



## September 2014 Issue

### *Activities of Virginia Legislative Study Commissions and Joint Subcommittees*



Virginia Division of Legislative Services

# Virginia Legislative Record

Volume 24 Issue 3

The *Virginia Legislative Record* is a report of the activities of Virginia legislative study commissions and joint subcommittees, reflecting the ongoing deliberations and recommendations of interim legislative studies. Meeting summaries were prepared by the staff of the Division of Legislative Services. More information concerning the individual commissions and committees is available on the **DLS website** (<http://dls.virginia.gov/>) or by calling 804-786-3591.

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## Regulation Information

The *Virginia Register of Regulations* is Virginia's official publication of proposed, final, and emergency regulations. All regulations must be filed with the Registrar of Regulations to become law. The *Virginia Register*, published every other Monday, provides a snapshot of all regulatory activity in Virginia. The current *Register* issue, as well as prior issues and additional information about the regulatory process in Virginia, is available at <http://register.dls.virginia.gov>. Contact the Division of Legislative Services at 804-786-3591 (ext. 258, 261, or 262) or follow the *Virginia Register* on Twitter @varegs for more information.

## ***Brown v. Board of Education* Scholarship Committee**

*August 15, 2014*

The *Brown v. Board of Education* Scholarship Committee met with its Advisory Council on August 15, 2014, in Richmond to review applications, make awards for the 2014-2015 academic year, discuss matters pertaining to certain students, set the amount of scholarship awards and the book allowance for the 2014-2015 academic year, and consider modifications to its website.

### **Election of Vice-Chairman**

The Committee elected Delegate Luke E. Torian as vice-chairman to fill the vacancy created by the retirement of Senator Henry L. Marsh, III.

### **Staff Review**

The staff updated the Committee concerning the number of applications, the potential need to modify the Committee's policies, the publication of a brochure, and status of modifications to the Committee's website. The Committee established the 2015 schedule for its public information and training workshops. Also discussed was the feasibility of allowing the book allowance to be used by *Brown* scholars to purchase personal computers beginning in the 2015-2016 academic year. However, before the decision becomes effective, the staff was directed to research the best means of accomplishing this goal under the state's procurement policy.

Lee Andes, Assistant Director of Financial Aid at the State Council of Higher Education for Virginia, presented the fiscal report dated August 15, 2014, which included the nine-year program totals. During this period, 85 individual undergraduate and graduate students have been served at two-year and four-year public and private institutions of higher education in Virginia, and awards through the 2013-2014 academic year totaled \$1,053,822. The tally for the 2014-2015 academic year was not included in the report.

### **Legacy Scholarship Awards**

A lengthy discussion ensued concerning "legacy scholarships," an issue that has been repeatedly debated by the Committee since the beginning of the scholarship program in 2004. Legacy scholarships would provide that the descendants of those who were *directly* affected by Massive Resistance would be eligible to receive an award. However, the Committee determined that the matter should be deferred until it sought legal guidance from the Attorney General. In addition, the Committee was advised that the program's fund balance is substantially lower than when the program began and that a sufficient reserve must be maintained in the fund to pay for escalating tuition and fees for new applicants and students already in the pipeline, many of whom are opting to continue their postsecondary education beyond the two-year level and attend graduate school, which is much more expensive. Given this trend, it was estimated that the balance of funds would be consumed by awards to new students approved for the 2014-2015 academic year, awards to students already in the pipeline, and the purchase of personal computers, which the Committee approved beginning in the 2015-2016 academic year.

### **Executive Session**

The Committee properly voted to convene in executive session pursuant to subdivision A 37 of § 2.2-3711 of the Code of Virginia to discuss and consider matters pertaining to the *Brown v. Board of*

*Education* Scholarship Program excluded from public discussion under this section. At the conclusion of the executive session, the Committee voted to return to open session.

### **Next Meeting**

The Committee agreed to meet again before the 2015 Legislative Session at a date and time to be determined.

