Rebecca Carroll
Widener University, Delaware Law School
November 4, 2024

This paper is for educational purposes only and is not intended as legal advice.

Comparative Analysis for a Non-Tidal Wetland Regulatory Program in Delaware

Delaware is the only state in the mid-Atlantic region without a state-level nontidal wetland regulatory program.[1] To prevent nontidal wetland loss, Delaware is investigating how best to structure a nontidal wetlands regulatory framework.

I. Background

Approximately 75% of Delaware's wetlands are nontidal wetlands[2] (NTW), however, only NTW of 400 acres or more are currently regulated by the State.[3] To protect Delaware's extensive NTWs, a state-level nontidal regulatory program is necessary.[4]

Currently, Delaware regulates tidal wetlands through the Delaware Wetlands Act (7 Del. Code, Chapter 66) and the Wetlands Regulations (7 DE Admin. Code 7502) while the U.S. Army Corps of Engineers[5] (Corps) and the Environmental Protection Agency (EPA) regulate wetlands through the federal Clean Water Act (CWA).[6]

For this analysis, the three most relevant sections of the CWA include Sections: 401[7], 402[8], and 404[9]:

- Pursuant to Section 401, state agencies must evaluate projects that will result in the discharge of dredged or fill material into waters of the United States (WOTUS)[10] to determine whether the discharge will violate the state's water

[1] Delaware Department of Natural Resources and Control, *SJR 2 – Report to the Governor and Legislature Prepared by DNREC*, OPTIONS FOR NONTIDAL WETLAND PERMITTING PROGRAM, at 1.
[2] Non-tidal wetlands are freshwater, found around inland areas, and do not have tidal influxes of water. *Non-Tidal Wetlands*, DNREC: ENVIRONMENTAL PERSPECTIVES, Identifying non-tidal wetlands (May 14, 2019), https://perspectives.dnrec.delaware.gov/stories/s/Non-Tidal-Wetlands/mw4n-bstg/
[3] *Id*. This large area of jurisdiction has never been found applicable to any actual nontidal wetlands in the state.
[4] *Id*.
[5] The U.S. Army Corps of Engineers (Corps) is a public engineering agency that provides services to the United States and other countries. The USACE's mission is to provide engineering services to the nation, including: protecting the nation's aquatic resources, including wetlands, while still allowing for reasonable development. Any discharging dredged or fill material into wetlands without authorization from the Corps is a violation of federal law. *Regulatory Program*, US ARMY CORPS OF ENGINEERS (2024), https://www.nwp.usace.army.mil/Missions/Regulatory/FAQ/
[6] The Clean Water Act (CWA) establishes the basic structure for regulating discharges of pollutants into the waters of the United States and regulating quality standards for surface waters. 33 U.S.C. §1251 et seq. (2023).
[7] 33 U.S.C. § 1341.
[8] 33 U.S.C. § 1342.
[9] 33 U.S.C. § 1334.
[10] The federal definition of WOTUS includes (1) All waters which are 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

quality standards and any person who wishes to place dredged or fill material into wetlands, streams, or lakes must apply for an individual Section 401 certification.[11] A Section 401 water quality certification (WQC) is required for any activity that requires a federal permit, such as a Section 404 permit, described below.[12]

- Section 402 allows for the discharge of pollutants into WOTUS from a point source[13] if the discharger has a National Pollution Discharge Elimination System (NPDES)[14] permit and is applicable for any direct discharges into WOTUS.

- Section 404 requires a permit before dredged or fill material may be discharged into WOTUS and 404(g) gives states and tribes the option of assuming the permitting responsibility and administration of these permits for certain waters.[15] The EPA issues regulations governing issuance of those section 404 permits, but the permits themselves are issued by Corps.

Delaware already utilizes its authority under the CWA to certify Section 404 permits.[16] Along with Section 404 permits, Delaware Department of Natural Resources and Environmental Control (DNREC) is responsible for utilizing Section 401 water quality certification in coordination with state regulation of subaqueous lands, tidal wetlands, and authorities under the Coastal Zone Management program.

In 2023, the Supreme Court in *Sackett v. Environmental Protection Agency* significantly narrowed the types of wetlands included within the definition of WOTUS as waters "having a

---

flow of the tide; (2) All interstate waters including interstate wetlands; and (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters. . . [40 CFR 230.3(s)]. According to the Supreme Court in *Sackett v. Environmental Protection Agency*, 598 U.S. 651, 678 (2023), wetlands are only considered WOTUS if they have a continuous surface connection to other WOTUS such that there is "no clear demarcation" between the two. *Id*.

[11] *Overview of CWA Section 401 Certification*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, https://www.epa.gov/cwa-401/overview-cwa-section-401-certification (last updated Aug. 30, 2024).

[12] *Id*.

[13] A point source is "any identifiable, confined, and discrete conveyance that can discharge pollutants, such as a pipe, ditch, channel, tunnel, well, or vessel".
Tiffany Dowell, *The Clean Water Act and Agriculture: The Basics*, TEXAS A&M AGRILIFE EXTENSION, Section 402 (Sept. 2, 2015), https://agrilife.org/texasaglaw/2015/09/02/clean-water-act-basics/

[14] The NPDES regulates point sources that discharge pollutants into the state's surface water bodies. NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (2024), https://dnrec.delaware.gov/water/commercial-government/npdes/.

[15] *Basic Information About Assumption Under CWA Section 404*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, What is Assumption?, https://www.epa.gov/cwa404g/basic-information-about-assumption-under-cwa-section-404 (last updated Sept. 23, 2024). There are statutory exemptions to Section 404 including, not limited to, normal agriculture, silviculture, and ranching activities. § 404(f)(1).

[16] The purpose of a Section 404 permit is to regulate the discharge of dredged or fill material into waters of the United States, including wetlands. The permit is required to ensure that the discharge does not significantly degrade the nation's waters or harm aquatic resources.
Permit Program Under CWA Section 404, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Overview, https://www.epa.gov/cwa-404/permit-program-under-cwa-section-404 (last updated Apr. 11, 2024).

continuous surface connection to bodies that are WOTUS in their own right, with no clear demarcation between the "waters" and wetlands".[17] States that do not have state-level wetland protection laws are now faced with the decision of leaving wetlands that fall outside of the definition of WOTUS unregulated or adopting more inclusive definitions of waters of the state (WOTS) and/or developing regulatory schemes[18] to control the water quality, discharge, and filling of wetlands.[19] States have the option to impose more protective legal restrictions on resources regulated by the federal government, however, they may not impose any less protective restrictions.

This memorandum provides a comparative analysis of how other states implement a state-level NTW regulatory program and how Delaware can create an effective NTW regulatory program. This memorandum also includes a summary of how land use regulation can incentivize wetland protection.

A. Research Objectives and Methodology

This memorandum has been constructed based on research focusing on surrounding states' wetland regulatory programs. The states chosen for review include Maryland, New Jersey, Ohio, Pennsylvania, and Virginia. Information was gathered via virtual interviews with NTW/wetland program department managers and/or directors, as well as reviewing public information published on each state department's website. The following topics were covered in each discussion:

(1) Each state's delineation methodology (which delineation methods are used, how each state defines NTW, and the scope of the jurisdiction);
(2) How does the state work with the Corps and the roles and duties of the entities in regulating wetlands;
(3) Funding for each state's program- through state or federal funding, or grants;
(4) The number of staff involved in each state's program and is there any cross-functionality among their NTW program employees into their compliance program or legal counsel;
(5) Overview of permit application process- any transparency (online status portal) or an established permitting timetable which is used to provide an overview for managing

[17] *Sackett v. Environmental Protection Agency*, 598 U.S. 678, 651 (2023): Writing for the 5-to-4 majority, Justice Samuel Alito asserted that the late Justice Scalia's definition of "waters of the United States" was the proper one: any wetland that does not connect at its surface to another body of federally protected water doesn't merit the same degree of protection. Alito dismissed the significant nexus rule established by the now-retired Justice Kennedy as "particularly implausible." Jeff Turrentine, *What the Supreme Court's Sackett v. EPA Ruling Means for Wetlands and Other Waterways*, NRDC, The impact on our wetlands—and our water (June 5, 2023), https://www.nrdc.org/stories/what-you-need-know-about-sackett-v-epa.

