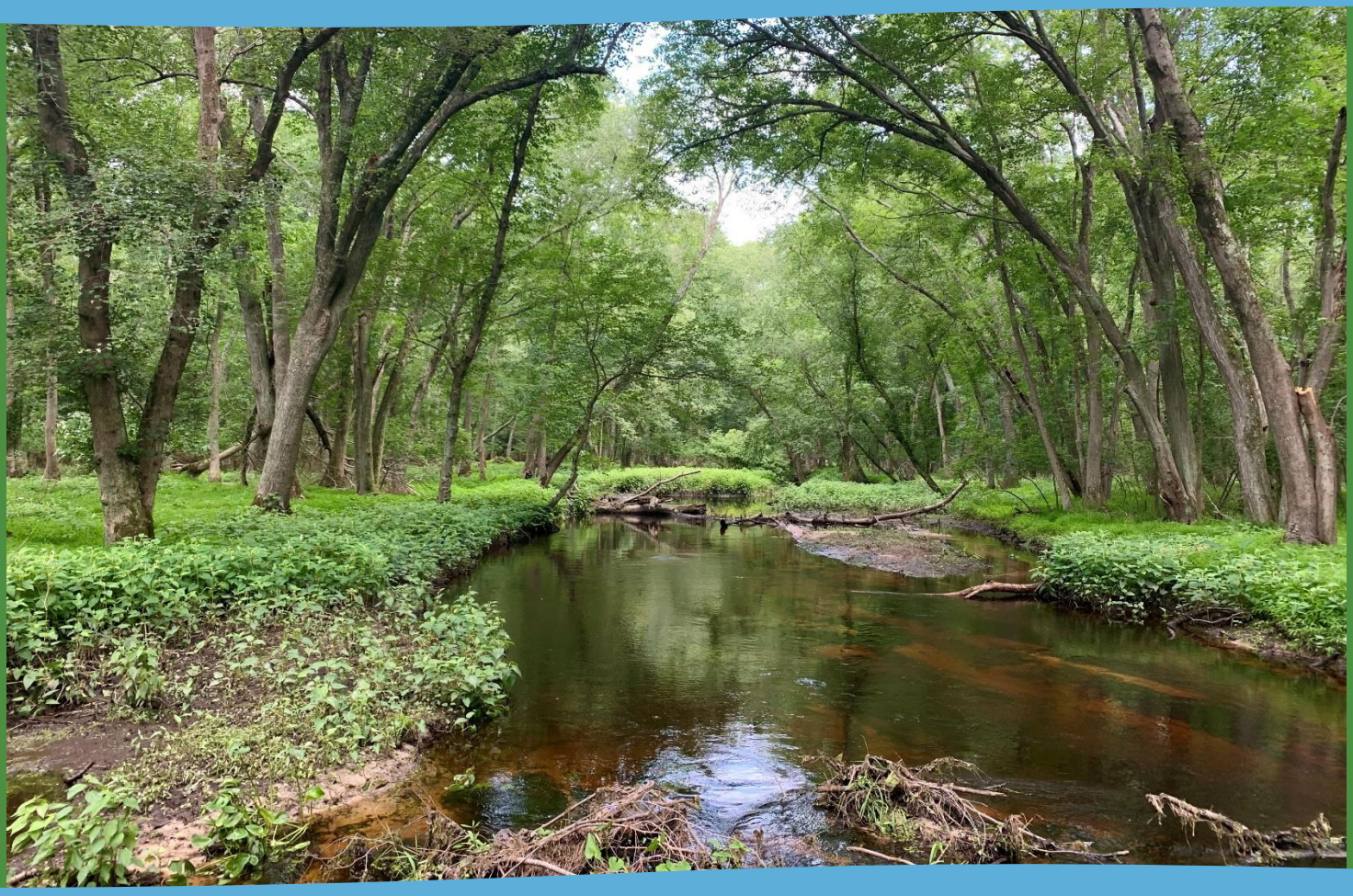

Options for a Nontidal Wetland Permitting Program

SJR 2 – Report to the Governor and Legislature
Prepared by DNREC

DELAWARE DEPARTMENT OF
NATURAL RESOURCES AND
ENVIRONMENTAL CONTROL

September 30, 2022
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STATE OF DELAWARE
DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL
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The Honorable John Carney, Governor of Delaware
Honorable Members of the 151st Delaware General Assembly
411 Legislative Ave.
Dover, DE 19901

Dear Governor Carney and Members of the 151st Delaware General Assembly:

The Delaware Department of Natural Resources and Environmental Control (DNREC) is committed to managing Delaware's valuable natural resources in the most effective and efficient way possible, while also meeting the needs of Delaware's citizens.

As directed in Senate Joint Resolution 2, Senate Amendment 1 of the 151st General Assembly, DNREC completed an evaluation of the fiscal, administrative, and legal requirements for developing a nontidal wetland permitting program and to provide options for your consideration. There are many options and details to consider when determining the best path forward. Many of those choices are difficult to evaluate given the uncertainty at the federal level of wetland regulation. DNREC staff used relevant information and put thoughtful effort into the content presented herein.

DNREC presents this report for your review and consideration. We look forward to future conversations on this topic as we decide on the appropriate path forward. Thank you for your interest as we consider the nontidal wetland permitting program review.

If you have any questions, please contact me at (302) 739-9000.

Sincerely,

Shawn M. Garvin
Secretary

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Executive Summary

Wetlands make up nearly 25% of Delaware's land area and over half of those are freshwater, dominated by forested wetlands. Despite efforts to increase understanding and value for wetlands, thousands of acres of nontidal wetlands have been destroyed by humans over the last several decades. Federal oversight has not been able to combat the intense pressures on wetlands and a state-level nontidal wetland program is needed.

In June 2021 Senate Joint Resolution 2, Senate Amendment 1 of the 151st General Assembly encouraged steps in establishing a state nontidal wetland permitting program. This resolution directed DNREC to investigate the options, requirements, and details involved in establishing such a program. It also directed DNREC to reach out to federal counterparts to engage in conversations related to the process and coordination needed. Lastly, DNREC was asked to compile a report detailing all pertinent information needed to evaluate options for a program, including DNREC's options for a preferred path forward.

Historically, several previous attempts at developing a nontidal wetland program have been made. Between 1988 and 2014, five attempts to better conserve and protect freshwater wetlands, sometimes isolated wetlands specifically, have been made by various parties. These attempts included a Governor's Executive Order, multiple Senate Bills, a House Bill, a partner effort, a roundtable, and an advisory committee. These attempts progressed to varying stages but were not successful, often due to opposition by select stakeholders, lack of support by legislators, or lack of passing committee votes. However, each of these efforts reiterated the interest in and need for Delaware to consider a nontidal wetland program.

