OPPOSE - HB 2048:

SPONSOR TALKING POINTS REBUTTAL

House Bill 2048 (Sherwood)
BENEFITS OF WATER QUALITY PROGRAM CONSOLIDATION AT THE DEPARTMENT OF ENVIRONMENTAL QUALITY

· *This is an Administration bill that would consolidate water quality permitting and planning programs at the Department of Environmental Quality.*

Separations of power are essential to preserving the rights and freedoms of individuals from those who would seek to consolidate that power for their own gain. Such separations are the only barrier between a free nation and despotism. The same holds true here. Combining all permitting and planning programs at the DEQ breaks down the protections for citizens inherently found in maintaining those programs under another agency, the sole focus of which is not maximum regulation.

· **As amended, this bill WILL NOT affect oversight of the Soil & Water Conservation Districts or staffing of the Soil and Water Conservation Board which would remain with the Department of Conservation and Recreation.**

o Nutrient management planning, Resource management planning and administration of the agriculture cost-share program would remain with DCR and the Soil & Water Conservation Board.

Why is management of these nutrient trading programs being sent to DEQ when the nutrient management planning portion is already at DCR as set out in § 10.1-104.2.?

· **Over the last day or so, there has been some information circulated about this legislation that suggests there is some confusion regarding this bill:**

o The bill that is in front of you has been amended, so that the staffing of the Soil programs relating to the Soil & Water Conservation Districts REMAIN AT DCR and will not move to DEQ. This amendment was made in committee to alleviate some concerns that have been expressed out of some of the confusion and misperception of what this bill would do with respect to the districts and voluntary programs.

While the SWCDs may remain within DCR for now, it was not without serious effort to the contrary in the original bills, even so far as to conceal the true legislation as a 92 page bill was substituted unanimously in committee in a single day for a 49 page bill, which boggles the mind at the idea that those voting for it even had an opportunity to read the entire piece of substitute legislation, let alone understand it. The real question is the original intent behind increasing the power and reach of the DEQ, as well as the intent behind the elements of the original bill still inside the amended bill. Where was the transparency in the process of drafting and adopting the substitute? How did each member of the committee get the memo about the substitute before any member of the public even had a chance to look it over to instruct their legislator on how to vote? This is precisely the behavior that leads to angry constituents, and for good reason.

o In page length, this bill is a big bill. But it is a big bill only because statutory language is being moved from one part of the Code into another part of the Code and this bill was carefully drafted so as to NOT CHANGE the state's regulatory authority in any way.

FALSE.

The bill does change the state's regulatory authority. See next item below, specifically, Line 2595 in the proposed bill.

o This bill DOES NOT increase the regulatory authority of any agency of the Commonwealth, it merely shifts existing oversight from one agency to another without expanding that authority in any way – it will take a separate act of the General Assembly to do that – neither DEQ nor DCR employees have any more or any less authority in implementing these programs.

FALSE.

This bill expands the power of the State Water Control Board (62.1-44.19:20, Line 2595) by giving it the power to adopt regulations for establishing certifications of point source nutrient credits. Given that these credits are required for certain types of economic and development activities, they could reasonably be construed as a tax - the authority over which, this unelected board has control. Further, this section forces the board to adopt regulations for the purpose of establishing procedures for the certification of nonpoint source nutrient credits, and abolishes all exclusions (Appendix C).

- So this bill also DOES NOT increase or decrease any mandates on localities as overall state regulatory authority remains unchanged.

FALSE.

Increased regulations on localities stemming from the increased powers of the SWCB as noted above in § 62.1-44.19:20 (line 2595). In addition, given that localities would be beholden to DEQ rather than DCR in regards to stormwater runoff abatement (Lines 374-375), localities would arguably be in a worse position, given the DEQ's relationship to the EPA as noted in Appendices A, B, and C.

- Finally, there has been concern expressed about this bill opening a door for EPA. The Virginia DEQ is NOT EPA.

FALSE.

The idea that someone is proposing that the Virginia DEQ is literally the EPA, is a preposterous red herring. However, the door is thrown wide open for the EPA as evidenced by the Chesapeake Bay Agreement (1987), and VA § 10.1-2100, proposed § *62.1-44.15:67* (Lines 2251-2252, HB2048), proposed Article 2.3, (Lines 748-1584, HB2048), and the Clean Water Act (Appendix A, #1-2).