[18] E.A. Crunden, *Sackett Fallout Leaves Wetlands' Fate to States*, E&E NEWS BY POLITICO (June 28, 2023), https://www.eenews.net/articles/sackett-fallout-leaves-wetlands-fate-to-states/.

[19] This change in definition has led to several attempts in creating a NTW regulatory program in Delaware which have been explored, in-depth, in DNREC's SJR 2 Report to the Governor and Legislature discussing options for a NTW permitting program.

the public's expectations when applying for a permit (e.g., a permit for < 1 acre, expect permit in < 3 months); and

(6) The fee schedule for NTW projects.

B. Maryland

As explained more fully below, Maryland has a comprehensive state-level wetland permitting program and regulates nontidal wetlands through a Statewide Programmatic General Permits (SPGP).

1. Delineation Methodology

Maryland's NTW program is administered by the Maryland Department of the Environment (MDE). For NTW delineation, MDE requires the Wetland Delineation Manual Regional Supplements of Atlantic and Gulf Coastal Plain and Eastern Mountains and Piedmont to be used for its permit applications.[20] Maryland has maps depicting NTWs which may be viewed online, but they are to be used for guidance only.[21]

Maryland defines a NTW as "an area that is inundated or saturated by surface water or groundwater at a frequency and duration sufficient to support, and that under normal circumstances does support, a prevalence of vegetation typically adapted for life in saturated soil conditions, commonly known as hydrophytic vegetation."[22] There are approximately 287,420 acres of vegetated NTWs in Maryland, comprising 4.6 percent of the state's land mass.[23]

Maryland includes both tidal and nontidal wetlands within the definition of WOTS and affords the state's NTWs protection under the state's nontidal wetlands regulatory program.[24] The scope of Maryland's jurisdictional power was created in 1989 when the Maryland General Assembly passed legislation that established a statewide program for the conservation, enhancement, regulation, creation and monitoring of NTWs. The goal is no net loss of NTW acreage and function, and the NTW Division of the MDE has written regulations and set up a permit program to meet this goal.[25]

Regarding isolated wetlands, Maryland has regulatory authority over impacts to all wetlands including isolated wetlands. MDE additionally regulates activities in a 25-foot buffer

---

[20] *Coastal Plain Supplement to U.S. Army Corps of Engineers Wetland Delineation Manual Enters One-Year Interim Period*, MARYLAND DEPARTMENT OF THE ENVIRONMENT (2024), https://mde.maryland.gov/programs/water/WetlandsandWaterways/DocumentsandInformation/Pages/cpsupplement.aspx

[21] *Wetlands and Waterways Protection Resources*, MARYLAND DEPARTMENT OF THE ENVIRONMENT (2024), https://mde.maryland.gov/programs/water/wetlandsandwaterways/documentsandinformation/pages/maps.aspx

[22] MD. Environment Code § 5-901(m)(1). This definition is very similar to the definition of wetland in 40 C.F.R. § 120(c)(1).

[23] *Id.*

[24] Md. Code Regs. 26.08.01.01, 103(A).

[25] *Id.*

around NTWs.[26] Buffer requirements are expanded to 100 feet for "NTWs of special State concern", and NTWs of special state concern are designated by regulation and mapped as having exceptional ecological or educational value of statewide significance.[27] MDE also regulates the alteration of vegetation and hydrology in wetlands.[28]

Maryland has an antidegradation policy based on three tiers of protection (as outlined by the EPA); Tier I, Tier II, and Tier III.[29] Maryland requires a Tier II antidegradation review for any NTW and Waterways permits and activities requiring a Section 401 WQC. The goal of the Tier II review is to protect and maintain Tier II high quality waters from degradation. The review consists of 3 steps: (1) a no-discharge alternative analysis, (2) a minimization alternative analysis, and (3) if there is no assimilative capacity remaining in the Tier II water, a social and economic justification for impacts to Tier II waters.[30]

2. Roles of State and the Corps

Maryland utilizes a Statewide Programmatic Permit (SPGP) to authorize work in NTWs. The type of permit required for any activity is determined by the activity and the requested area's threshold limits (e.g., nontidal waters and wetlands = 5 acres).[31] Using a SPGP reduces duplicate permitting between federal and state permit applications and allows for shared jurisdictional determination and delineation responsibilities.[32] SPGPs allow the permitting process to be more efficient by only involving the state agency for projects with wetlands designated as WOTS, while still having the Corps carry out the bulk of the permitting process for any waters federally protected as WOTUS.[33]

Table 1.1 below highlights the federal and state permit authorities, and Table 1.2 focuses on the structural categorical breakdown of the MDSPGP-6 and the application process for each category.

---

[26] *History of Current Regulatory Programs*, APPENDIX . MARYLAND'S WETLAND MANAGEMENT FRAMEWORK, 131, https://mde.maryland.gov/programs/water/WetlandsandWaterways/MDWetlandConservationPlan/Documents/www.mde.state.md.us/assets/document/wetlandswaterways/appendix_2fnl.pdf

[27] *Id.*

[28] *Id.*

[29] *Maryland's Surface Water Quality Standards*, MARYLAND DEPARTMENT OF THE ENVIRONMENT, https://mde.maryland.gov/programs/water/tmdl/waterqualitystandards/pages/index.aspx (last updated Sept. 2024).

[30] *Antidegradation Tier Review - Frequently Asked Questions*, MARYLAND DEPARTMENT OF THE ENVIRONMENT, https://mde.maryland.gov/programs/Water/TMDL/WaterQualityStandards/Pages/Tier-II-FAQ.aspx (last updated June 2021).

[31] *3.19 NONTIDAL WETLANDS (NONTIDAL WETLANDS AND WATERWAYS PERMITS)*, MARYLAND DEPARTMENT OF THE ENVIRONMENT, https://mde.maryland.gov/programs/Permits/Documents/2008permitguide/WMA/3.19.pdf

[32] *Id.*

[33] *Id.*

TABLE 1.1 Scope of Permitting Authorities

Federal[34]	Section 10 of the Rivers and Harbors Act of 1899	Section 404 of the Clean Water Act	Section 14 of the Rivers and Harbors Act of 1899		
State	Nontidal Wetlands Protection Act	Appropriation or Use of Waters, Reservoirs, and Dams	Wetlands and Riparian Rights	Water Pollution Control	All other applicable regulations.

TABLE 1.2 MDSPGP-6 Structural Categories and Application Process

Category	**Corps Review**	**Application Review**	**Public Notice**	**Alternate Corps Review**	**Agency Review**[35]
A	No	MDE	State regulation dependent	Strong concerns must exist for aquatic environment[36]	N/A
B	Yes[37]	Yes	See Agency Review	N/A	EPA, NMFS-HEAD, NMFS-PRD, FWS, MHT, MDE, MD DNR, USCG, NRCS

[34] Roles and responsibilities: (1) Pursuant to Section 404 of the CWA and Section 10 of the Rivers and Harbors Act, the Corps has the authority to issue general permits, which can operate in conjunction with a state regulatory program that protects the aquatic environment in a manner equivalent to the Department of the Army (DA) regulatory program, provided that the activities authorized under the general permit are similar in nature and result in no more than minimal individual or cumulative adverse effects on the aquatic environment; (2) Upon the recommendation of the Chief of Engineers, and under the provisions of Section 404 of the CWA, as amended (33 U.S.C. 1344), and Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403), the Secretary of the Army hereby authorizes the discharge of dredged or fill material or the placement of structures into waters of the United States including jurisdictional wetlands and navigable waters. These discharges and structures must comply with all terms and conditions identified in the MDSPGP-6.
U.S. Army Corps of Engineers Baltimore District, *Federal Permit Authorities, Roles, and Responsibilities*, MD SPGP-6, 4, https://www.nab.usace.army.mil/Portals/63/MDSPGP-6%20Permit%20Final%20with%20Appendicies%2020210930.pdf (last updated Oct. 1, 2021).
[35] Agencies include: Environmental Protection Agency (EPA), National Marine Fisheries Service-Habitat and Ecosystem Services Division (NMFS-HEAD), NMFS-Protected Resource Division (NMFS-PRD), United States Fish and Wildlife Service (FWS), Maryland Historical Trust (MHT), Tribal Nations, MDE, Maryland Department of Natural Resources (MD DNR), U.S. Coast Guard (USCG), and Natural Resources Conservation Service (NRCS) Local Field Service Centers. *Id*. at 10.
[36] Under these circumstances, MDE will place the project on state public notice, in response to which the Corps may either provide comments or invoke discretionary authority to require an alternate Corps permit review because of concerns for the aquatic environment or for any other public interest factor. *Id*.
[37] An application for a Category B project that proposes work in an area encumbered by an existing site protection instrument such as a conservation easement, deed restriction, or declaration of restrictive covenants required as a condition of a prior Corps, MDE, or EPA authorization must also include the following for Corps review: (1) A