In Delaware, the state regulates activities in tidal wetlands and nontidal wetlands that are 400 or more contiguous acres under the Delaware Wetlands Act (7 Del. Code, Chapter 66) and the Wetlands Regulations (7 DE Admin. Code 7502). The federal Army Corps of Engineers (Corps) regulates nontidal wetlands through Clean Water Act Section 404. There are various permit types at both the federal and state level based on the activity, degree of impact, and wetland type. In addition, Delaware uses its authority under CWA Section 401 to certify Section 404 permits and Section 10 permits by the Corps and utilizes their general water quality standards to ensure compliance with State Surface Water Quality Standards. Under the Federal Consistency program, the Delaware Coastal Program reviews projects for consistency with state coastal policies.

Over the past two decades, multiple legal challenges in lower courts and decisions by the Supreme Court, including the pending *Sackett vs. EPA* case, as well as federal administration changes over time, have created continuous ambiguity in federal jurisdiction over nontidal wetlands under the Clean Water Act (CWA). The definition of what constitutes Waters of the United States (WOTUS) has changed considerably leading to wetlands and streams having varying protection. This results in lack of consistency and confusion by landowners and the regulated public. Additionally, the amount of federal personnel for permitting and enforcement in Delaware has been inconsistent in past years. Collectively, these issues have resulted in

inadequate protection of nontidal wetlands leading to loss of acreage and the valuable natural functions wetlands provide.

Delaware is the only state in the mid-Atlantic region without a state-level nontidal wetland regulatory program. This leaves Delaware landowners at the mercy of the everchanging bureaucracy at the federal level and without state autonomy in establishing how nontidal wetlands should be protected as valuable assets that belong to the people of Delaware.

Several options exist for establishing a comprehensive wetland permitting program for Delaware that incorporates both the existing tidal wetlands program and the needed nontidal program in one more streamlined process. Each option varies in what resources and activities it covers, and whether it operates with full state authority, as a surrogate to the Corps, or a combination of the two. One option for Delaware is to take full assumption of Section 404 to establish a complete wetland program (tidal and nontidal) that uses the federal definition of wetlands.

Secondly, Delaware could administer the federal program as it is for the Corps through State Programmatic General Permits (SPGPs). Third, Delaware could let the Corps continue to run their program while the state creates a small program to cover just isolated federally unregulated wetlands omitted from the federal definition. Lastly, Delaware could adopt a combination program with full federal coverage through SPGPs or Assumption and run a program to fill the unregulated federal coverage gaps.

Staffing requirements and operational costs are an important component in the development process. Estimated salaries and associated expenses need to be considered against available funding to achieve an effective and sustainable program. Detailed salary estimates for a nontidal wetland program that includes federal and federally unregulated wetlands are provided. An estimate of 15 new full-time staff in various roles, including fringe benefits, will cost $898,900 per year. In addition, this analysis identified $200,000 in additional annual operation costs including legal consultation and overhead expenses. These estimates can be adjusted as needed to properly reflect the scope of a potential program.

In addition to the expense of program staff, it is important to consider potential program income generated from permit fees. Revenue from permits vary widely among other states and can be tailored to suit the program's needs. Compared to ten other states, Delaware's current tidal wetland permit fees rank below average. Although total program support using fee generated revenue is highly unlikely, it highlights the possibility of supporting ⅓ to ½ of program costs in addition to general funds for the remaining costs.

After a review of Delaware's nontidal wetland resources, the various program options and requirements, a hypothetical budget, and examples provided from other states around the country, DNREC is considering a wetland permit program that combines SPGPs and a supplemental federally unregulated wetland program. Under this scenario, Delaware will benefit from strengthened wetland protection and efficiencies by administering the federal program without the process of full assumption, in addition to filling critical regulatory gaps with a small component for unregulated wetlands. Under this scenario, Delaware will host a comprehensive wetland program offering streamlined service, reduced hassle, and less confusion with users. A

state program that covers all tidal and nontidal wetlands makes the most efficient use of staffing and provides more consistency with permittees.

Introduction

Wetlands in Delaware

As of 2017, Delaware had 296,351 acres of wetlands, making up nearly 25% of the state's land area. Just over half of Delaware's wetlands are freshwater and 80% of those are forested. This highlights the magnitude of Delaware's wetland resources and importance of effective regulation and management. The terms nontidal and freshwater are generally interchangeable within this report.

Springtime open water in a coastal plain isolated pond in Kent County.

Unfortunately, depending on the current federal definition, roughly 30,000 acres of valuable freshwater wetlands do not fall within federal jurisdiction, leaving them vulnerable to impacts and direct loss. In addition to the importance of Delaware's wetlands omitted from jurisdiction, federal oversight has been historically inconsistent due to staffing resources and changing jurisdiction.

Over the last several decades, DNREC has cataloged and documented the continued loss of regulated and unregulated wetlands across the state for various reasons, nearly all being human driven. Land use decisions at the local level have not stemmed activities in the areas under the most demand. Despite efforts to increase voluntary conservation and minimize impacts, wetland resources face continued pressure from many angles in Delaware.

Context of This Report

This report prepared for the Delaware Governor and General Assembly is the deliverable by the Department of Natural Resources and Environmental Control (DNREC) as directed by Senate Joint Resolution 2 with Senate Amendment 1 (hereinafter SJR2) (Appendix A) of the 151st General Assembly (June 2021). More specifically, SJR2 directed DNREC to begin coordination with federal agencies to identify the necessary structure for a state nontidal wetland program for the purpose of shifting permitting authority from the federal level to the state. The primary federal agencies are the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps), but there are also roles by the U.S. Fish and Wildlife Service (USFWS) and the National Oceanic and Atmospheric Administration (NOAA). DNREC was also directed to identify the administrative, fiscal, and legal requirements to support a state program. This report

identifies steps and resources necessary for establishing a Delaware nontidal wetland regulatory program and gives options for consideration.

In response to the directive given in the SJR2, DNREC formed a small work group to carry out the necessary work. Comprised of staff from the Office of the Secretary including the Secretary and Deputy Secretary, Division of Watershed Stewardship, and Division of Water, this work group met several times over the span of a year to report on research, discuss financial, operating, and legal logistics, and summarize options. In addition, the work group reached out to federal staff at the EPA and Corps to make exploratory intentions known, gather useful program information, and clarify the potential steps and requirements to take on a nontidal wetland program.

History/Other Legislative Attempts

Ferns in a forested headwater flat wetland in Delaware.

There have been several previous efforts to support better conservation and protection of freshwater wetlands in Delaware. In 1988, Governor Castle signed Executive Order 56 which required all state agencies to minimize adverse impacts to freshwater wetlands, to conserve and enhance wetland functions, avoid undertaking or providing financial assistance for construction located in freshwater wetlands or that result in adverse impacts, and to seek all practicable alternatives to projects that have potential impacts. Executive Order 56 also established a Freshwater Wetlands Roundtable to develop workable definitions for freshwater wetlands, and to recommend methods of using conservation programs to protect freshwater wetlands on private lands including financial ramifications to the state's budget. The Freshwater Wetlands Roundtable, which included several participants who would later serve on the Delaware Wetlands Advisory Committee (2013-2014), delivered a report to Governor Castle in 1989 with comprehensive recommendations. This effort increased the overall knowledge of the importance of wetlands and the need to protect and conserve.