The best way to protect Virginians from Federal overreach by EPA is to put up our biggest shield up and our biggest shield against that overreach today is DEQ where they are best equipped to push back on EPA overreach … as they do every day.

FALSE.

The biggest shield against Federal overreach by the EPA, or any other agency, is the Office of the Attorney General as evidenced by the recent lawsuit *Virginia Department of Transportation, et. al., v. United States Environmental Protection Agency, et. al. E.D. Va., No. 1:12-cv-775, (2013)* If the DEQ were truly equipped to push back on the EPA, they would've at the very least signed on to the lawsuit. Given that the DEQ is nowhere to be found in the complaint, the realistic expectation of the DEQ pushing back against the EPA is consigned to the edge of preposterous conjecture.

· **The sole purpose and impact of this bill is to make government more efficient and more effective.**

False.

The only way to make the government more efficient and effective is to reduce it's size. The interagency lateral transference of assets does not reduce anything. Further, the very inefficiency of regulatory agencies, like the DEQ, ironically makes ineffectiveness and incompetence a protection to the people it is supposed to regulate. A better solution is to remove parts of the current code which can be construed as trampling on the civil rights of the individuals involved. For example, Lines 2082-2092 where VESCP authorities (including utility companies) have the ability to come onto the property of citizens and undertake physical work on the property without the owners permission, after "proper notice." The problem is the "proper notice" is never defined, nor is there any mention of remedy through, or course of action via, due process in the courts - a vital part of the 4th Amendment.

· **In fact, this bill comes from a recommendation of the Governor's Commission on Government Reform to improve one-stop shopping and coordination of water quality goals.**

Coming from a Governor's Commission does not give legislation any more authority than coming from a band of dancing monkeys. Where a bill comes from does not give it any standing as to it's rightness or wrongness. There is a reason why bills are passed by legislative branches, not declared by fiat from the executive. What gives a bill its rightness or wrongness is whether it protects the inalienable rights given to all men by their Creator, as enumerated in the Constitutions of both the United States and the Commonwealth of Virginia. This bill does not do that, and as such has no moral imperative or causal impetus leading to a supportive authoritative mandate. Legislators exist solely to represent the will of their citizens to the bureaucracy, not to represent the will of the bureaucracy to their citizens. Public opinion is overwhelmingly negative on this. It is easy to see how a legislator might know best on some things, except when they don't, because their sole responsibility is to represent the will of their constituents and to safeguard their constituents' rights.

The benefits include:

· **Providing a Single Point of Contact**

o Citizens, regulated facilities and state/federal agencies would have a single point of contact (DEQ) for all regulated water quality activities. Enhancement of coordination of regulated water quality programs.

Making it easier for federal agencies is not a benefit, unless the intent is higher enforcement of federal mandates against the Commonwealth and its citizens. Coordination with federal entities is only a goal when the aim is to increase the power of the federal entity over the groups of individuals & stakeholders they are coordinating with.

o Simplifies stakeholder input with one agency

Conveniently ignores the fact that this agency is the most dangerous to those stakeholders by way of its very nature as a regulatory agency and relationship with the EPA as noted in Appendices A, B, and C.

o Will reduce citizen confusion for permitting and water quality planning

Citizens are always confused when they have to get a permit for something that should be their natural right to do. What is not being discussed is the major property rights landmine in this bill contained in proposed § 62.1-44.15:60 (Lines 1694-1699, 2082-2092). This includes the specific ability for "authorities" including utility companies and railroads to go on property and start work without the approval of the landowner (Appendix D).

o DEQ best-positioned to manage EPA efforts aimed at regulatory programs.

Which is precisely the problem. It is wholly hypocritical to argue in one paragraph against opening the door for the EPA and then in the next enumerate how the DEQ is best positioned to manage the EPA's regulatory efforts.

o Most states manage water quality programs in a single agency

We are Virginia, not "most states." As such, our decisions should be made as to what is best for Virginia's citizens, not what is best for the citizens of "most" other states.