The Nontidal Wetlands Protection Act also allows for delegation of all or part of the State program to local governments and provides for the development of watershed management plans.[38] Watershed management plans, developed in accordance with the Nontidal Wetlands Protection Act and the Code of Maryland Regulations (COMAR), can be used as the basis for regulatory decisions. The plans are developed in cooperation with local governments and specifically protect wetlands by incorporating them into a jurisdiction's land use decisions.[39]

From its inception, Maryland's NTWs protection program was designed to parallel many aspects of Section 404 of the Clean Water Act (CWA). Regulated activities include the removal, excavation, or dredging of soil or materials of any kind; changing existing drainage or flood retention characteristics; disturbance of the water level or water table by drainage, impoundment, or other means; filling, dumping, discharging of material, driving piles, or placing obstructions; grading or removal of material that would alter existing topography; and destruction or removal of plant life.[40]

3. Program Funding

Maryland's Wetlands Program operations and activities are funded through general funds which are appropriated in the State budget and through special funds. Special funds include application, compensation, mitigation fees, and grant awards. The amount awarded to the program is $8M annually.[41]

Maryland does not receive any federal funding for their wetlands program and has occasionally received U.S. Environmental Protection Agency State Wetland Program Development Grants, which are the only source of funding available for program improvements and the grants are competitively awarded.[42]

4. Program Staffing

Within Maryland's Wetlands Program, there are 61 full-time positions.[43] These positions

---

copy of the recorded site protection instrument, (2) A scaled survey drawing of the project area depicting the area encumbered by the site protection instrument as well as the proposed work, U.S. Army Corps of Engineers 11 MDSPGP-6 Baltimore District October 1, 2021 (3) Current contact information for the grantee/easement holder charged with enforcement of the site protection instrument, and (4) Written concurrence for the proposed project from the grantee/easement holder charged with enforce. *Id*. at 10-11.

[38] *History of Current Regulatory Programs*, APPENDIX . MARYLAND'S WETLAND MANAGEMENT FRAMEWORK, 130, https://mde.maryland.gov/programs/water/WetlandsandWaterways/MDWetlandConservationPlan/Documents/www.mde.state.md.us/assets/document/wetlandswaterways/appendix_2fnl.pdf.

[39] *Id*.

[40] *Id*.

[41] Nelson, Heather. "Wetlands Program Development" Rebecca Carroll, Aug. 14, 2024. Email Interview.

[42] *Id*.

[43] *Id*.

include natural resource planners, engineers, administrative staff, and management.[44] Permit compliance is performed through MDE's Water and Science Administration's Compliance Program which holds 83 positions: 46 of these are compliance specialists and engineers who are responsible for multimedia inspections (tidal wetlands, NTWs, waterway, sediment and erosion control, and NPDES compliance) so they are not strictly dedicated to wetlands inspections, rather they are wholly focused on public health and the environment.[45]

Regarding legal support, Maryland's Office of the Attorney General supplies assigned attorneys to MDE and MDE provides allocated funding for their time.[46]

5. Permit Application Process

When creating their NTW program, Maryland prioritized the customer service element of establishing their permitting program so that there would be streamlined coordination between the state and federal agencies involved with the regulatory process.[47]
To enhance coordination, the following actions were taken:

(1) Adoption of the 1987 U.S. Army Corps of Engineers (Corps) Wetland Delineation Manual and federal wetland definition in statute to ensure consistency with federal regulatory jurisdiction;
(2) Development of standard operating procedures to clarify respective State and federal roles in the permit application review process and to reduce duplication;
(3) Installation of the Regulatory Analysis and Management System (RAMS), a permit tracking system used by the Corps to ensure a common database and facilitate efficient and effective communication;
(4) Creation of a Permit Service Center which receives, logs, and distributes all wetland and waterway applications for both State and federal agencies;
(5) Issuance of the Maryland General Permit by the Corps to facilitate the review and authorization of minor activities with minimal NTW impacts; and,
(6) Establishment of a toll-free permit tracking number and the establishment of regional offices.[48]

The Wetlands and Waterways Permits Interactive Search Portal (available to view here) was also established and when an application for a permit is received, the NTWs & Waterways Division will notify the applicant within 45 days as to whether the application is complete or

[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *History of Current Regulatory Programs*, APPENDIX . MARYLAND'S WETLAND MANAGEMENT FRAMEWORK, 131-2,https://mde.maryland.gov/programs/water/WetlandsandWaterways/MDWetlandConservationPlan/Documents/www.mde.state.md.us/assets/document/wetlandswaterways/appendix_2fnl.pdf.
[48] *Id.*

requires correction.[49] The permit application process turnaround time varies on the size and the scope of the project. Details are available in Table 3.1, below:

TABLE 1.3 MDE Permit Turnaround Time[50]

	PROJECT CATEGORY[51]	**PROJECT TIME**
NTWs AND WATERWAY CONSTRUCTION	Minor[52]	6 months
	Major[53]	9 months
	Stream Restoration Projects[54]	90 days

6. Permit Fee Schedule

The MDE Wetlands and Waterways Program Application Fee Schedule and Guidelines are viewable here, and note that Fee Schedule A and Fee Schedule C are related to NTW projects.[55]

C. New Jersey

New Jersey is one of only two states[56] that has completely assumed jurisdictional authority from the federal government to administer a Section 404 program.

---

[49] *Nontidal Wetlands Protection Programs*, MARYLAND DEPARTMENT OF THE ENVIRONMENT, Which activities are regulated and require letters of exemption?, https://mde.maryland.gov/programs/water/WetlandsandWaterways/DocumentsandInformation/Documents/www.mde.state.md.us/assets/document/WetlandsWaterways/protection.pdf.

[50] *FY24 STANDARD APPLICATION TURNAROUND TIMES*, MARYLAND DEPARTMENT OF THE ENVIRONMENT, 6, https://mde.maryland.gov/programs/permits/Documents/FY24%20Standard%20Application%20Turnaround%20Times%20-%20Google%20Docs.pdf (2024).

[51] MDE created their own threshold limits to determine major and minor categorical distinction.

[52] Minor projects include the following: (1) Projects proposing to impact less than 5,000 square feet of wetlands, waterways, including the 100-year floodplain; (2) A project that proposes residential activities: (a) Residential Activity means a noncommercial activity that is conducted on residential property (residential property means improved property that is used primarily as a residence or unimproved property that is zoned for use as a residence, *not* a commercial building, a marina, or a residential apartment complex or building); and (3) Mining activities. WETLANDS AND WATERWAYS PROGRAM APPLICATION FEE SCHEDULE AND GUIDELINES, 1,3, https://mde.maryland.gov/programs/water/WetlandsandWaterways/Documents/FeeSchedule.pdf (last updated Oct. 1, 2019).

[53] Major projects include the following: (1) A project that proposes to permanently impact 5,000 square feet or more of wetlands or waterways, including the100 year floodplain; (2) A project that is located in an area identified as potentially impacting a NTW of special State concern, or (3) A project that requires the issuance of a public notice by the Department. *Id*.

[54] No public hearing required. *Id*.

[55] *Id*.