Building on the work of the Freshwater Wetlands Roundtable, there were attempts to pass a Freshwater Wetlands Act, referenced here as SB248, in 1992 and 1993. SB248 passed in the Senate in 1993 but was not introduced for a vote in the House. This was the first significant effort that elevated the need for nontidal wetland protection in Delaware and raised awareness among legislators.

In 2002, in reaction to federal legal decisions to lessen jurisdiction, an effort was put forth by the Delaware House to pass a bill to amend Title 7, Chapter 66 of the Delaware Code, referenced as HS 1 for HB No. 340). This bill focused on isolated wetlands not jurisdictional at the federal level. The bill did not receive a House floor vote. This effort aided in the understanding there are valuable wetlands in Delaware that are not regulated by the existing federal program with the intent to close this gap.

Further attention by resource conservation interests led to a bill drafted by Dr. Jerry Kauffman, Director of the Water Resources Center (formerly Water Resources Agency) at the University of Delaware, titled Freshwater Wetlands Act based on New Jersey's wetland law. There was interest from a General Assembly member in the Inland Bays region and the draft bill was discussed but set aside. More conservation organizations have since supported development of a comprehensive wetland protection program in Delaware.

In reaction to increased DNREC involvement in flooding complaints and information on prolonged wetland degradation, DNREC Secretary Collin O'Mara agreed with legislators to engage a broad group of stakeholders using a committee approach supported through legislative action. Senate Bill 78 authorized the formation of the Delaware Wetlands Advisory Committee (2013-2014). The purpose of SB78 was to promote public health, safety, and welfare through conservation and restoration of nontidal wetlands which provide significant public value and critical ecological functions through the mitigation and prevention of flood damage, provision of wildlife habitat, removal of pollutants from water resources, and reduction in costs for governments, residents, and businesses that result when wetlands are degraded.

The Committee met 11 times and considered information shared on wetland ecology and detailing Delaware's wetland resources, understanding past wetland legislative efforts, reviewing current state and federal permitting procedures, accounting for gaps in wetland tracking, understanding perspectives from the permitted community, pursuing opportunities to reinvigorate existing programs, and considering various incentive-and regulatory-based programs for adoption.

Eleven recommendations were brought to a committee vote. Three recommendations characterized as regulatory focused on giving DNREC authority to: (a) regulate rare and unique (Category 1) wetlands that are federally regulated and unregulated, (b) Regulate all wetlands- not federally regulated, and (c) To protect all federally regulated wetlands. None of these were approved by the Committee. The eight other recommendations, characterized as incentive-based, were approved by the Committee. These included more support for the Forestland Preservation Program, Ag Preservation Foundation, and Open Space Program, increased availability of tax credits, more accurate documentation of Category 1 wetlands, and increased coordination to identify land conservation opportunities, The Secretary delivered a final report (see Appendix B) summarizing the work of the Committee to the General Assembly by the deadline of December 31, 2014.

The Wetlands Advisory Committee provided a platform to fully discuss and consider all manners of wetland protection and conservation. Committee members from a suite of stakeholder groups were supportive of wetland conservation but differed on the methods to do so. The incentive-based efforts have helped to further raise awareness of wetland importance but can only go so far with voluntary protection and conservation. All the historical efforts documented here have created the foundation for a comprehensive wetland protection program in Delaware.

Current Federal and State Regulatory Roles

Federal

The current wetland regulatory framework in Delaware involves both federal and state agencies for the protection of wetlands and waters. Generally, for wetlands, the State regulates activities in tidal wetlands and the federal Army Corps of Engineers (Corps) regulates all wetlands (tidal and nontidal) through Section 404 of the Clean Water Act. There are various permit types at both the federal and state level based on the activity, degree of impact, and wetland type.

Bald cypress (*Taxodium distichum*) trees in Sussex County.

Section 404 of the Clean Water Act (CWA) establishes a program to regulate the discharge of dredged or fill material into waters of the United States, including wetlands. Activities in waters of the United States regulated under this program include fill for development, water resource projects (such as dams and levees), infrastructure development (such as highways and airports), and mining projects. Section 404 requires a permit before dredged or fill material may be discharged into waters of the United States, unless the activity is exempt from Section 404 regulation (e.g., certain farming and forestry activities) or the activity is not considered a discharge or fill and therefore is not regulated.

The basic premise of the program is that no discharge of dredged or fill material may be permitted if: (1) a practicable alternative exists that is less damaging to the aquatic environment or (2) the nation's waters would be significantly degraded. In other words, when you apply for a permit, you must first show that steps have been taken to avoid impacts to wetlands, streams, and other aquatic resources; potential impacts have been minimized; and compensation will be provided for all remaining unavoidable impacts.

Proposed activities are regulated through a permit review process. An individual permit is required for potentially significant impacts. Individual permits are reviewed by the U.S. Army Corps of Engineers or an approved State/Tribal 404(g) Program (https://www.epa.gov/cwa404g) which evaluates applications under a public interest review, as well as the environmental criteria set forth in the CWA Section 404(b)(1) guidelines and regulations promulgated by EPA.

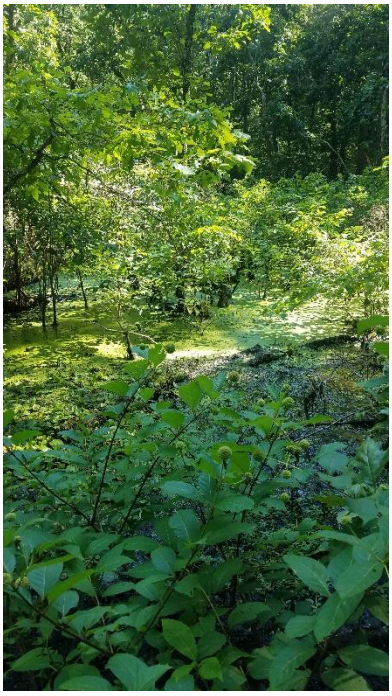
For most discharges that will have only minimal adverse effects, a general permit may be suitable. General permits are issued on a nationwide, regional, or state basis for certain activities. The general permit process eliminates individual review and allows certain activities to proceed with little or no delay, provided that the general or specific conditions for the general permit are met. For example, minor road activities, utility line backfill, and bedding are activities that can be considered for a general permit.

Corps permits are necessary for work, including filling and dredging, in the Nation's navigable waters. Permit decisions recognize the essential values of the Nation's aquatic ecosystems, and

during the permit process, the Corps considers input from government agencies and the public. Unavoidable adverse impacts to the aquatic environment are offset by mitigation requirements, which may include restoring, enhancing, creating, and preserving aquatic functions and values.