· Better coordination of TMDL development

By better coordination, it can reasonably be assumed to mean better creation of regulatory restrictions and enforcement in alignment with the EPA, via the State Water Control Board (SWCB) in accordance with VA § 45.1-254. The SWCB is one of three regulatory boards under the purview of the DEQ, with the authority of this section being vested specifically in the Director of the DEQ (Appendix B).

· **Integration of management and administration of Nutrient Trading Programs**

o Removes redundancy in state government.

Separations of power in government are not redundancies, they are important protections against the consolidation of power in a central location. Further, these separations of power should never be construed as a weakness of our representative form of government, rather, they should be recognized as the very hedge that prevents us from charging headlong off the cliff of despotism.

o Provides better management of Nutrient Trading Programs.

Moving oversight of Nutrient Trading Programs does not provide better management of these programs because the planning of these programs is remaining where it currently is within DCR, pursuant to § 10.1-104.2. Management of nutrient trading programs should remain at DCR as well. Further, consolidating power inside a single organization increases the ability for that organization ot abuse its legal mandate, power, and authority. Over time, this makes it easier for an agency to rationalize doing so when deemed 'necessary,' much like the EPA's recent attempt in Fairfax against our own DOT.

· **Improvement of environmental data management**

o IT solutions can be applied to all water programs, thus improving quality of information, database capabilities and reporting.

IT solutions can already be applied to all water programs. Further, this creates privacy concerns which are not addressed within the text of the bill as to what type of information is available, what and who has access to it, what information is sensitive, personally identifiable, or otherwise potentially damaging to the individual or their company, as well as what type of data protection safeguards are in place to prevent internal or external data breaches leading to identity theft or other misuse of personal information.

· **Co-locate regional offices for efficiency**

o More efficient data management systems.

Efficient Data Management is not beneficial to information privacy. This creates privacy concerns regarding that are not addressed within the text of the bill.

o Reduces lease expenses and streamlines some management functions.

Lease expenses can already be reduced simply by choosing less expensive office space. Legislation is not necessary where common sense, basic math, and a modicum of fiscal restraint will suffice.

Appendix A

1. The issue of concern is that the DEQ would be acting as a regulatory agent for the EPA, which is the agency responsible for the coordination (p6) of the 1987 Chesapeake Bay Agreement signed by Virginia, Maryland, Pennsylvania, the District of Columbia and the United States - represented specifically and exclusively by the EPA (p1).

(Available here http://www.chesapeakebay.net/content/publications/cbp_12510.pdf and referred to here Barker Jr., P. D. (1990) The Chesapeake Bay Preservation Act: The Problem with State Land Regulation of Interstate Resources. William & Mary Law Review 31(3) 735-772.)

The Chesapeake Bay Preservation Act (1988, § 10.1-2100) and referred to in this legislation as (§ *62.1-44.15:67*) is Virginia's response to fall in line with the mandates and expectations of that Agreement. The proposed changes with HB 2048 would make the DEQ the regulatory authority of this Act in response to the agreement with the EPA as specifically defined in the proposed legislation (Lines 2251-2252) and make them a de-facto partner in enforcement with the EPA as outlined in the Federal agreement. The DEQ serves no other purpose than regulation and enforcement, whereas DCR does.

Further, and more to the point, there is no evidence that the DEQ is a shield from the EPA, nor that it will push back on the EPA. To the contrary, the idea that the DEQ would be the regulatory agency responsible for enforcing adherence to the terms of the agreement would seem to indicate the direct opposite, that the DEQ would be acting in accordance to the wishes of and even under the guidance of the EPA in it's actions as the sole and exclusive representative of the United States in the Chesapeake Bay Agreement.

2. Since the Stormwater Management Act (HB 2048, Article 2.3, Lines 749-1584) is enforced under the federal Clean Water Act (CWA), the EPA has the authority to enforce the CWA (Olexa, Borisova, Broome, 2). This means that the DEQ is once again responsible for the state regulation of items under the purview of the EPA. Can anyone really sell the idea that two regulatory agencies, regulating, will somehow not work together to regulate more?

(Olexa, M.T., Borisova, T. and Broome, Z. (2005) Handbook of Florida Water Regulation: Clean Water Act. Food and Resource Economics Department, Florida Cooperative Extension Service, Institute of Food and Agricultural Sciences, University of Florida FE582.)