## ***Brown v. Board of Education* Scholarship Committee**

### **Senator L. Louise Lucas, Chairwoman**

Brenda H. Edwards, DLS Senior Research Associate

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## **Coal and Energy Commission**

*August 8, 2014*

The Coal and Energy Commission held its first meeting of the 2014 interim on August 8, 2014, at Wytheville Community College in Wytheville with Delegate Terry Kilgore, chair, presiding. Information regarding membership and staff of the Commission is available on the website at <http://studies.viriniageneralassembly.gov/studies/247>.

### **Presentation: EPA CO2 Emissions Regulations**

*Luke Popovich, Vice-President of External Communications, National Mining Association*

Mr. Popovich briefed the Commission on the rules proposed by the Environmental Protection Agency (EPA) for new and existing coal-fired power plants and the anticipated effects of the rules. Mr. Popovich predicted that the proposed rules would cause Virginia electricity prices to rise, harming both the coal industry and communities more generally.

The rules will come in two phases: first, rules for new stationary sources of CO<sub>2</sub>, and second, rules for existing plants. For new stationary sources, the EPA plans to reduce greenhouse gas emissions by setting a technology standard that, according to Mr. Popovich, can be met only by using carbon capture and storage technology. Mr. Popovich reported that no viable plant in the world uses this technology. In addition, the EPA is required by the Clean Air Act to set air quality standards based only on technologies that have been adequately demonstrated. Mr. Popovich sees the standard as deliberately thwarting new coal-fired generating plants (effectively banning construction of the most energy-efficient coal plants) and reducing the reliability of the nation's power grid as a result.

The rule for existing plants seeks a 30 percent reduction in U.S. greenhouse gas emissions by 2030. The comment period remains open for the proposed rule. The EPA states that the baseline year for calculating these reductions is 2005. However, the National Mining Association states that the true baseline is 2012 because the EPA is preventing power companies and states like Virginia from taking credit for any greenhouse gas reductions they might have achieved before 2012. In Virginia's case, the EPA will not count the large steps that Virginia took toward energy conservation and efficiency between 2005 and 2012 in the share of the greenhouse gas reduction that it assigns to Virginia.



To calculate each state's share of the overall national emissions reduction, the EPA uses a complex set of assumptions it calls building blocks. Mr. Popovich described the building blocks as mostly implausible and in some cases impossible to apply. Some of the building blocks call for greater efficiency, which conflicts with rules issued in 2012 on mercury emissions and toxins that require retrofits that make plants less efficient. Mr. Popovich argued that EPA assumptions about the generating capacity of natural gas plants are unrealistic; increases in the use of renewable fuels depend on permitting and financing, factors the EPA has not indicated it has taken into account; and the assumption of 1.5 percent growth in energy efficiency is without a credible basis.

Mr. Popovich suggested that what is missing from the EPA's proposed rules is a recognition of the value of fuel diversity in stabilizing supplies and prices. By reducing diversity, the proposed rules will raise prices significantly. An IHS Energy study of the reduction in fuel diversity predicted an increase in the average retail price of power of 25 percent. This increase would reduce the national GDP by nearly \$200 billion and lead to 1 million fewer jobs. A study by the U.S. Chamber of Commerce predicts an annual net job loss of at least 224,000 by 2030. The benefits of the proposed rules, Mr. Popovich stated, theoretically include a reduction in global temperatures of less than 1/100 of one degree. According to a Brookings Institution study, the benefits of U.S. greenhouse-gas reductions are most likely to occur in foreign countries, and Mr. Popovich characterized the real purpose of the rule as shaming the large greenhouse-gas emitters in developing nations into reducing their emissions.

### **Presentation: Overview of Energy Production and Gas and Oil Extraction in Virginia**

*Rick Cooper, Director of the Division of Gas and Oil, Department of Mines, Minerals & Energy (DMME)*

Mr. Cooper briefed the Commission on the state of oil and gas drilling in Virginia and the use of hydraulic fracturing ("fracking") in Virginia gas wells. He first described the variety and distribution of energy resources in the state. There are 67 active coal mines in Virginia, down from about 360 some 25 years ago. As a result of the steady decline in coal mining for more than 20 years, Virginia is less productive and less prosperous than it used to be, and some of the many counties that derive revenue from coal and gas taxes—for example, Buchanan County—are suffering fiscally. Other resources cited by Mr. Cooper include wind energy (limited to a small offshore area); uranium, which is subject to a state moratorium; and an estimated trillion cubic feet of offshore gas, which is subject to a federal moratorium.