[56] To date, two states, Michigan and New Jersey, have assumed administration of the Federal permit program. *State or Tribal Assumption of the CWA Section 404 Permit Program*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Status of State/Tribal Section 404 Program Assumption (Oct. 29, 2024), https://www.epa.gov/cwa-404/state-or-tribal-assumption-cwa-section-404-permit-program.

1. Delineation Methodology

NTWs in New Jersey are referred to as "freshwater wetlands". A freshwater wetland (FWW) is defined as an area that is inundated or saturated by surface water or groundwater at a frequency and duration sufficient to support, and that under normal circumstances does support, a prevalence of vegetation typically adapted for life in saturated soil conditions, commonly known as hydrophytic vegetation.[57] In designating a wetland, the New Jersey Department of Environmental Protection (NJ DEP) uses the three-parameter approach (hydrology, soils and vegetation) enumerated in the 1989 Federal Manual as defined in this section.[58]

FWW are monitored by NJ DEP's Watershed & Land Management Division (WLM), which is a subdivision of the Division of Land Use Regulation (DLUR). The WLM strives to protect FWW through research, planning, public involvement, permitting, mitigation, and public education. WLM oversees FWW permitting and plays a key role in the efforts undertaken by the New Jersey Coastal Management Program (NJCMP) to protect coastal and FWW within New Jersey's coastal zone.[59]

New Jersey also protects the land areas adjacent to FWW, which are labeled as transition areas. In transition areas, a special approval called a transition area waiver is necessary to ensure the protective boundary surrounding the FWW is maintained.[60]

Common types of activities that require a FWW permit, or transition area waiver include construction activities (such as houses and swimming pools), disturbances to the soil (such as excavation), disturbances to the water level (such as draining or ditching), the dumping of materials (such as filling), and disturbances to the vegetation (such as cutting down trees or spraying herbicide).[61]

New Jersey began the process of fully assuming the Section 404 permitting program by passing the Freshwater Wetland Protection Act (FWPA) which contained a provision directing the state to "take all appropriate action to secure the assumption of the permit jurisdiction exercised by the USACE pursuant to the Federal Act".[62]

2. Roles of State and the Corps

Because New Jersey has assumed the Section 404 program, the only areas the agencies jointly review are "below the head of tide and wetlands adjacent to those waters up to 1,000 feet

[57] N.J.A.C. 7:7A-3.1(a).
[58] *Id.*
[59] *Watershed & Land Management*, DEPARTMENT OF ENVIRONMENTAL PROTECTION, Wetlands, https://dep.nj.gov/wlm/lrp/wetlands/ (last updated Aug. 2, 2024).
[60] *Id.*
[61] *Id.*
[62] N.J. Stat. § 13:9B-27.

inland".[63] Also, interstate wetlands and waters (such as the Delaware River, which forms the border between New Jersey and Pennsylvania, Greenwood Lake, on New Jersey's border with New York State) remain under dual jurisdiction.[64] The State performs all jurisdictional determinations for wetlands and the Corps accepts them.[65]

If there are any large-scale impacts to a FWW area, New Jersey's assumption agreement incorporates coordination with EPA for any project involving 5 acres (or more) of fill or major discharge.[66]

3. Program Funding

The WLM is funded mainly through the revenue generated by permit applications. Aside from permit fees, letters of interpretation (LOI) fees as well as jurisdictional determination (JD) fees are also included in revenue.[67] LOIs are not required but encouraged (see Permit Application Process and Permit Application Fee Schedule for more information regarding LOIs and fee range).[68]

4. Program Staffing

The FWW section of the WLM program employs 17 full-time permit reviewers, two supervisors, and one manager.

The Bureau of Coastal and Land Use Compliance & Enforcement (CLUE) is responsible for enforcing the FWPA. The FWPA gives authority for NJ DEP to regulate any and all development within environmentally sensitive areas, including wetlands.[69]

There is a designated unit within New Jersey's Office of the Attorney General to help with any relevant matters and the WLM is charged for any legal service provided.[70]

---

[63] *Joint Permitting*, NEW JERSEY STATE WETLAND PROGRAM SUMMARY, 5, https://www.nawm.org/pdf_lib/state_summaries/new_jersey_state_wetland_program_summary_090415.pdf (last updated Sept. 2015).
[64] *Id.*
[65] *Id.*
[66] Henry, P. "New Jersey Wetlands Program Conversation" (Microsoft Teams Meeting) Sept. 20, 2024.
[67] *Id.*
[68] More information regarding New Jersey's WLM budget will be provided as a supplement at a later date.
[69] *Coastal & Land Use Enforcement*, WATERSHED & LAND MANAGEMENT, https://dep.nj.gov/wlm/enforcement/ (last updated Apr. 10, 2024).
[70] *Id.*

5. Permit Application Process

To determine if a permit is necessary, WLM has created an online mapping tool to help identify if the project is in a protected area using ArcGIS software.[71] WLM provides supplemental resources for accessing and using the application along with a use guide.

For clear and determinative knowledge as to whether or not there are FWWs or FWW transition areas on a site is made through a LOI. A LOI does not grant approval to conduct any regulated activities, the sole function of a LOI is to provide or confirm information about the presence or absence, boundaries, and/or resource value classification of FWWs, transition areas, and/or State open waters.[72]

If it is deemed that the activity will occur in a FWW, there are several FWW permits available, including General Permits-by Certification (GPC), General Permits (GP), and Individual Permits (IP). There are 2 types of activities which require a GPC[73], there are 30 types of FWW GPs[74] available, and if the requested activity does not meet either of the above criteria, an IP is most likely required. Transition area waivers (TAW) are also required if there is a transition area surrounding FWW, and there are 5 types of TAWs[75] available.

There are 12 steps[76] to WLM's permitting process (further explanation of each step can found here):

(1) Pre-application conferences,
(2) Determining the Appropriate Applications,
(3) Application Preparation,
(4) Application Submittal,
(5) Administrative Review,
(6) Technical Review,
(7) Public Comment,
(8) Permit Decision
(9) Post-Permit Issuance Requirements
(10) Modifications
(11) Extensions
(12) Appeals

---

[71] *Watershed & Lang Management*, DEPARTMENT OF ENVIRONMENTAL PROTECTION, Web Mapping Application, https://dep.nj.gov/wlm/maps/ (last updated May 24, 2024).
[72] *Id*.
[73] (1) GPC-8: Construction of an addition to a lawfully existing residential dwelling, or (2) GPC 24: Repair or modification of a malfunctioning individual subsurface sewage disposal (septic) system. *Id*.
[74] View all GP Descriptions here: https://dep.nj.gov/wlm/lrp/wetlands/
[75] GP TAW, (2) Special activity TAW, (3) Averaging plan TAW, (4) Access TAW, and (5) Hardship TAW, with more details available here: https://dep.nj.gov/wlm/lrp/wetlands/
[76] *Watershed & Land Management*, DEPARTMENT OF ENVIRONMENTAL PROTECTION, The Permit Process, https://dep.nj.gov/wlm/the-permit-process/ (last updated Mar. 30, 2023).

Regarding application review, there are two review units involved: (1) the Administrative Support Unit, and (2) the Project Manager, Mitigation Unit/Endangered Species Unit. The administrative review portion is conducted within 20-days and returned with any errors. The technical review process may be prolonged if additional review is required by the EPA or Corps. Any permit applications for activities that meet the definition of a "major discharge"[77] are sent upon receipt to the EPA for distribution and review by EPA, Corps, U.S. Fish and Wildlife Service (USFWS), and National Marine Fisheries Service (NMFS).[78]

TABLE 2.1 Average Permit Application Review Period[79]

Permit/Approval Type	**Average Review Period (days)**
FWW LOI	91
FWW GP	75
FWW TAW	81
FWW IP	181
FW Letter of Exemption	61
Stream Encroachment Permit	84

6. Permit Fee Schedule

New Jersey's permit fee schedule can be found here. Please note that the application fees can be found starting with Table 18.1 on page 179 continuing through the top of page 181.

D. Ohio

Ohio has established its own state regulatory program for isolated wetlands and is not regulated by the Clean Water Act.