State

Delaware regulates all of its tidal wetlands as well as those nontidal wetlands that include 400 or more contiguous acres under the Delaware Wetlands Act (7 Del. Code, Chapter 66) and the Wetlands Regulations (7 DE Admin. Code 7502). "State-regulated" wetlands protected by law are defined as "those lands lying at or below two feet above local mean high water which support or are capable of supporting" certain plant species that are listed in the law and regulations. The types of activities in these wetlands that are regulated (i.e., that require a permit from DNREC) include dredging, draining, filling, construction of any kind, bulkheading, mining, drilling and excavation. Delaware regulates all tidal waters (up to the mean high-water line) as well as all nontidal rivers, streams, lakes, ponds, bays, and inlets (up to the ordinary high water line) under the Subaqueous Lands Act (7 Del. Code, Chapter 72) and the Regulations Governing the Use of Subaqueous Lands (7 DE Admin. Code 7504). Delaware's jurisdiction in nontidal streams typically includes perennial (always wet) and intermittent (seasonally wet) watercourses. The federal jurisdiction in these waterbodies has been significantly more consistent than their fluctuating definition of wetlands and as such the State and Federal programs are more geographically aligned in these areas.



Thick vegetation in an isolated pond wetland.

Delaware uses its authority under CWA Section 401 to certify Section 404 permits and Section 10 permits by the Corps essentially ensuring that surface water quality is not degraded. Delaware can issue, conditionally issue, waive, or deny certification. Denying certification is rare and it is much more common to work with the applicant to modify a project.

The Federal Consistency program was established by Congress in 1972 as part of the Coastal Zone Management Act. Every coastal or Great Lakes state with a Coastal Management Program implements Federal Consistency within its approved federal coastal zone boundary. Federal Consistency requires that projects conducted directly by a federal agency, projects authorized by a federal permit, and some projects implemented with federal funds be consistent with Delaware's Coastal Zone Management policies, and if consistent, then concurrence is issued.

Currently, the above state programs coordinate with, but are not part of, a comprehensive wetland protection program. The ideal scenario would be to combine the existing tidal and a new nontidal wetlands program along with subaqueous, Section 401, and Coastal Zone federal consistency into a more efficient and effective process. The intent of this comprehensive effort would be increased responsiveness to the public and consistency in the protection of all surface waters in Delaware.

Uncertainties at the Federal Level

Over the past two decades, multiple legal challenges and decisions by the Supreme Court and in lower courts, as well as federal administration changes over time, have created continuous change to the scope of federal jurisdiction over nontidal wetlands under the Clean Water Act (CWA). The definition of what constitutes Waters of the United States (WOTUS) has changed considerably due to different political priorities, leading to wetlands and streams having protection in some instances and having no protection in others. This results in lack of consistency and confusion for landowners and the regulated public and typically leads to higher costs when preparing permit applications and approved engineered plans associated with property improvements. It has also resulted in substandard protection of nontidal wetlands leading to loss of acreage and the valuable natural functions wetlands provide.

As of the writing of this report, the effort continues at the federal level to determine the extent of WOTUS in revising wetland regulatory jurisdiction in the CWA Section 404 program, including a pending Supreme Court case (*Sackett vs. EPA*), and there is current rulemaking in progress for Section 404(g) for states and tribes regarding Assumption. Because these processes are ongoing, the legal, administrative, and fiscal requirements of a Delaware nontidal program cannot be fully determined within this report. The identification of exactly which nontidal wetlands currently do or do not fall within federal jurisdiction also cannot be fully detailed in this report. However, the contents of this report contain significant information and data that provides a good sense of what is needed for a state program.

Delaware's Regulatory Landscape and State Options

Delaware is the only state in the mid-Atlantic region without a state-level nontidal wetland regulatory program. This leaves Delaware landowners at the mercy of the everchanging focus at the federal level, and without state control in establishing how nontidal wetlands should be protected as valuable assets that belong to the people of Delaware. Delaware regulating tidal wetlands but not nontidal creates additional confusion with the public. Several options for establishing a nontidal wetland permitting program were considered as part of this process. Each option varied in what resources and activities it covers, and whether it operates with full state authority or through the Corps.


A forested nontidal wetland in Kent County.

It should be noted that when a state assumes any authority to regulate wetlands as part of the Clean Water Act, it may be equal or more stringent than the federal system, but not less according to 40 CFR §233.1(d): "Any approved State Program shall, at all times, be conducted in

accordance with the requirements of the Act (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."

Alternative Analysis

In the process of producing options in response to SJR2, a few different options were considered. One option was for Delaware to establish a nontidal wetland program through assumption. A few states (New Jersey, Michigan, Florida) have completely assumed the jurisdictional authority from the federal government to administer a comprehensive wetlands program (tidal and nontidal) at the state level. Full assumption of Section 404 includes wetlands that meet the federal definition and state programs can go beyond to include wetland types currently excluded. Many other states regulate nontidal wetlands fully or partially through Statewide Programmatic General Permits (SPGP) in which the state simply administers the federal program through the state.

Comparing Assumption and SPGP Options

Full assumption and an SPGP are closely aligned and can be difficult to separate. The table below compares both options in terms of coverage, efficiency, timing, and execution.

Assumption	**SPGP**
State program can provide consistency throughout the state with one set of requirements for all state waters (assumed and those beyond the scope of the approved program).	Increases consistency within the state, but may only apply to certain activities and certain waters
Reduces duplication between Corps and state agencies.	Reduces duplication between Corps and state agencies.
Can be faster than applying to the Corps.	Can be faster than applying to the Corps.
Covers all dredged/fill activities in assumed waters.	Limited to activities with minimal impacts in all federal waters, subject to exclusions and conditions.
May not cover all waters; Corps has the right to retain traditionally navigable waters and their adjacent wetlands.	Scope is spelled out in the SPGP. Ability to cover all federal waters.
State is permitting authority for assumed waters.	Corps is permitting authority through the state.
Partial assumption currently not allowed.	Can cover partial waters, activities, areas.
Assumed program does not expire.	Must be issued at least every five years by the Corps to the state.

DNREC's internal committee compared full assumption to SPGP, taking into account the legal process, the potential regulatory reach, improvements in protection and efficiencies, cost, and logistics. In the end, assumption was ruled out as the successful path forward due to the extensive work required to assume the program and the cost to implement it.

Alternatively, Delaware could simply establish its own federally unregulated wetland program, separate from the Corps, that provides partial coverage just for the wetland categories that are excluded from federal jurisdiction, covering the roughly 30,000 acres mentioned previously. Several states, including Connecticut, Indiana, Ohio, Wisconsin, and West Virginia, established programs that include isolated, federally unregulated wetlands. Current federal coverage and procedures would remain the same, but Delaware could establish a program for unprotected nontidal wetlands. The extent of this program would depend on the status of the federal definition and would establish regulatory oversight for some important and rare wetland types.

After review, this path was not selected due to several reasons. The cost to establish a small program is still about ⅗ that of building a more comprehensive program. A program for federally unregulated wetlands would still require compliance and enforcement, legal changes, compensatory mitigation, and administrative and regulatory development. Also, adding only federally unregulated wetlands to the state tidal wetland program would fail to achieve any improvements in regulatory consistency for the user, fail to offer streamlined permitting, and would require constant coordination to operate around federally jurisdictional wetlands.