Gas drilling has a long history in Virginia. The first gas well in the state was drilled in the 1930s. Today there are almost 10,000 wells in the state, of which almost 8,000 are presently producing gas, all in Southwestern Virginia. A portion of the Marcellus Shale Formation extends into western Virginia, but though the formation is known for typically containing a high quality of gas and may be producible in Virginia, there are presently no wells in Virginia's portion. Although drilling has occurred in the Taylorsville Basin in the past, there are no operating wells there today. A large portion of Virginia gas goes to New York, since that is where the infrastructure and the demand for gas are found. Although some power plants in Southwestern Virginia are getting ready to use gas, Virginia does not have the infrastructure in place to fully take advantage of its gas resources.

The vast majority of wells in Virginia—about 8,000 wells total—are hydraulically fractured. Wells have been fractured in all parts of Virginia, although there are presently no permits in the Tidewater region. Fracking involves the use of water, nitrogen, or other materials to fracture the geologic structure to get at the gas contained within. The design of the well casing is important in the hydraulic fracturing of a gas well. Every well has two to four steel casings that keep the gas inside and the groundwater out. Keeping groundwater out is important not only for environmental reasons but also because if water is allowed in,

the well cannot produce gas. While Marcellus Shale reservoirs drilled in other states provide gas at pressures of 3,000 to 4,000 psi, the gas reservoirs around Virginia usually exhibit pressures of 300 to 400 psi, so the potential for leakage is much lower.

Mr. Cooper stated that the operators of hydraulically fractured gas wells in Virginia are environmentally sensitive. There has been no documented instance of surface or groundwater contamination or permanent loss of groundwater in Virginia as a result of hydraulic fracturing. In addition, Virginia law requires water replacement if any water supply is damaged. DMME is currently engaged in the process of gathering best management practices and drawing up any regulations that might be needed to address concerns related to hydraulic fracturing. There has been much discussion of chemical disclosures. There has also been discussion of the effect of fracking on the water table and the use of baseline water monitoring to determine safety.

Finally, Mr. Cooper provided an update on the funds held in escrow on behalf of coal gas owners who are not necessarily known. The issue of disbursing the funds is a subject of constant conversation within DMME. DMME derives no revenue from the funds it holds and has no reason to want to keep the money; its mission is to disburse the funds. Although in recent years a huge backlog existed, all payments have now been brought up to date. All the moneys that have been brought before the Gas and Oil Board have been disbursed. Because people associated with these wells live in every state in the country, the Gas and Oil Board is planning to place on its website, in addition to the escrow estimator already there, all of the documentation on file that is associated with a given well.

### **Other Business**

*James Golden, Deputy Director for Operations, Virginia Department of Environmental Quality (DEQ)*

Mr. Golden provided a brief discussion of the EPA's proposed coal-fired power plant regulations. He stated that DEQ takes issue with the proposed rules for a number of reasons. DEQ has held listening sessions, had meetings with electric generators, and gathered the thoughts of its own staff and is preparing comments that it will send to the EPA. Although DEQ might not be allowed the flexibility to ask for a change in the EPA's overall reduction, it might have room to object to Virginia's share of the reduction. DEQ believes that many of the calculations that the EPA used to come up with Virginia's share are inaccurate, for example. DEQ will be seeking to improve Virginia's position and make the best deal for Virginia that it can.

## **Coal and Energy Commission**

### **Delegate Terry Kilgore, Chair**

Martin G. Farber, DLS Senior Research Associate

Scott Meacham, DLS Attorney

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## Virginia Code Commission

*July 21, 2014*

The Virginia Code Commission met on July 21, 2014, with Senator John Edwards, chair, presiding.