[77] "Major discharge" activities include: draft GPs, discharges with potential to affect federally-listed threatened and endangered species, discharges with potential impacts for another state, discharges with toxic or hazardous substances, discharges in vicinity of public water intakes, discharges to critical areas (national/state parks, etc.), filling of 5 or more acres of wetlands, significant reductions in ecological, commercial or recreational value of 5 or more acres, culverts longer than 100 feet, and channelization of more than 500 feet or river or stream. *What Activities Are "Major Discharges?"*, NEW JERSEY'S ASSUMED WETLAND PROGRAM, 8,9, https://www.nawm.org/pdf_lib/assumption_webinar/nj_assumed_wetland_program_021820_lockwood.pdf

[78] *Id*.

[79] *Frequently Asked Questions*, LAND USE REGULATION PROGRAM, 2, https://westwoodnj.gov/DocumentCenter/View/294/Frequently-Asked-Questions---Land-Use-Regulation-Program-PDF

1. Delineation Methodology

Ohio defines a wetland as "an area that is inundated or saturated by surface or groundwater at a frequency and duration that is sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions; this includes swamps, marshes, bogs, and similar areas that are delineated in accordance with the 1987 USACE wetland delineation manual and any other procedures and requirements adopted by the Corps for delineating wetlands."[80] Isolated wetlands are regulated by the Ohio EPA (OEPA), Division of Surface Water (DSW).[81]

Ohio categorizes wetlands into three categories (shown below, Table 3.1) and each category is determined by applying the Ohio Rapid Assessment Method (ORAM). The ORAM combines metrics of wetland habitat, hydrology, and surrounding land use into a single score of Wetland Quality and these scores are then used to categorize the wetlands into either Category 1, 2, or 3.[82]

The use of ORAM in OEPA's implementation of its isolated wetland permitting and CWA Section 401 certification programs has strengthened the basis for the regulatory decisions made by the agency and provided the foundation for the development of wetland mitigation performance standards in Ohio.[83]

[80] ORC 6111.02.
[81] *Water Quality Certification and Isolated Wetland Permits*, OHIO ENVIRONMENTAL PROTECTION AGENCY, Isolated Wetland Permits, https://epa.ohio.gov/divisions-and-offices/surface-water/permitting/water-quality-certification-and-isolated-wetland-permits
[82] *Wetlands*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Ohio Uses Wetlands Program Development Grants to Protect Wetlands, https://www.epa.gov/wetlands/ohio-uses-wetlands-program-development-grants-protect-wetlands (last updated Apr. 28, 2024).
[83] *Id*.

TABLE 3.1 Ohio Wetland Categories Defined[84]

Category Label	Wetlands with. . .
Category 1[85]	Limited water quality that provide minimal public health, habitat, or safety services
Category 2[86]	Moderately high quality that may be good candidates for wetland enhancement
Category 3[87]	"Superior" wetlands that should not be impacted unless the proposed action can be shown to be necessary to meet a public need

2. Roles of the State and the Corps

Because Ohio has statewide isolated wetland protections, the Supreme Court's ruling in *Sackett v. EPA* did not have an adverse impact on isolated wetland regulation within the state.[88] The OEPA has jurisdiction over wetlands and isolated wetlands which is granted via the Ohio

[84] *Ohio*, NATIONAL ASSOCIATION OF WETLAND MANAGERS, https://www.nawm.org/pdf_lib/wwqs/ohio.pdf

[85] Wetlands assigned to category 1 support minimal wildlife habitat, and minimal hydrological and recreational functions as determined by an appropriate wetland evaluation methodology acceptable to the director. Wetlands assigned to category 1 do not provide critical habitat for threatened or endangered species or contain rare, threatened or endangered species. (b) Wetlands assigned to category 1 may be typified by some or all of the following characteristics: hydrologic isolation, low species diversity, a predominance of non-native species (greater than fifty per cent areal cover for vegetative species), no significant habitat or wildlife use, and limited potential to achieve beneficial wetland functions. (c) Wetlands assigned to category 1 may include, but are not limited to, wetlands that are acidic ponds created or excavated on mined lands without a connection to other surface waters throughout the year and that have little or no vegetation and wetlands that are hydrologically isolated and comprised of vegetation that is dominated (> 80% aerial cover) by species including, but not limited to: Lythrum salicaria; Phalaris arundinacea; and Phragmites australis. *Id*. at 2.

[86] (a) Wetlands assigned to category 2 support moderate wildlife habitat, or hydrological or recreational functions as determined by an appropriate wetland evaluation methodology acceptable to the director or his authorized representative. (b) Wetlands assigned to category 2 may include, but are not limited to: wetlands dominated by native species but generally without the presence of, or habitat for, rare, threatened or endangered species; and wetlands which are degraded but have a reasonable potential for reestablishing lost wetland functions. (3) Wetlands assigned to category 3. *Id*. at 3.

[87] (a) Wetlands assigned to category 3 support superior habitat, or hydrological or recreational functions as determined by an appropriate wetland evaluation methodology acceptable to the director or his authorized representative. (b) Wetlands assigned to category 3 may be typified by some or all of the following characteristics: high levels of diversity, a high proportion of native species, or high functional values. (c) Wetlands assigned to category 3 may include, but are not limited to: wetlands which contain or provide habitat for threatened or endangered species; high quality forested wetlands, including old growth forested wetlands, and mature forested riparian wetlands; vernal pools; and wetlands which are scarce regionally and/or statewide including, but not limited to, bogs and fens. (4) In addition to assigning a wetland a category pursuant to this rule, the director may designate a wetland which has national ecological or recreational significance as an outstanding national resource water pursuant to rule 3745-1-05 of the Administrative Code. Requests to undertake activities which will result in short-term disturbances to water quality in wetlands which are designated as outstanding national resource waters shall be evaluated in accordance with rule 3745-1-05 of the Administrative Code." *Id*. at 3.

[88] Zaria Johnson, *Ohio Is Set to Regulate Wetlands After U.S. Supreme Court Limits Federal Control*, IDEASTREAM PUBLIC MEDIA (July 10, 2023), https://www.ideastream.org/environment-energy/2023-07-10/ohio-is-set-to-regulate-wetlands-after-u-s-supreme-court-limits-federal-control

Revised Code Section 6111.02 through 6111.028. OEPA frequently works with the Corps regulating any wetlands that are considered to be WOTUS.

There are three Corps districts with regulatory jurisdiction in Ohio: Buffalo District (Lake Erie Basin), the Pittsburgh District (Mahoning River Basin and Central Ohio River tributaries) and Huntington District (Muskingum, Hocking, Scioto, Little Miami and Great Miami River basins).[89] As part of the permit review process, other state and federal agencies are also consulted and these include the Ohio EPA, the Ohio Department of Natural Resources, the U.S. Environmental Protection Agency and the U.S. Fish and Wildlife Service.[90]

3. Program Funding

The program is funded by application fees and federal grants.

4. Program Staffing

There are 7 full-time employees involved with permitting and 5 who handle compliance and inspection.

5. Permit Application Process

For any project that involves the discharge of dredged or fill material into WOTUS, regardless of being on public or private property, the applicant must obtain a Section 404 permit from the Corps and a WQC from the State.[91] If an isolated wetland is involved, then an Isolated Wetland Permit must be obtained from OEPA.[92]

OEPA strongly recommends scheduling a pre-application meeting to help streamline the application process. Because the application is tedious, a pre-application meeting is offered to help avoid delays in the application review process, such as missing information, and this meeting can be scheduled with an OEPA 401 Coordinator.[93]

A list of required materials for a WQC application can be found here. Under Ohio Revised Code division 6111.30(B), OEPA will review an application within 15 business days of receipt and notify the applicant in writing whether the application is considered complete. If complete, the letter will specify the type of public notice required for the project and the applicant will be asked to acknowledge receipt of the letter. If the application is found to be incomplete, the applicant has 60 days to make corrections.[94]

---

[89] *Ohio Wetlands*, OHIO ENVIRONMENTAL PROTECTION AGENCY, 2 (July 2023), https://dam.assets.ohio.gov/image/upload/epa.ohio.gov/Portals/47/facts/ohio_wetlands.pdf
[90] *Id.*
[91] *Water Quality Certification and Isolated Wetland Permits*, OHIO ENVIRONMENTAL PROTECTION AGENCY, Water Quality Certifications, https://epa.ohio.gov/divisions-and-offices/surface-water/permitting/water-quality-certification-and-isolated-wetland-permits
[92] *Id.*
[93] *Id.*
[94] ORC 6111.30.