Appendix B

§ 45.1-254 is yet more relevant code showing the direct link between EPA purview and the DEQ in regards to the Chesapeake Bay Watershed. The proposed legislative result would be one regulator dealing directly with another regulator, in the passing down of both federal and state mandates to its citizens. Regulations can only roll downhill so far before crushing the object of their regulation and it is difficult to believe that the DEQ would be interested in doing anything other than passing regulations down, given it's solitary focus on environmental regulations in the first place. Regulations, like taxes, have the power to destroy and there is a limit to how much regulation any individual or entity can endure before it, too, is destroyed.

§ 45.1-254. National pollutant discharge elimination system permits.

A. The **authority to issue, amend, revoke and enforce national pollutant discharge elimination system permits** under the State Water Control Law (§ 62.1-44.2 et seq.) for the discharge of sewage, industrial wastes and other wastes from coal surface mining operations, **to the extent delegated by the U.S. Environmental Protection Agency and required under the federal Clean Water Act, P.L. 92-500, as amended, is vested solely in the Director**, notwithstanding any provision of law contained in Title 62.1, except as provided herein. For the purpose of enforcement under this section, the provisions of §§ 62.1-44.31 and 62.1-44.32 shall apply to permits, orders and regulations issued by the Director in accordance with this section.

D. **No national pollutant discharge elimination system permit shall be issued if**, within 30 days of the date of the transmittal of the complete application and the proposed national pollution discharge elimination system permit, **the State Water Control Board objects in writing to the issuance of such permit.** Whenever the State Water Control Board objects to the issuance of such permit under this section, such written objection shall contain a statement of the reasons for such objection and the effluent limitations and conditions which such permits would include if it were issued by the State Water Control Board.

Appendix C

§ 62.1-44.19:20. Nutrient credit certification. (Line 2595)

A. *The Board may adopt regulations for the purpose of establishing procedures for the certification of point source nutrient credits except that no certification shall be required for point source nitrogen and point source phosphorus credits generated by point sources regulated under the Watershed General Virginia Pollutant Discharge Elimination System Permit issued pursuant to § 62.1-44.19:14*. The Board ~~may~~ *shall* adopt regulations for the purpose of establishing procedures for the certification of *nonpoint source* nutrient credits ~~other than (i) point source nitrogen or point source phosphorus credits generated by point sources covered by the general permit issued pursuant to § 62.1-44.19:14 and (ii) nutrient credits certified by the Soil and Water Conservation Board and the Department of Conservation and Recreation pursuant to Article 1.1:1 (§ 10.1-603.15:1 et seq.) of Chapter 6 of Title 10.1. During the promulgation of the regulations, the Board shall consult with the Department of Conservation and Recreation to avoid duplication and to promote consistency where appropriate.~~

Appendix D

(Lines 1585-1586)

Article 2.4

Erosion & Sediment Control Act

(Lines 1694-1699)

"Virginia Erosion and Sediment Control Program authority" or "VESCP authority" means an authority approved by the Board to operate a Virginia Erosion and Sediment Control Program. ***An authority may include*** *a state entity, including the Department;* ***a federal entity; a district, county, city, or town; or for linear projects subject to annual standards and specifications, electric, natural gas, and telephone utility companies, interstate and intrastate natural gas pipeline companies, railroad companies, or authorities created pursuant to*** *§ 15.2-5102.*

§ 62.1-44.15:60. Right of entry. (Lines 2082-2092)

The Department, the VESCP authority, where authorized to enforce this article, or ***any duly authorized agent of the Department or such VESCP authority may, at reasonable times and under reasonable circumstances, enter any establishment or upon any property, public or private, for the purpose of obtaining information or conducting surveys or investigations necessary in the enforcement of the provisions of this article.***

In accordance with a performance bond with surety, cash escrow, letter of credit, any combination thereof, or such other legal arrangement, ***a VESCP authority may also enter any establishment or upon any property, public or private, for the purpose of initiating or maintaining appropriate actions that are required by the permit conditions associated with a land-disturbing activity when a permittee, after proper notice, has failed to take acceptable action within the time specified.***