### **2005 research on Code of Virginia numbering scheme options**

*Cheryl Jackson, Reference Center Manager, Division of Legislative Services*

Ms. Jackson explained that she had been asked to present historical information relating to research done and options presented in 2005 on Code of Virginia numbering schemes. For comparison purposes, the original 1950 Code used a title-section scheme that did not reference or embed the chapter or article in section-level numbering. Since 1984, a title-section scheme that embeds the chapter in section-level numbering has been used. In 2005, a DLS work group reviewed the numbering systems used by the other 49 states and presented several options to the Code Commission with the Code Commission adopting a two-dash system that embeds both chapter and article. More detailed information on the 2005 recommendation can be found in the minutes of the April 20, 2005, meeting.

Following Ms. Jackson's remarks, the Code Commission discussed how a new numbering system would be phased in and agreed that the civil and criminal codes would be problematic. One member suggested renumbering as volumes are replaced, and another member suggested renumbering during the title revision process. Lilli Hausenfluck, DLS Chief Editor, noted that half of the titles have been converted to the current numbering scheme initiated in 1984 (i.e., title-section scheme with chapter embedded).

After a motion was made and properly seconded to begin using the two-dash system with embedded chapter and article in future title recodifications, the Commission discussed the issue further, with members expressing concerns about the Code simultaneously containing three different numbering systems, describing obstacles to renumbering the Code, and inquiring whether the current numbering system (title-section scheme with embedded chapter) might be preferable to the two-dash system.

E.M. Miller suggested that the Code Commission review an example of a chapter of the Code prepared in the format being considered before making a decision. DLS staff will prepare a chapter of the recently completed Title 33.2 title revision for the members to review.

### **Virginia Administrative Code proposed contract change**

*Christopher R. Nolen, Code Commission Member*

Mr. Nolen explained that, at the last meeting, the chair asked the Virginia Administrative Code Contract Subcommittee to review West's request to amend the contract to allow increases in CD-ROM pricing to be consistent with increases in print pricing. This issue was discovered when West notified the Code Commission earlier this year of a 3.1% increase in the print product. The contract establishes the initial CD-ROM pricing but does not address increases in CD-ROM pricing. The subcommittee looked into whether the Producer Price Index for Book Publishing is intended to include CD-ROM or only print and discovered that the index is described as including print, CD-ROM, or proprietary electronic works. The Code Commission voted to approve the subcommittee's recommendation to amend the contract to make it clear that price increases apply to the CD-ROM product under the limits set forth under the original contract.

**Proposed legislation to allow mailing of certain notices by commercial delivery**

*Caroline Stalker, Attorney, Division of Legislative Services*

Ms. Stalker explained a bill draft requested by Senator Edwards that adds sections in Titles 16.1, 17.1, 18.2, and 19.2 to allow delivery of certain notices required to be sent by U.S. mail to include delivery by commercial delivery service. The bill is based on a narrow proposal that appeared in the Supreme Court's Study of Notice Provisions report presented at the last meeting. Delegate Habeeb asked if "commercial delivery service" is defined anywhere. Ms. Stalker responded that the term is neither currently defined nor defined in the proposed legislation. The Supreme Court's report indicates that the Court intentionally did not propose a definition of the term and further noted that the Rules of Virginia Supreme Court have used the term without definition for several years without difficulty. The Code Commission voted to approve the bill for introduction at the next General Assembly session.

**Policy to not set out certain provisions of the Code of Virginia**

*G. Timothy Oksman, Opinions Counsel, Office of the Attorney General and Code Commission Member*

Mr. Oksman stated that an assistant attorney general called his attention to a Code section listed in the printed Code where the section number is followed by the phrase "not set out." The section text could be found in an online Code service, however. Omission of statutory text struck him as problematic. He understands that some enacted provisions do not need to be codified and understands there is a history of and rationale for not setting out certain provisions, but is calling the issue to the attention of the Code Commission.

Ms. Chaffin briefed members on the background and current policy. The policy on statutes included and statutes omitted from the 1950 Code appears in an explanatory note in the 1948 Report of the Commission on Code Recodification and Proposed Code of Virginia. The general policy as stated in the report was to include only statutes of a general nature and to leave out special and local acts. The report further specifies a number of categories of statutes that were omitted from the 1950 Code, including (i) repealed, expired, superseded, or obsolete statutes; (ii) statutes declared unconstitutional by the Virginia Supreme Court; (iii) preambles and preliminary recitals and legislative policy; (iv) severability provisions; and (v) statutes not effective unless a contingency is met. At its September 2013 meeting, the Code Commission reaffirmed its current policy to set out provisions from the Acts of Assembly in the Code of Virginia only when the provisions have general or permanent application and to exclude provisions that establish policy, purpose, and legislative intent.

