SPONSOR: Sen. Hansen & Sen. Townsend & Rep. Heffernan
Sens. Ennis, Poore, Sokola; Reps. Dorsey Walker, Mitchell, Osienski

DELAWARE STATE SENATE
151st GENERAL ASSEMBLY

SENATE JOINT RESOLUTION NO. 2

DIRECTING THE DELAWARE DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL TO BEGIN COORDINATION WITH THE FEDERAL AGENCIES CARRYING AUTHORITY TO IDENTIFY THE STRUCTURE NECESSARY FOR A STATE NONTIDAL WETLANDS PROGRAM FOR THE PURPOSE OF SHIFTING PERMITTING AUTHORITY FROM THE FEDERAL LEVEL TO THE STATE.

WHEREAS, it is commonly known that healthy nontidal wetlands reduce, store, and filter stormwater runoff and can help remove harmful bacteria and pollutants, thereby protecting sources of Delaware's water supply; and

WHEREAS, it is also commonly known that nontidal wetlands provide flood storage capacity thereby protecting public and private property from flooding and the resultant financial and personal impacts associated therewith; and

WHEREAS, the State has acted to protect tidal wetlands, and it currently relies on federal regulations enforced by the United States Army Corps of Engineers pursuant to the Clean Water Act to protect the State's nontidal wetlands; and

WHEREAS, the U.S. Environmental Protection Agency (EPA) proposed a dramatic reduction in protections under the Clean Water Act, leaving nontidal wetlands in Delaware without adequate federal or State protection; and

WHEREAS, the EPA rule reducing these protections became final on June 22, 2020, stripping protections from thousands of acres in Delaware; and

WHEREAS, it is important that the State modify its existing tidal wetlands permit program to add necessary protections for nontidal wetlands, as Delaware is the only state in the mid-Atlantic region without state-level protections, and thus is especially vulnerable to the changes proposed at the federal level; and

WHEREAS, protection of nontidal wetlands will be consistent with the current policy of this State to preserve and protect the productive public and private wetlands to prevent their loss and impairment and consistent with the historic right of private ownership of lands; and

WHEREAS, unlike a federally administered program, a State program provides benefits to the public through local knowledge and accessibility resulting in responsiveness, convenience, and efficiency.

NOW, THEREFORE:

BE IT RESOLVED by the Senate and House of Representatives of the 151st General Assembly of the State of Delaware, with the approval of the Governor, that the Delaware Department of Natural Resources and Environmental Control (Department) is authorized and directed to engage the Environmental Protection Agency and the U.S. Army Corps of Engineers to identify the overall structure of a State nontidal wetlands permitting program.

BE IT FURTHER RESOLVED that the State has the capability to administer, in accordance with 40 C.F.R. part 233, the dredge and fill permitting program established in Section 404 of the federal Clean Water Act (CWA), Pub. L. No. 92-500, as amended, 33 U.S.C. ss. 1251 et seq., and rules promulgated thereunder, for the purposes of permitting dredge and fill material.

BE IT FURTHER RESOLVED that, for the State to receive this authority, there must be an established structure and resources to support a nontidal wetlands program to be granted official federal approval.

BE IT FURTHER RESOLVED that, in engaging the federal agencies, the Department will need to identify administrative, fiscal, and legal requirements to support a State program and will need to determine where state laws and administrative procedures apply, and that these align with, and do not conflict with, federal requirements.

BE IT FURTHER RESOLVED that the Department shall attempt to identify which nontidal wetlands currently have federal jurisdiction after the recent EPA rule changes and which nontidal wetlands do not have regulatory jurisdiction under CWA Section 404 at the federal level.

BE IT FURTHER RESOLVED that the Department will identify and coordinate with the appropriate stakeholder groups to address any conflicts and reach agreement on sufficient structure of a State nontidal wetlands program, including the consideration of typical exemptions.

BE IT FURTHER RESOLVED that the Department will prepare a report on the findings, structure, and resource needs to support a State nontidal wetlands program and submit the report to the General Assembly and the Governor no later than one year from the enactment of this resolution.

BE IT FURTHER RESOLVED that, using the results of the report, the Department will determine whether a federal Statewide Programmatic General Permit or full Assumption is the appropriate action to administer the CWA Section 404 program at the State level.

BE IT FURTHER RESOLVED that, pending the results of the final report, appropriate legislative establishment may be considered for a State nontidal wetlands permitting program.

Ssynopsis

This Senate Joint Resolution requires the Department of Natural Resources and Environmental Control to engage authoritative federal agencies to identify the administrative structure, legal structure, and resource needs to establish a State nontidal wetlands permitting program effectively shifting the permitting program from the federal to the State level. This Senate Joint Resolution also requires that a report containing the results of this review be completed and made public within 1 year.