The three levels of isolated permit applications are listed below in Table 3.2 as well as their OEPA review period and type of permit required.

TABLE 3.2 Isolated Permit Application Procedures

Wetland Category	Acres of Potential Wetland Impact	Public Notice Required	Mandatory Public Hearing	OEPA Permit Review Period[95]	Type of Permit	Type of IWP Review
1 or 2	≤ 0.5	No	No	30 days	GP	Level 1[96]
1	> 0.5	Yes	No	90 days	Individual Level 2 IWP	Level 2[97]
2	≤ 3, but > 0.5	N/A	N/A	N/A	N/A	N/A
2	> 3	Yes	MP	180 days	Individual Level 3 IWP	Level 3[98]
3	Any Size	Yes	Yes			

6. Permit Fee Schedule

The fee schedule for Ohio's permits can be found here. The relevant information can be found on pp.24-26 (WQC, Isolated Wetland Permit).

E. Pennsylvania

Like Maryland, Pennsylvania regulates wetlands included within and excluded from the definition of WOTUS and uses a SPGP to reduce the administrative burdens of regulation.

1. Delineation Methodology

"Wetlands" are defined as "[a]reas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil

[95] Review period begins on the date when OEPA sends the applicant a letter documenting the application is complete. *Id*.
[96] See Level 1 requirements, .https://epa.ohio.gov/divisions-and-offices/surface-water/permitting/isolated-wetland-permitting-level-one-
[97] See Level 2 requirements, https://epa.ohio.gov/divisions-and-offices/surface-water/permitting/level-2-isolated-wetland-permitting
[98] See Level 3 requirements, https://epa.ohio.gov/divisions-and-offices/surface-water/permitting/level-3-isolated-wetland-permitting

conditions, including swamps, marshes, bogs and similar areas."[99] In Pennsylvania, wetlands can be referred to as WOTUS or WOC, and therefore are regulated by both state and federal governments.[100]

Pennsylvania's regulatory program was established by the Pennsylvania Dam Safety and Encroachment Act of 1978 (PA Chapter 105) and is known as the Chapter 105 regulatory program.[101] State regulations protect the waters of the Commonwealth (WOC), which includes wetlands and NTWs. PA Chapter 105 permits and Section 401 WCQs are administered by the PA DEP, and any activity that impacts wetlands requires a Chapter 105 permit.[102]

Regarding delineation methodology, the Pennsylvania Department of Environmental Protection (PA DEP) utilizes the 1987 Corps Delineation Manual and other appropriate supplements to identify wetlands in Pennsylvania.

2. Roles of the State and the Corps

There are several programs involved with protecting Pennsylvania's wetlands. Pennsylvania also utilizes a SPGP which is overseen by the Corps, and it authorizes the discharge of dredged or fill materials and/or the placement of structures that are components of a single and complete project, including all attendant features both temporary and/or permanent, which individually or cumulatively result in impacts to $\leq$ 1 acre of WOTUS, including jurisdictional wetlands.[103]

A Section 401 WQC, regulated by the PA DEP, is a prerequisite for other federal permits, e.g., the Section 404 permit. DEP certifies that any discharges into WOTUS resulting from the proposed project are in compliance with Pennsylvania water quality standards and other federal and state laws and regulations.[104]

3. Program Funding

Based on the most recent fee analysis (FY2021) the Department receives ~$2.5M in permit fees annually, and Conservation Districts[105] that are delegated Chapter 105

---

[99] 25 Pa. Stat. Ann. § 105.1.
[100] *Streams and Wetlands*, PENNSYLVANIA DEPARTMENT OF TRANSPORTATION (2024), https://www.penndot.pa.gov/ProjectAndPrograms/RoadDesignEnvironment/Environment/environmental-policy/Pages/Natural-Resources.aspx
[101] *Stream and Wetland Regulatory Program*, DEPARTMENT OF ENVIRONMENTAL PROTECTION (2024), https://www.dep.pa.gov/Business/Water/Waterways/Encroachments/Pages/default.aspx
[102] *Id*.
[103] *Environmental Policy and Development*, PENNSYLVANIA DEPARTMENT OF TRANSPORTATION, Streams and Wetlands, https://www.penndot.pa.gov/ProjectAndPrograms/RoadDesignEnvironment/Environment/environmental-policy/Pages/Natural-Resources.aspx (2024).
[104] *Id*.
[105] Conservation Districts each hold a Board of Directors whose expertise focuses on the following areas to support their local communities: abandoned mines, agricultural land preservation, Chesapeake Bay Program, environmental education, erosion & sedimentation pollution control, floodplain management, forest management, mosquito borne disease control program, nutrient management program, stormwater management, the dirt and gravel and low volume road program, waterway protection, and wildlife management.

responsibilities (about half of them) receive ~$350k annually. However, it should be noted that this review is not enough to currently offset program costs. Since the most recent fee analysis, the Department is now allowed to keep the review from Submerged Lands License Agreement charges, however, it is to be used for specific conservation activities and not to offset the cost of running that part of the program.

4. Program Staffing

Chapter 105 staff also work in other programs, and work within other areas of the Bureau of Waterways Engineering and Wetlands (BWEW), the Regional Permitting Coordination Office (RPCO) and 6 regional offices. Over the last 5 years, there have been ~ 82 full-time employees working within the realm of Chapter 105.[106]

5. Permit Application Process

The PA DEP administers PA Chapter 105 permits and Section 401 WQCs which for wetlands are usually in the form of a Waiver, GP, or Standard Permit.

The PA DEP has implemented a Pilot Program that will evaluate the effect of modified business processes on the quality of applications received and reviewed times for Joint Permit Applications.[107] Prior to the submission of an application, the applicant must participate in two pre-application meetings with DEP.[108] Following the meeting, a joint permit will be submitted to DEP's pilot program and permit eligibility will be determined within 7 business days.[109] If the application is accepted into the Pilot Program, DEP will conduct a concurrent completeness and technical review of the application within 46 days of reception.[110] If any deficiencies are found, DEP will allow resubmission within 22 business days and the resubmission will be reviewed within 23 business days.[111] DEP will then prepare and issue the permit following any necessary permit coordination.[112]

Fact Sheet, PENNSYLVANIA'S CONSERVATION DISTRICTS, Overview (June 2019), https://pacd.org/wp-content/uploads/2019/07/PA-Conservation-District-Fact-Sheet-June-2019.pdf

[106] Grace, Austin. "Follow Up from BWEW" Rebecca Carroll, Sept. 23, 2024. Email Interview.

[107] PennDOT Bureau of Waterways Engineering and Wetlands, Review of Individual Chapter 105 Joint Permit Applications (Jpas) Pilot Program, Standard Operating Procedure (SOP), Figure 1 (Aug. 6, 2024), https://files.dep.state.pa.us/Water/BWEW/WaterObstruction/CH_105_JPA_Pilot/SOP_%26_Checklist_Chapter_105_JPA_Pilot_Program.pdf

[108] *Id*.

[109] *Id*.

[110] *Id*.

[111] *Id*.

[112] *Id*.

TABLE 4.1 Generalized Summary of Wetland Permitting in Pennsylvania[113]

Surface Area Impacts to Waters (including Wetlands)	**Linear Impacts to Watercourses**	**DEP PA Chapter 105 Permit**	**USACE Section 404 Permit**	**Application Type**
< 0.5 acre	≤ 250 linear feet	Waivers and GPs	PASPGP Category I	Waiver or GP Notification
> 0.5 acre	1000 linear feet	N/A	Corps	GP
≤ 1.0 acre	≤ 250 linear feet	Standard Permit	PASPGP Category II	Joint Permit Application[114] or GP Notification
≤ 1.0 acre	≥ 250 linear feet	Standard Permit	PASPGP Category III	Joint Permit Application
> 1.0 acre	Any	Standard Permit	Corps or PASPGP	Joint Permit Application

TABLE 4.2 Wetland Permitting Turnaround Time

Wetland Impacts (acres)	**Permitting Time[115] (months)**
De minimis, ≤ 0.05	≤ 3
<1	6 to 12
1 to 5	12 to 24
> 5	18 to 24

[113] Pennsylvania Department of Transportation, *State and Federal Jurisdiction of Wetlands and Watercourses*, WETLAND RES. HANDBOOK, at 16.