A general discussion ensued about who applies the criteria and decides which sections are not set out. Staff explained that the Code Commission's Executive Committee, led by DLS Deputy Director Bill Crammé, makes such decisions. The publisher might present the question, but the Executive Committee makes the decision. Also, the Code Commission applies the "not set out" criteria during the recodification process, and this information is noted in the report's drafting notes and later applied in the Code by the publishers.

Staff noted that approximately 100 sections currently are not set out in the Code. The annotated print Code describes the subject matter of the Code section and explains why it is not set out, but the online Code on the Legislative Information System does not contain this annotation. More and more people are going to the online Code as its prominence and accessibility increases; a section described as "not set out" without explanation is more likely to raise a red flag.

Mr. Miller stated that provisions that fall into one of the categories that warrant omission from the Code should not be drafted with Code section numbers and should be drafted, instead, as uncodified acts. The



Commission recognizes that, although the Division of Legislative Services staff might advise legislators to avoid codifying certain provisions, the legislator makes the final decision. Staff pointed out that the Code Commission is given specific authority in § 30-149 to omit from statutes provisions that, in the judgment of the Commission, are inappropriate in a Code.

Mr. Nolen asked if staff would check into adding links to the acts of the not set out sections on the Legislative Information System.

Senator Edwards stated that the way the policy is implemented is inconsistent and ambiguous and asked Bob Tavenner to have DLS look at the existing policy and associated issues and report back with a recommendation.

Mr. Tavenner mentioned that he had recently returned from the Uniform Law Commission (ULC) meeting. The ULC is encouraging all states to adopt the Uniform Electronic Legal Materials Act (UELMA). For Virginia to adopt UELMA would require designating the electronic version of the Code as official. He has staff looking at why Virginia does not designate any statutory code as official and what problems might be faced going to an official Code. He will report his findings on this matter and on the not set out policy at an upcoming meeting.

### **Recodification of Title 23, Educational Institutions**

*Tom Stevens and Ryan Brimmer, Attorneys, Division of Legislative Services*

Tom Stevens and Ryan Brimmer presented draft language amending the enabling legislation for four-year public universities. Mr. Stevens clarified that the language before the Code Commission consists of only a portion of each university's enabling legislation. The full chapters will be presented at another meeting. The draft language deals with the membership and terms of, appointment to, and removal from the governing boards. The most extensive changes are to the removal and alumni provisions.

Provisions for removing board members exist for some, but not all, universities. Staff recommends, and the work group concurs, that provisions relating to the removal of the board of visitors of each public institution of higher education appear in a newly created general provisions chapter that applies uniformly to all universities.

The Commission discussed the removal provisions at length presented in subsection B of page 2 of Chapter 13 (Governing Boards). Seven of 14 institutions have existing removal provisions. Mr. Miller asked if the removal provisions have ever been used. Elizabeth Hooper with Virginia Tech was called upon to answer this question. She stated that Virginia Tech used it about 10 years ago for nonattendance purposes. Mr. Stevens added that Longwood University asked to have it added to its basic law.

Judge Sharp commented that he finds subsection B confusing. The first sentence addresses nonperformance of duties and the second deals with nonattendance. Nonattendance is not an issue unless you cannot establish a quorum. The Code Commission asked staff to readdress the language with the work group.

### **Administrative Law Advisory Committee (ALAC) work plan and budget**

*Andrew Kubincanek, ALAC Program Coordinator, Division of Legislative Services*

Mr. Kubincanek presented ALAC's proposed work plan and budget request.

Continuing studies include the review of the Model State Administrative Procedure Act (MSAPA). The MSAPA judicial work group is discussing default orders in administrative hearings, ex parte communications, and disqualification of hearing officers. ALAC also plans to discuss administrative



hearings by teleconference or videoconference. Agencies' use of guidance documents has been studied by ALAC in the past. In anticipation of a future study on guidance documents, ALAC is soliciting presentations from the Department of Environmental Quality and the Department of Health Professions regarding their use of guidance documents.