Lastly, Delaware could develop a comprehensive state wetland program by choosing to cover all tidal and nontidal wetlands. Under this scenario, Delaware could add to the existing state tidal wetland program an SPGP for federal nontidal wetlands in addition to taking on federally unregulated wetlands. This option offers the most efficiency by covering the most resources while also providing more consistency. Minnesota and Nebraska have an SPGP in addition to a state program that regulates isolated or excluded wetland types. The details of this recommended path are delivered in the sections below.

State Programmatic General Permits (SPGPs) Details

An alternative for enhanced state engagement in addressing nontidal wetland activities involving discharges of dredge or fill material are programmatic general permits. These are general permits issued by the Corps to address activities on a statewide or regional basis – State Programmatic General Permits (SPGPs) and Regional General Permits (RGPs), respectively. CWA section 404I authorizes the Corps to issue general permits for discharges of dredge/fill material, authorizing certain categories of discharge activities when they are similar in nature and will cause only minimal adverse environmental effects, individually or cumulatively. Once a general permit has been issued, individual activities falling within the categories of activities in the general permit may be authorized (or "verified") under that permit, so long as they have no more than minimal effects and meet additional conditions contained in the permit held by the state.

The state currently has two SPGPs established with the Corps where the federal and state jurisdictions are both stable and synchronous. One covers a wide range of activities in artificial lagoons, and the other covers a specific list of activities within natural, navigable waterways. In the most recent five-year SPGP authorization period the state issued/verified nearly 1,000 of

these SPGPs on behalf of the Corps as part of the state permitting process. Additional SPGPs could potentially be established to provide similar coverage for specific activities in priority wetlands.

Sensitive fern (*Onoclea sensibilis*) growing in a freshwater forested wetland.

Activities regulated by a state program can get an expedited federal Section 404 authorization through the SPGP subject to necessary federal agency oversight and safeguards to ensure the aquatic environment is being adequately protected. A discharge is authorized under an SPGP if the permittee has first received a permit for the discharge under the state permitting program for projects of the type listed in the SPGP and if the discharge will have no more than minimal adverse environmental impacts. The SPGP allows a state to verify an applicant's project qualification for federal authorization along with issuance of a state permit. An SPGP, once issued, can be applied to an individual activity that is authorized under a Corps general permit without another alternatives analysis or other Section 404(b)(1) Guidelines steps.

For example, a group of similar activities having minimal impact can be streamlined by the development of an SPGP. However, and SPGP is not as effective when projects with larger impacts or multiple activities that require a case-by-case assessment. For example, the Corps' authorizations require compliance with the Endangered Species Act and National Historic Preservation Act meaning SPGPs may not be efficient if this Corps' review is necessary and limits streamlining. However, more states choose to utilize SPGPs to manage their aquatic resources rather than undertake assuming a 404 program. SPGPs are developed by the Corps to rely upon state regulatory frameworks and Delaware currently has the framework and two SPGPs for work in tidal waters. Unlike state assumption, SPGPs are limited by the permit activity, which allows for a quicker processing time, eliminates potential duplication of effort, provides processing predictability, and a more transparent application process for the applicant. SPGPs are flexible and can be developed individually for different activities, providing autonomy and more state authority over permitting decisions.

Protecting Federally Unregulated Wetlands

In 2001, a U.S. Supreme Court decision (*Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*) removed permitting authority under Section 404 for small, isolated wetlands. These federally unregulated wetlands became non-jurisdictional due to the lack of a significant nexus or adjacency to downstream navigable waters. Delaware has these types of isolated, federally unregulated wetlands, some of which are known as Delmarva Bays, that although not protected under the CWA Section 404, still provide water quantity and quality benefits, reduce flooding, and contain vital habitat for rare plant and animal species.

Protecting federally unregulated wetlands would require a definition of how to determine wetlands that are not federally jurisdictional (e.g., the three-parameter wetland delineation method). This would be a smaller program in scope covering approximately 30,000 acres pending

the process and legal challenges that are ongoing at the federal level to determine the extent of federal jurisdiction under the CWA.

The most reasonable pathway to protect federally unregulated wetlands is through amending 7 Del. Code Chapter 66 to include federally unregulated wetlands. Other states (i.e., CT, OH, IN, WI, WV) have chosen to include federally unregulated wetlands by creating a wetland program where these states still depend on the Section 404 program but have local protection for federally unregulated wetlands in a separate state program.

Adding federally unregulated wetlands to Delaware's wetland program would be more 'localized' to the needs of citizens including consideration of streamlined permitting, flexibility, potential exemptions for certain activities, etc. An added benefit of a federally unregulated wetland program is the ability to regulate activities in jurisdictional wetlands that are not considered an impact by the definition of the Corps dredge and fill program. Providing clear definitions of permissible or prohibited activities offers the benefit of consistent wetland protection.

For example, in Bethany Beach, Delaware in 2019, a developer built a residential community on top of a rare interdunal swale freshwater wetland that did not require a federal permit. The federal interpretation is that pilings and piling-supported structures are not considered as fill. By building the roads, driveways and homes on pilings, the development could proceed without federal review or approval. Building structures such as this suspended over the wetland significantly reduce the quality and function of the wetland. This wetland was one of only a handful of remaining wetlands of this type, which will certainly be severely impacted by shade. Lack of federal protection such as this would be the type of activity DNREC might consider covering under a state program for federally unregulated wetlands.

Minnesota and Nebraska developed programs that pair up an SPGP for federal wetlands and a state program for federally unregulated wetlands. This option would allow one-stop shopping by users, going to the state for wetland permits of all types, even if there are multiple permits.

This scenario would also lend itself to improved local regulation of federally defined wetlands plus the added regulation of wetlands that fall outside of federal definitions, resulting in better overall protection statewide when combined with the existing tidal wetland program. In total, DNREC would have the ability to regulate activities in all wetland resources, federal and federally unregulated. Regulatory development would consider what activities require a full permit, blanket permit, and/or potential activity exemptions.

Estimated Annual Costs

As described above, the staffing and associated operational costs necessary to support the addition of a nontidal wetland program to the existing tidal wetland program are considerable. Estimated program expenses need to be considered and balanced with available funding to achieve effectiveness and efficiency. Only through realistic planning will Delaware be able to provide sufficient resource protection and improve efficiencies while maintaining a sustainable program.

The following estimates are for the addition of a nontidal wetland program component operating in the Division of Water in concert with the existing tidal wetland program. These estimates will be adjusted at the Department or Division's discretion if we move forward.

Salaries

Based on estimates of workload and necessary supporting staff, the addition of a nontidal wetland program component would require bringing on 15 full time employees. These positions include a program manager, administrative specialists, a planner, environmental compliance specialists, and environmental scientists. Staffing estimates were calculated using 85% of paygrade midpoints and include 33% fringe benefits. Annual estimates for salary total $898,900.


Blue flag iris (*Iris virginica*)

Additional Program Expenses

In addition to salary there are several other operational expenses to consider. Regulatory decisions will require legal consultation with the Delaware Attorney General's office. Using an estimate of 600 hours, this service will cost $36,000 annually. Also, operational costs such as indirect, office space, and provision of vehicles for permit inspection and enforcement add an estimated $100,000 annually. These components add roughly $200,000 annually.