[114] Joint Permit Application with USACE (Corps);
1, Pennsylvania Department of Transportation, Introduction, https://files.dep.state.pa.us/Water/BWEW/WaterObstruction/CH_105_JPA_Pilot/Summary_Chapter_105_JPA_Pilot.pdf (last updated Aug. 6, 2024)

[115] Permitting time includes the estimated total time to conduct studies, assemble the permit, and coordinate the agency review process.
Pennsylvania Department of Transportation, *State and Federal Jurisdiction of Wetlands and Watercourses*, WETLAND RES. HANDBOOK, at 17.

6. Permit Fee Schedule

Fees are calculated by the applicant using the Chapter 105 General Permit Calculation Sheet, viewable here. Table 6.4 shown below gives a general guideline to Pennsylvania's permitting fees.

TABLE 4.3 Approximate Permitting Fee Schedule

Wetland Impacts (acres)	Permitting Time[116] (months)	Permitting Cost[117]
De minimis, ≤ 0.05	≤ 3	$3,000 - $10,000
<1	6 to 12	$3,000 - $15,000
1 to 5	12 to 24	$15,000 - $50,000
> 5	18 to 24	$50,000 - $100,000

F. Virginia

Virginia, though the passage of its own NTW protection law and the use of a SPGP has adopted a comprehensive wetland regulatory approach.

1. Delineation Methodology

Virginia defines an NTW as "wetlands other than tidal wetlands that are inundated or saturated by surface water or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions, as defined by the U.S. Environmental Protection Agency pursuant to Section 404 of the federal Clean Water Act in 40 CFR 230.3(t)."

Regarding delineation methodology, Virginia utilizes the 1987 Corps' Delineation Manual, "Wetlands Delineation Manual, Technical Report Y-87-1, January 1987, Final Report" as the approved method for delineating wetlands. Any delineation accepted by the Corps as sufficient for its exercise of jurisdiction pursuant to Section 404 of the CWA shall be determinative of the geographic area of that delineated wetland.[118]

2. Roles of the State and the Corps

The Virginia Department of Environmental Quality (DEQ) regulates isolated wetlands under the authority granted by the Nontidal Wetlands Act of 2001. Virginia utilizes a SPGP which applies to development projects with impacts up to 1 acre of NTW or waters and 2,000 linear feet of stream channel, and linear transportation projects with impacts up to ½ acre of

[116] Permitting time includes the estimated total time to conduct studies, assemble the permit, and coordinate the agency review process. *Id.*
[117] Estimated total cost to conduct studies, assemble the permit, and coordinate the agency review process. *Id.*
[118] Code of Virginia, § 62.1-44.15:21(C).

NTW or waters and 1,000 linear feet of stream channel at any single impact site.[119] To be valid, all Section 404 permits must be accompanied by a Section 401 WQC, which in Virginia comes in the form of a Virginia Water Protection (VWP) permit or a certification from the Corps.[120]

The Baltimore and Norfolk Districts of the Corps administer the Section 404 and Section 10 programs within Virginia, and EPA Region III oversees the Corps' administration of the Section 404 program.

3. Program Funding

DEQ receives $3.5M annually from state funding.[121] Virginia's VWP receives competitive grants from EPA for special projects in support of their regulatory program (e.g. , for 2024-2026, received $525,147 federal funding with a state match of $175,034).[122]

4. Program Staffing

Currently, there are 37 DEQ staff involved with wetland permits and compliance, which includes management and regulatory support staff.[123] The VWP permitting staff are also responsible for compliance efforts within the VWP permitting program.[124]

5. Permit Application Process

To establish when a permit is necessary, DEQ has created an extremely user-friendly website for their permitting section. In the Wetlands & Streams section of DEQ's permit website (found here), there are several drop-down menus which include subjects including: "Activities that Need a VWP Permit", "Activities that Do Not Need a VWP Permit", "Type of VWP Permits", "How to Apply for a VWP Permit", etc. An important subsection of the "Types of VWP Permits" section is "Target Schedule for VWP Permits". This section introduces Virginia DEQ's Permitting and Evaluation Platform (PEEP, found here) which details pending and recently completed VWP General Permits and Individual Permit applications.

The target schedule for a typical VWP General Permit Coverage to obtain a final decision is 75 days. The target schedule for a VWP Individual Permit is 150 days.

This link will show the application details for a VWP General Permit Application. Virginia's Permit Transparency program allows for a timeline to be generated so the applicant can follow along with the expected time each step of review will take and see an original target completion date so that any disruptions or delays can be tracked.

---

[119] *Id*.
[120] *Id*.
[121] Rolband, M. "Virginia Nontidal Wetlands Program Conversation" (Microsoft Teams Meeting) Aug. 9, 2024.
[122] *Id*.
[123] *Id*.
[124] *Id*.

6. Permit Fee Schedule

The fee schedule for VWP General Permit coverages administered by DEQ are set in the Virginia Administrative Code, and can be found here (Section C) and here.

II. Incentives for Preserving NTWs From Development

In addition to regulation, zoning and development laws can incentivize growth that protects sensitive natural resources like wetlands. Examples of incentive zoning and development techniques include cluster development, overlay zones, planned unit development (PUD), and transferable development rights.

Low density zoning limits the amount of development that can happen on a site and although it reduces the totality of development it does not serve to protect onsite environmental features. An alternative development strategy is cluster development. Cluster development allows for development to be clustered on smaller lots in the portion of a development site that does not contain sensitive natural resources, such as wetlands, in exchange for preservation of onsite natural resources. In some cases, incentivizing clustering development can be done by allowing for bonus density in exchange for prioritizing preservation of environmental resources.[125] The positive attributes of cluster development include allowing larger environmental corridors between development sites, supporting the beneficial natural attributes of resources like wetlands, and allowing for better stormwater management and infiltration by reducing impervious surface on the site.[126] The negative aspects of cluster development include the need to move away from traditional development review and regulation which may be viewed as a burden for jurisdictions and the need to properly protect and maintain open space on a development site.[127] Cluster development can be added to existing subdivision regulations, applied to a site using an overlay zone, or utilized during the PUD process.

Overlay zones impose additional regulatory requirements onto an existing zone. In the wetlands context, overlay zones can be used to impose increased setbacks and buffers to protect wetland areas within existing zones.[128]

The PUD process is a flexible development process that can be used to implement cluster development and conservation design. Having a PUD process allows local governments

---

[125] James City County, VA has a number of zoning districts including Planned Unit of Development (PUD) and Cluster Overlay that enable developers to earn density bonuses for development plans that use LID/green infrastructure stormwater management practices, prioritize conservation areas adjacent to floodplains, implement watershed or greenway master plans, etc.
Resilient Zoning, WETLANDS WATCH, James City County (2024), https://ross-weaver-cnr0.squarespace.com/resilient-zoning

[126] *The Advantages and Disadvantages of Cluster/Conservation Development*, COMMUNITY PLANNING AND ZONING (June 25, 2019), https://community-planning.extension.org/the-advantages-and-disadvantages-of-cluster-conservation-development/

[127] *Id*.

[128] Lancaster, VA has a Waterfront Residential Overlay District that covers all parcels within 800 ft. of tidal waters/wetlands and requires 100 ft. buffer from HWM and tidal wetlands, and a 50 ft. buffer from nontidal wetlands.
Resilient Zoning, WETLANDS WATCH, James City County (2024), https://ross-weaver-cnr0.squarespace.com/resilient-zoning

to review developments based on defined development goals such as the creation of open space, mixed uses, and the preservation of environmental site features without the constraints imposed by traditional zoning.[129] Because PUDs are assessed on a case-by-case basis, the review can be taxing for local governments but the flexibility provides an opportunity to avoid some of the common pitfalls associated with traditional zoning such as urban sprawl and compartmentalization of uses.