A new work group has been formed to work with the Governor's office to offer input on the implementation of Executive Order 17, Development and Review of State Agency Regulations. The Governor's office expressed an interest in hearing suggestions from ALAC on the implementation of this executive order.

ALAC plans to form a work group to discuss alternative delivery methods, such as commercial delivery services, for administrative notices. This issue is added at the request of Senator Edwards.

ALAC is monitoring the FOIA Advisory Council study of FOIA exemptions directed by HJR 96 (2014).

Additionally, ALAC will review two Administrative Process Act (APA) exemption issues—House Bill 955 (2014), which was carried over and would effectively exempt all regulations from the APA, and a 2011 amendment that places a time restriction on using the APA exemption for regulations that are necessary to conform to changes in Virginia law where no agency discretion is involved.

Mr. Kubincanek presented ALAC's proposed 2014-2015 budget for approval. The total amount requested is \$20,000 for meetings and related expenses, consultant and intern expenses, conferences and training, and publications and supplies. Mr. Kubincanek stressed that any expenditure related to consultants/interns would be made in consultation with the Director of Legislative Services.

The Code Commission approved ALAC's proposed work plan and budget request as presented.

### Next Meeting

The Commission is scheduled to meet on Tuesday, September 16, 2014.

## Virginia Code Commission

**Senator John S. Edwards, Chair**

Jane Chaffin, DLS Staff

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[codecommission.dls.virginia.gov/](http://codecommission.dls.virginia.gov/)

## General Laws Special Joint Subcommittee Studying the Virginia Public Procurement Act

### Work Group 1: Construction and Design Professionals

*July 23, 2014*

Work Group 1, Construction and Design Professionals, of the General Laws Special Joint Subcommittee Studying the Virginia Public Procurement Act (VPPA) held its third meeting of the 2014 interim on Wednesday, July 23, 2014, in Richmond. The work group members reviewed revised discussion drafts, prepared by staff, that incorporated comments and suggestions submitted for consideration by members and interested parties after the June 19 work group meeting.



### **Term Contracts for Architectural and Engineering Services; Revised Discussion Draft**

The initial objective of the draft was to remove the A/E term contract provisions from the definitions section without making substantive language changes. During the June 19 meeting, it was noted that multiphase contracts were not term contracts and therefore should not be included and that the term contract language should be moved to the new section proposed by the discussion draft. The revised discussion draft accomplished this change. Concern was raised regarding confusing language of existing law in the draft regarding the timing of submission of nonbinding estimates at the initial stage of consideration. It was agreed that staff would develop for review at the next meeting language to clarify when price may be considered. In addition, the work group will also take a look at the current contract and project price limits for possible revision.

### **Cooperative Procurement; Revised Discussion Draft**

The draft contained several options for resolving the consensus position submitted by work group members and interested parties covering areas of disagreement. A major area of discussion among the work group involved whether or not to remove construction and maintenance from cooperative procurement. The work group discussed options including prohibiting new capital construction and placing a cap on the amount of construction that may be procured. The work group reached consensus that there were two types of procurement going on under § 2.2-4304, the provision authorizing cooperative procurement. In the first type, a public body conducts or administers a cooperative procurement agreement on behalf of or in conjunction with another public body. This is the type of procurement that is contemplated by the first paragraph of subsection A of the discussion draft, beginning at line 6. It includes some involvement by the public body at the time that the Request for Proposals (RFP) or Invitation to Bid (ITB) is issued. In the second type, a public body purchases from another public body's contract even though it did not participate in the RFP or ITB. This possibility is contemplated by the second paragraph of subsection A, beginning on line 12. The result is that one public body is allowed to "piggyback" onto another public body's contract. It is this situation that appears to be the source of the problems when it comes to construction.

Citing significant movement toward overall consensus, the Work Group requested staff to develop a draft encompassing the concepts that had been discussed, including a general prohibition on using cooperative procurement for procuring construction and provisions allowing the cooperative procurement of some forms construction or maintenance in limited situations or circumstances or for certain entities.