Program Development

Aside from day-to-day program costs, there is a need for startup or program development resources. This provides for the process of fleshing out legislative changes, building a team of staff and stakeholders, and establishing operational flow. It is possible to seek EPA grant funding to assist with this portion of program establishment, but it is not guaranteed as it's a competitive grant process. These funds are strictly assigned for program development and cannot be used for program implementation.

Supporting Program Costs

As described above, the staffing and resources necessary to support the addition of a nontidal wetland program to the existing tidal wetland program are considerable. In comparison with staffing and program cost/acre, the estimates presented here are representation of what may be needed. This sets Delaware up to sufficiently handle the workload and requirements of a comprehensive state wetland permitting program including compliance, enforcement, and education with appropriate resources. As mentioned previously, building a sustainable wetland program is essential. Another important component to the program budget is potential revenue generated by wetland activities. The Corps permitting process is heavily subsidized by the federal government and depending on the service required, cost can range from free to $100. Permittees additionally can have other costs associated with the permit such as with required compensatory mitigation or change plan orders.

Most states with wetland programs use permit fees to offset expenses. These fees can be customized and adjusted to meet the anticipated program costs and reduce reliance on state general funds. In a review of ten states, each one has its own fee schedule with varying fee items

and amounts. For example, fees in New Jersey range from $1,000 for a general permit to $5,000 for a freshwater wetland permit for a large subdivision. In Ohio, a wetland permit review fee costs $500 per acre in addition to a $200 application fee. States such as Nebraska do not charge for permits at all. Currently DNREC collects a $450 fee for all projects in state-regulated tidal wetlands.

Pickerel frog (*Lithobates palustrisn*)

One scenario that is favorable follows the example led by Minnesota. There, a general permit authorization costs $100. In addition, a public water work permit is applied based on the scale of impact. Fees run a minimum of $300 and a maximum of $3,000. In between those amounts, the fee is calculated as $0.75 per linear foot of shoreline impacted or $0.75 per cubic foot of fill or excavated material. Under this scenario the state is guaranteed a base fee but resource impact minimization by the permittee is incentivized to reduce their calculated permit fees.

To realistically gauge workload and potential for fee revenue in Delaware, recent federal wetland activity patterns were used to create educated estimates. The Army Corps of Engineers Philadelphia District provided DNREC with a summary of wetland-related actions for the period of 2017-2021. This summary included the average frequency, annually, for nine types of activities including nationwide permits, standard permits, letters of permission, no permit required reviews, jurisdictional determinations, and consultations. Details such as impact size, wetland type, permittee, and type of activity were not provided.

Using the workload information provided and applying a hypothetical fee structure, we estimate that ⅓- ½ of the annual staffing costs for a comprehensive program described on page 13 could be offset by fee generated revenue. Exact calculations require areas of impact and type of actions permitted and will vary greatly but this demonstrates the potential to be more self-sustainable and less reliant solely on general funds.

It should be noted that 72% of tallied activities shared by the Corps were actions and sub-actions. This includes requesting additional information, Essential Fish Habitat, Endangered Species Act and Section 106 of National Historic Preservation Act consultations. These consultations require coordination with agencies such as the U.S. Fish and Wildlife Service, the National Marine Fisheries Service, the Advisory Council on Historic Preservation, and the National Park Service, all of which require separate evaluations of the activities which can significantly increase review timeframes. These steps are part of the standard permitting process and do not warrant a separate fee. However, the time necessary to complete these steps is considerable and is accounted for in the staffing and fee estimates.

Summary and Discussion

This report reviewed in detail the landscape of wetlands in Delaware, the current roles of both federal and state agencies in wetland regulation, the history of nontidal wetland program attempts, and an alternative analysis of options for developing a state nontidal wetland permitting program. The analysis included the requirements and basic steps for development, and important benefits and challenges associated with each option. Detailed staffing estimates and costs were investigated as well. There are many examples, details and options involved while considering the development of a new wetland regulatory program.

In summary, the predicted cost, including program development, staffing, and long-term program administration, of a nontidal wetland program in Delaware is variable until the exact scope of a state program is established, and this document provides a general estimate. With federal jurisdiction currently in flux, a full program through Assumption or an SPGP is dependent on a further federal determination of the CWA's reach. A smaller focused program on specific wetland types or specific activities would require less resources but many of the same costs as a full program such as legal review, program development, and establishing regulations.

There are significant steps to begin the development of a new program. This involves securing funding and positions, reviewing potential changes to legal language, working with the federal agencies to be granted the ability to run a state program, establishing the administrative and regulatory structure (including exemptions, permitting steps, public notices, fee schedules, enforcement, and mitigation), and working with the public to build support and deliver information on the program. Establishing a state program can be a lengthy and difficult process.

Smooth beggartick (Bidens laevis)

In review of the efforts of other states who have fully assumed Section 404, or have full or partial state programs, their efforts typically lasted 3-4 years or more. Additionally, there have been states who have gone through the process over multiple years only to get to the final stages and find out that a specific nuance in their state, either legally or administratively, still did not align exactly with the federal process.

It is evident that no matter the scope or extent of a new state nontidal wetland program, the process requires a very similar and challenging path. Considering that a high level of investment will be needed, it makes sense for an expanded state program to be a comprehensive wetland program using the SPGP process, with the addition of a federally unregulated wetland component, combined with the existing tidal wetland program.

A comprehensive program creates consistency, an intended easier path for permit issuance, and less confusion by the public in understanding and navigating wetland protection programs. While Delaware considers the necessary resources and feasibility of a state nontidal wetland program, it should also be considering how to protect wetlands that are not federally protected. It is reasonable in forming a combined tidal and nontidal wetland program that wetlands beyond the current federal jurisdiction should be included. Including both federal and federally unregulated

wetlands would create a comprehensive and consistent state program with the same framework and process for all wetland permits and activities.

References

https://www.epa.gov/cwa-404/permit-program-under-cwa-section-404

https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/Obtain-a-Permit/

https://www.nawm.org/wetland-programs

Delaware Wetlands 2007-2017 Status and Trends report (unpublished)

Appendices

Appendix A -- SJR2, SA1

Appendix B – Delaware Wetland Advisory Committee final report

Appendix C -- Assumption Process Flowchart (NAWM)

Appendix D -- EPA's 40 CFR Part 233

Addendum to SJR2 (2022) assigned through SCR 86 (2023)

Introduction

Senate Concurrent Resolution 86 requests that the Delaware Department of Natural Resources and Environmental Control (DNREC) update the analysis and recommendations presented in the Senate Joint Resolution 2 Report (September 2022) utilizing the new information provided by the most recently promulgated federal wetlands regulations and the results of the Supreme Court case, *Sackett vs. Environmental Protection Agency (EPA)*, by September 30, 2023. The following assessment to produce this update is based solely on the information currently available. Additional information on the details of the *Sackett* case (May 2023) and the issuance of a new federal rule can be found at the end of this document.