Transfer of development rights (TDR) programs are voluntary and enable the movement of development rights from so-called 'sending sites' in preservation areas to receiving sites in areas that are appropriate for development. TDR programs can facilitate planning goals including preserving environmental sensitive features such as wetlands. By directing development away from wetland areas, communities can reap the beneficial attributes of wetlands such as flood and stormwater mitigation.[130] The positive attributes of TDR programs include a financial incentive for land conservation and providing a less costly alternative to land acquisition.[131] The negative aspects of TDR programs include the complexity of program administration and the need for willing market participants to make the program effective.[132] "A vibrant market for development rights transfers is very difficult to create."[133]

III. Conclusion

This comparative analysis has highlighted key issues for Delaware to consider when developing the state's NTW regulatory program. Delaware can choose to either fully assume the Section 404(g) permitting program, adopt a SPGP and work concurrently with the Corps, or a combination of those two programs.

A. Section 404 Program Assumption

If Delaware chose to assume the Section 404 program, permitting would be issued by the state instead of the Corps, while still allowing the Corps to retain permitting authority for wetlands adjacent to navigable waters and their tributaries.[134] For a state to fully assume the Section 404 program, the program must be consistent with and no less stringent than the requirements set forth in the CWA. While states assume permitting authority over certain waters, some permitting authority remains with the Corps and does not reduce the scope of CWA

[129] PLANNING IMPLEMENTATION TOOLS CONSERVATION DESIGN, Tool Description (Apr. 2006), https://www3.uwsp.edu/cnr-ap/clue/Documents/PlanImplementation/Conservation_Design.pdf
[130] *Transferable Development Rights*, WETLANDS WATCH, Transfer of Development Rights (2024), https://ross-weaver-cnr0.squarespace.com/transfer-of-development-rights.
[131] *Id*.
[132] *Id*.
[133] Todd K. BenDor et al., *Evaluations of American TDR Programs*, A NATIONAL INVENTORY AND ANALYSIS OF US TRANSFER OF DEVELOPMENT RIGHTS PROGRAMS, 8, https://par.nsf.gov/servlets/purl/10334747
[134] *Basic Information About Assumption Under CWA Section 404*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, What is Assumption?, https://www.epa.gov/cwa404g/basic-information-about-assumption-under-cwa-section-404 (last updated Sept. 23, 2024).

jurisdiction, but instead shifts the responsibility for administering a Section 404 permitting program for certain WOTUS from the federal government to authorized states.[135]

The assumed program must include the following provisions (a full list of program requirements can be found here):

(1) Permitting procedures;
(2) Administrative and judicial review procedures;
(3) Regulating discharges into all assumed waters within the state's jurisdiction;
(4) Regulation of at least the same scope of activities as the Section 404 program;
(5) Public participation;
(6) Meeting public notice requirements;
(7) Permit issuance consistent with the environmental review criteria known as the CWA Section 404(b)(1) Guidelines;
(8) Compliance and enforcement authorities as specified in the regulations; and
(9) Coordination procedures with federal agencies, adjacent states and tribes.[136]

The assumption process is tedious and requires a Section 404 assumption package be prepared and submitted to the state's designated EPA Regional Administrator and the review process takes 120-days.[137]

Presently, only two states have adopted an assumption program, New Jersey and Michigan. More states have chosen not to fully assume the Section 404 program because doing so requires additional funds for administration and enforcement of state wetland regulations.[138] Also, many states do not have sufficiently comprehensive wetland regulations (therefore not meeting the " as stringent as the CWA regulations" standard) to qualify them for assumption.[139] Most states have found that SPGPs offer a more flexible approach for sharing permitting responsibilities with the federal government than the state assumption program.[140]

If Delaware were to adopt an assumption program, it would require a greater amount of funding and staffing within its wetlands regulatory department. Delaware would also need to implement more stringent wetland regulations to meet the federal standard. A more flexible approach for Delaware would be utilizing a SPGP or delegating to a designated state agency.

B. State Programmatic General Permit (SPGP)

Under Section 404 of the CWA, the Corps can issue general permits to authorize activities which have minimal adverse effects on wetlands. A SPGP is a type of programmatic

[135] *Id*.
[136] *Id*.
[137] *Id*.
[138] Jon Kusler & Jeanne Christie, *State Wetland Regulatory Programs*, COMMON QUESTIONS, at Why have not more states assumed the Section 404 program?, 7.
[139] *Id*.
[140] *Id*.

general permit that is administered by a state agency and designed to eliminate duplication of effort between the Corps and the states.[141] SPGPs allow states to issue permits for a broad range of activities in wetlands, as long as state regulations are equal to or exceed federal regulations.[142] When the Corps issues a SPGP to a state, it results in the division of permitting responsibilities between the state and the Corps.[143] This allows the Corps to continue to regulate activities in navigable waters and any activities with major impacts in wetlands, leaving the state to directly regulate activities with minor impacts and allowing for joint-review for any activities which may have a moderate impact.[144]

Delaware already has a SPGP for work in tidal waters.[145] Delaware would need to acquire a new SPGP to include work in NTWs.

C. Combination Program: Federal Coverage with State Regulatory Program

When Ohio enacted the Isolated Wetlands Law in 2001, it gave the state the authority to govern the bulk of wetlands-related activity at the state-level.[146] The Isolated Wetlands Law establishes three levels of regulation based on the size of wetlands and their categorical assignment.[147] There are no minimum size thresholds for isolated wetlands that fall outside the jurisdictional boundaries of Section 401/404.[148]

As seen with Ohio's wetland program, the state has delegated primary authority for wetland regulation to OEPA. By delegating authority to OEPA, Ohio has been able to create and support sub-groups which provide scientific research to substantiate wetland regulations.[149] Another benefit of having OEPA lead the charge for the state's wetlands program, is that it shifts the burden of handling the permit process to a single state agency while still allowing the Corps to regulate any navigable waters present in the state. This could be a strategic move for Delaware if it is able to modify its existing tidal wetland program to incorporate a designated agency or

---

[141] *State Programmatic General Permits*, NATIONAL ASSOCIATION OF WETLAND MANAGERS, https://www.nawm.org/wetland-programs/regulation/programmatic-general-permits.html (2024).
[142] Jon Kusler & Jeanne Christie, *State Wetland Regulatory Programs*, COMMON QUESTIONS, at Why Have Not More States Assumed the Section 404 program? 7.
[143] *Id*.
[144] *Id*.
[145] Michael D. Yost, *Special Public Notice*, U.S. ARMY CORPS OF ENGINEERS, https://www.nap.usace.army.mil/Portals/39/docs/regulatory/spgp/Public-Notice-SPGP-18-Issuance-Feb-2023.pdf?ver=VBG_6b_2Wklc7OiHYrTjzw%3d%3d (Feb. 9, 2023).
[146] *Section B. Regulation*, OHIO STATE WETLAND PROGRAM SUMMARY, How are Wetlands Regulated in the State?, https://www.nawm.org/pdf_lib/state_summaries/ohio_state_wetland_program_summary_111615.pdf (2015).
[147] *Id*.
[148] *Id*.
[149] An example of these sub-groups is the Wetland Ecology group. The Wetland Ecology group performs wetland research with the goal of developing wetland biocriteria and wetland water quality standards for Ohio. This group is funded by EPA grants which are dispersed to states to aid with the development of water quality standards for wetlands. The work performed by the Wetland Ecology group strengthens the basis for regulatory decisions made by the 401 WQC Section.

department solely focused on wetlands and permitting, while still allowing the Corps to regulate any permits for navigable waters.

The Supreme Court's decision in *Sackett v. EPA* narrowed the types of waters protected by the CWA and left states in the position of needing to fill the gaps in wetland regulation. Delaware has much to be gained from amending its regulations to cover impacts to non-tidal wetlands including improved clarity and consistency.