### **Job Order Contracting; Revised Discussion Draft**

After presentation of the job order contracting (JOC) discussion draft, several concerns were raised including the need to exclude highway maintenance and asset management from JOC and whether to allow incidental or ancillary A/E services to be a part of a JOC arrangement. Consensus was reached regarding the exclusion of highway maintenance and asset management from JOC. On the issue of incidental or ancillary architectural and engineering services, discussion ranged from requiring any work be conducted under an existing A/E term contract, defining "ancillary" or "incidental," and placing a cap on the amount of A/E work that may be done under a JOC.

Another area of extensive discussion among the work group involved establishing appropriate limitations on the use of JOC. Current limits are as follows: (i) sum of all projects performed in a one-year contract term, not to exceed \$2 million; (ii) project fee, not to exceed \$400,000 and (iii) renewable terms, up to four additional one-year terms. Proposals for changes to the limitations were offered, some

providing for different limits for DGS and larger localities; several work group members asserted, however, that not enough data existed to support changing the limits that became effective on July 1, 2014, and that the work group should wait and see what the experience is for the limits. It was the consensus of the work group to continue working toward compromise.

### **Public Comment**

The work group received public comment on the discussion drafts from three individuals.

*Herschel V. Keller, Esq., Petty, Livingston, Dawson & Richards, P.C.*

Mr. Keller stressed the need to establish an effective and meaningful enforcement mechanism as a means of reaching easier compromise on other more specific issues. He suggested that all discussions be tabled until the issues related to establishing meaningful enforcement and oversight mechanisms are resolved.

*Phillip Abraham, Old Dominion Highway Contractors Association*

Mr. Abraham stated that procurements for maintenance or asset management services that are administered by VDOT are unique and require procurement by competitive sealed bidding. He supported the position of Mr. Southward regarding the cooperative procurement and JOC discussion drafts with regard to excluding such procurements.

*Jeff Gore, Hefty & Wiley, P.C.*

Mr. Gore noted that Loudoun County has had success using JOC for HVAC maintenance and small construction projects, such as utility sheds. He stated that the county reaches out to small contractors to make sure that they get some of the work; typically about 14 contractors are involved. He maintained that JOC works well for large localities and suggested a higher limit for localities with a population of 200,000 or more. He offered to provide information on Loudoun County's JOC agreements.

### **Next Meeting**

The next meeting of the work group is scheduled for September 17, 2014. The meeting adjourned at 11:55 a.m.

## **Work Group 2: Information Technology, Goods, and Other Professional Services**

*July 23, 2014*

Work Group 2, Information Technology, Goods, and Other Professional Services, of the General Laws Special Joint Subcommittee Studying the Virginia Public Procurement Act (VPPA) held its third meeting of the 2014 interim on Wednesday, July 23, 2014, in Richmond. The meeting began with the review of staff-prepared discussion drafts reflecting the various proposals offered by work group members and interested parties. The objective of the review was to facilitate consensus on specific language regarding (i) establishing equal footing for competitive negotiations and competitive sealed bidding and (ii) revising the requirement for the publication of notice for competitive negotiation.

### **Equal Footing for Competitive Negotiation and Competitive Sealed Bidding; Discussion Draft**

Staff explained that the objective of the draft is to remove the preference for the use of competitive sealed bidding as the method for procurement under the Virginia Public Procurement Act (VPPA). The



work group reached consensus that both the preference for competitive sealed bidding and the requirement for the written determination be removed. The draft was subsequently approved as amended.

### **Publication of Notice, Competitive Negotiation; Discussion Draft**

The work group reviewed the discussion draft amending provisions in the Code relating to the requirement for procurements using competitive negotiation to be published in a local newspaper. The draft consists of three components. The first component provides for the Department of General Services to provide to any requesting newspaper or print publication with circulation in Virginia, free of charge, an electronic data file containing all active business opportunity notices posted on the agency's central electronic procurement website. The second component of the draft provides for the elimination of the publication requirement effective July 1, 2018, effectively establishing a transition period of three years. The third component requires all public bodies to report annually the method by which between July 1, 2015, and July 1, 2018, an offeror submitting a proposal in response to a request for proposal (RFP) became aware of the solicitation.