Assessment of Impact to Delaware

Importantly, an accurate assessment of the impact to Delaware cannot be fully determined until DNREC receives guidance from the EPA and Corps on how the new rule will be applied in the field and among differing landscape settings. With the revised rule becoming final on September 8, 2023, a preliminary process was employed to determine the extent of nontidal wetlands that may be without federal protection in Delaware. This process was cursory and used best professional judgement due to the lack of guidance from the federal agencies and time needed for a thorough assessment. Geospatial analysis, based on changes in the revised rule, was used to develop estimates of wetlands without protection by acreage and in consideration of wetland types. Typically, and with enough time, resources, and guidance, an assessment such as this requires a field-level verification process, but this was not conducted due to timeliness of the delivery of this addendum to the SJR2 report (2022) and the release of the final rule.

In the most recent statewide wetland mapping (2017), both wetlands and waters were mapped as a combined data set as required by the National Wetlands Inventory (NWI) using the Federal Geographic Data Committee standards. This brought together the wetlands data with the National Hydrologic Data (NHD – linear and polygonal waters such as streams and ponds) which created a comprehensive mapping of all water features and their characteristics. Having these data, along with the connectivity features, allowed for a spatial estimate of which wetlands contain a "continuous surface connection" to downstream Traditional Navigable Waters (TNW). Those wetlands that do not have that connection are considered *not federally protected* (loosely considered as 'isolated'). (NOTE: Geospatial analysis uses the most current and accurate data available to predict ground conditions, but there are inherently minor errors of commission and omission.)

Without the knowledge of how the revised rule will be applied in jurisdictional determinations in the field by the federal agencies, (e.g., how will "continuous surface connection" and "relatively permanent" be applied at a site location), this spatial assessment is based on best professional judgement. The following approach used linear water features to determine "continuous surface connection" that intersect wetland polygons, included both perennial and intermittent streams, but removed any ephemeral streams. From the resulting prediction of wetlands not protected at the federal level, any of those wetlands owned publicly (state and federal lands such as parks and

wildlife areas) were subtracted from the unprotected results since they are publicly owned and thus considered protected.

The assessment to estimate federally unprotected wetlands revealed a significant acreage of nontidal wetlands without protection. The geospatial analysis results show that roughly 75,000 acres of nontidal wetlands are vulnerable, representing about 45% of Delaware's nontidal wetlands. Depending upon how federal jurisdictional determinations are applied in the field, this amount could increase or decrease, but not significantly. This amount represents more than a 50% increase in what was left unprotected by the new Navigable Waters Protection Rule (NWPR, 2020), and greater than a 20-fold increase in wetlands not federally protected under *Rapanos* (2006; Figure 1).

Sackett (2023)	NWPR (2020)	*Rapanos* (2006)
~75,000 acres	~30,000 acres	~3,500 acres

Figure 1. Estimated amounts of nontidal wetland acreage in Delaware without federal protection after U.S. Supreme Court decisions and issuance of new Waters of the United States (WOTUS) rules. The acreage listed under *Rapanos* are almost exclusively isolated Coastal Plain Seasonal Ponds or Delmarva Bays.

Types of wetlands that may be excluded from federal protection are: Coastal Plain Seasonal Ponds, Inner Dune Depression Meadows, Delmarva Bays and Vernal Pools, Floodplain wetlands disconnected by a berm, Groundwater Seepage Swamps or Valleys, Forested Headwater Flat wetlands, and Headwater Interfluve wetlands (see photo examples below). In addition to providing vital wetland benefits such as improved water quality, flood protection, and recreational opportunities, these wetland types contain globally, federal, and/or state rare, threatened, and endangered animal and plant species habitat. The overall annual economic value of the natural functional services provided by these unprotected wetland types is conservatively in the millions of dollars.

This sharp increase (estimated) in federal regulatory gap leaves the states with a much larger and more important role to play in freshwater wetland protection. For Delaware to respond, it's important to meet with the federal agencies once guidance is available and look at associated information that was part of the *Sackett* decision. Most environmental laws in the U.S. are applied through cooperative federalism. Cooperative federalism means the federal government sets national environmental standards while states implement those standards within their borders. In practice, cooperative federalism is a continuous partnership between states and the federal government to work together on common goals.

The Opinion of the Court in *Sackett* pointed to a specific provision:

> "The Governor of any State desiring to administer its own individual and general permit program for the discharge of dredged or fill material into the navigable 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) within its jurisdiction

> may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact." 33 U. S. C. §1344(g)(1).

While adding that: *it is also instructive that the CWA expressly "protect[s] the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution" and "to plan the development and use of land and water resources."* And *"It is hard to see how the States' role in regulating water resources would remain "primary" if the EPA had jurisdiction over anything defined by the presence of water".*

From the states' perspective, the federal regulatory program provides the basis for a consistent national approach to wetlands protection. But if a portion of wetlands are no longer federally jurisdictional, it can be argued that the federal program no longer provides a baseline for consistent, minimum standards to regulate wetlands. This can lead to a disparate and confusing landscape of wetland protection where one state protects wetlands well, and across a state line, perhaps in the same watershed, another state may not.

The Sackett decision clearly narrowed the scope of the federal jurisdiction of WOTUS under the Clean Water Act and in doing so, has left states to determine how to "fill the gap" in protection of wetlands and waters. Implications of the decision are varied across jurisdictions and significant among aquatic resource types. With the Sackett results and the revised rule issued, states are working immediately to understand what the effects are, what actions to take, and most importantly, how to find the resources (i.e., funding and staff) to stand-up a new or expanded program to protect wetlands and waters where many states have depended on federal protection for decades.

Federal funding for wetland program implementation will be necessary if states are expected to "fill the gap" in wetland protection. There are other CWA programs where states receive federal funding for implementation, but implementation funding for wetland protection is presently unavailable. Currently, there are no clear intentions by either the agencies and/or Congress to provide program implementation funding. Additionally, in considering a source for this federal funding, funding should not be pulled from other CWA programs (e.g., 106, 319) as these programs are currently limited on funding at the state level.

Recommendations

Despite the changes at the federal level, the final recommendations in the initial SJR2 report remain the same. From the report:

> *It is evident that no matter the scope or extent of a new state nontidal wetland program, the process requires a very similar and challenging path. Considering that a high level of investment will be needed, it makes sense for a new state program to be a comprehensive wetland program using the SPGP process, with the addition of a nonfederal wetland component, combined with the existing tidal wetland program.*

A smaller focused program on specific wetland types (e.g., nonfederal wetlands) or specific activities would require less resources but many of the same costs as a full program such as legal review, program development, and establishing regulations creating a situation where a project could require both state and federal permits. This is not ideal for the public as it creates

confusion and is inefficient. Additionally, the program and staffing costs for recommending a comprehensive state program that includes federal and nonfederal wetlands are likely the same or very similar to what is in SJR2 as this would encompass all wetlands statewide. The exception would be a small increase in salaries for state staff based on the increase enacted in the FY2024 budget (and future yearly budgets), so generally assume a 5% increase. There are examples in the SJR2 report that speak to options for funding a statewide program.

Developed and applied correctly, a comprehensive program creates consistency, an intended easier path for permit issuance, and less confusion by the public in understanding and navigating wetland protection programs. There are significant steps for the development of a new state program. Other states with full or partial programs have taken 3-4 years to accomplish this in coordination with the federal agencies. This creates a significant time-gap until a potential program could be established that leaves wetlands unprotected at the federal or state level.

Examples of Wetlands Potentially Left Unprotected at the Federal Level

The following pictures depict several different types of freshwater wetlands in Delaware that may be omitted from federal protection and are vulnerable to unregulated impacts and destruction. These wetlands are not included in the federal definition of protected waters because they lack a direct surface water connection.

Isolated Freshwater Wetlands in Delaware

Delmarva Bay/Vernal Pool in spring (left) and fall (right).

Coastal plain seasonal pond.

Inner dune depression meadow.

Freshwater Wetlands in Delaware with No Direct Surface Water Connection

Forest headwater flat.

Groundwater seep depression/swamp.

Groundwater seep swale.

Black ash groundwater seep swamp.

Summary

The *Sackett* decision and the revised federal rule have changed the landscape of federal wetland jurisdiction, in effect reducing the reach of federally protected waters and wetlands. The extent this change effects Delaware's wetland protection cannot be fully determined until the EPA and Corps receive guidance and share that with states on how federal jurisdiction will be applied in the field in varying landscape conditions across the U.S. In the interim, DNREC will continue to monitor the changes to federal jurisdiction and remain in contact with these agencies to increase understanding of protection for Delaware's waters and wetlands.

Background and Additional Information Referenced for this Assessment

For perspective on the changes at the federal level, regulation over wetlands was static after a Supreme Court decision known as *Rapanos* (2006). The regulated public and legal challenges across the county still looked to clarify jurisdiction and set clear definitions. In 2015, the Obama Administration issued a new rule that incorporated the recommendations of the Science Advisory Board for protection of wetlands and waters. This rule was swiftly challenged legally as an 'overreach' leading to the 2015 rule being enjoined in 26 states and in effect in 22 states. The Trump Administration directed the agencies to develop a new rule for more clarity that excluded isolated and ephemeral wetlands and waters, and many headwater areas with intermittent flow, and became known as the National Water Protection Rule (NWPR, 2020). The NWPR was also challenged legally. In 2021, the Biden Administration directed the agencies to develop a "durable" rule that addresses the concerns of all stakeholders to meet clean water goals. This new rule was released in January 2023, but pending the decision of the *Sackett vs. EPA* case by the Supreme Court, there could be adjustments to this rule.

The U.S. Supreme Court issued a decision in the *Sackett v. EPA* case in May of 2023 that removes federal jurisdiction over some waters and wetlands under the Clean Water Act (CWA) Section 404. This decision redefines "Waters of the United States" (WOTUS) removing the "significant nexus" standard, removing federal jurisdiction from wetlands that cross state lines (interstate wetlands), and revising the definition of "adjacent wetlands" to "having only a continuous surface water connection." The decision addressed the "relatively permanent" standard established in Justice Scalia's opinion in *Rapanos*, which determines when a wetland, stream, or other water is a WOTUS protected by the CWA. Under Scalia's relatively permanent standard, a wetland, stream, or other water is a WOTUS if it contributes flow to a traditional navigable water and is "relatively permanent" due to having at least seasonal flows. In *Sackett*, wetlands are WOTUS if they are "as a practical matter indistinguishable" from a relatively permanent water and have a "continuous surface water connection to that water, making it difficult to determine where the 'water' ends and the 'wetland' begins".

The "significant nexus" standard was used to assess the flow characteristics and functions of the relevant reach of the tributary, in combination with functions collectively performed by all wetlands adjacent to the tributary, to determine if they have more than an insubstantial or speculative effect on the chemical, physical, or biological integrity of Traditionally Navigable Waters (TNW). Interstate *wetlands* were removed as jurisdictional if solely being considered

jurisdictional due to the interstate designation, but this does not affect interstate *waters* (TNW). The court rejected EPA's argument that "waters of the United States" covers any wetlands that are "bordering, contiguous, or neighboring" to covered waters. While acknowledging that this is the interpretation favored in the concurring opinion by Justice Brett Kavanaugh, the majority opinion held that an "adjacent" wetland must be part of the "covered" waters – mere proximity is not enough; a continuous surface connection is required.

As a result of *Sackett*, EPA and the Army Corps of Engineers (agencies) were required to conduct a rulemaking to adjust the previously published WOTUS rule (January 2023) to incorporate the components of the Supreme Court decision. The revised rule was released on August 29, 2023, and became immediately effective September 8, 2023, with publication in the Federal Register.

Detailed Changes to Waters of the United States

In the January 2023 rule, WOTUS were defined as: (1) traditional navigable waters, the territorial seas, and interstate waters; (2) impoundments of qualifying waters; (3) tributaries to qualifying waters; (4) wetlands adjacent to qualifying waters; and (5) certain intrastate lakes and ponds, streams, and wetlands. (33 CFR § 328.3 Definitions)

(a) Waters of the United States means:

(1) Waters which are:

(i) Currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(ii) The territorial seas; or

(iii) Interstate waters, including interstate wetlands;

(2) Impoundments of waters otherwise defined as waters of the United States under this definition, other than impoundments of waters identified under paragraph (a)(5) of this section;

(3) Tributaries of waters identified in paragraph (a)(1) or (2) of this section:

(i) That are relatively permanent, standing or continuously flowing bodies of water; or

(ii) That either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of waters identified in paragraph (a)(1) of this section;

(4) Wetlands adjacent to the following waters:

(i) Waters identified in paragraph (a)(1) of this section; or

(ii) Relatively permanent, standing or continuously flowing bodies of water identified in paragraph (a)(2) or (a)(3)(i) of this section and with a continuous surface connection to those waters; or

(iii) Waters identified in paragraph (a)(2) or (3) of this section when the wetlands either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of waters identified in paragraph (a)(1) of this section;

(5) Intrastate lakes and ponds, streams, or wetlands not identified in paragraphs (a)(1) through (a)(4) of this section:

(i) That are relatively permanent, standing or continuously flowing bodies of water with a continuous surface connection to the waters identified in paragraph (a)(1) or (a)(3)(i) of this section; or
(ii) That either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of waters identified in paragraph (a)(1) of this section.

In revising the January 2023 rule due to *Sackett*, the definitions received these adjustments (along with making conforming edits to the regulatory text):

- Removed the phrase "including interstate wetlands" from the (a)(1) provision.
- Removed the significant nexus standard from the (a)(3) tributaries provision.
- Removed the significant nexus standard from the (a)(4) adjacent wetlands provision.
- Removed the significant nexus standard and streams and wetlands from the (a)(5) provision for intrastate lakes and ponds, streams, or wetlands not otherwise identified in the definition.
- Revised the definition of "adjacent" meaning to have a continuous surface connection in the definitions section of *40 CFR 120.2(c)(2) and 33 CFR 328.3(c)(2)*.