Discussion among the work group centered on the appropriate length of the transition period and whether a reporting requirement was needed. After extensive discussion, it was the consensus of the work group to have a two-year transition period and a reporting period of one year. In addition, it was agreed that DGS and localities would provide an electronic data file containing all active business opportunities to any requesting newspaper free of charge. Localities would, however, have the option of providing procurement information directly to the newspapers or providing it to DGS to be included in what it submits to newspapers.

The work group received public comment on the publication of notice, competitive negotiation discussion draft from two individuals.

*Matt Paxton, Virginia News Gazette*

Mr. Paxton stated that his newspaper has been in business for over 213 years. He voiced concern that the Internet is not available in all parts of the state, which would have an adverse effect on both the citizens and local contractors in those areas. Mr. Paxton also asserted that the publication costs amount to a miniscule percentage of a local public body's total budget.

*Ginger Stanley, Virginia Press Association (VPA)*

Ms. Stanley asserted that RFPs published in local newspapers reach a broad pool of local businesses and also serve as notices of proposed government actions to local residents. By contrast, RFPs published on a government website reach fewer potential bidders, including small businesses, minority businesses, and businesses in rural areas. In addition, Ms. Stanley maintained that not all Virginia businesses have easy or immediate access to online requests for proposals, with some communities having no access to the Internet at all. Ms. Stanley provided the work group with the results of a recent survey conducted by DecideSmart for the VPA examining the views of 500 adult Virginians about the principle of the public's right to know and the placement of public notices. According to the survey, 97% of the respondents said that the principle of the public's right to know what their government is doing and planning is either very important or somewhat important. The survey also found that 94% of respondents thought that keeping the citizens informed of public notices/legal advertisements in newspapers is an important function of government agencies. Ms. Stanley added that she has worked on this issue for over 10 years and has never seen a survey conducted by the Virginia Municipal League or the Virginia Association of Counties.

## Enforcement and Oversight

Staff provided an array of items for consideration regarding enforcement and oversight relating to the procurement process. The items covered three general areas: (i) enforcement, procurement process; (ii) enforcement, administrative appeal alternative; and (iii) general oversight.

Initial discussion focused on the procurement appeals board that existed previously within the Secretary of Administration. This board was limited to procurements concerning goods and was discontinued for lack of use. Several members of the work group maintained that an effective appeals process is necessary in order to ensure compliance with the statutory requirements of the process. As a possible option, it was suggested that the work group consider providing a role for the Office of the Inspector General (OSIG) to receive and investigate complaints alleging a failure to comply with the requirements. After discussion it was the consensus of the work group to continue discussion of the issue at future meetings.

## Next Meeting

The next meeting of the work group is scheduled for September 17, 2014.

### **General Laws Special Joint Subcommittee Studying the Virginia Public Procurement Act**

#### **Delegate C. Todd Gilbert, Chair**

Maria J.K. Everett, DLS Senior Attorney

Amigo Wade, DLS Senior Attorney

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## **Joint Commission on Technology and Science**

*August 6, 2014*

The Joint Commission on Technology and Science (JCOTS) met on August 6, 2014, in Richmond, with Delegate Tom Rust, chair, presiding.

The general purpose of the meeting was to consider SB 599 (Cosgrove), which was referred to JCOTS by the 2014 Session of the General Assembly. SB 599 requires that any cloud computing service provider that enters into a contract with a local school board only utilize student data, as defined in the bill, according to the terms of its contract. The bill specifically prohibits the provider from using the data for any secondary purpose that benefits the provider or a third party, such as online advertising, the creation or correction of individual profiles, or the sale of the data.

### **Presentation of SB 599: Cloud Computing and Student Data**

Delegate Rust welcomed Delegate David Yancey to the meeting. Delegate Yancey carried HB 1114 (2014), which is identical to SB 599 and which was continued in the House Committee on Science and Technology without a referral to JCOTS. Delegate Yancey provided an overview of the legislation. He noted that sweeping new technology has changed the way that we view and treat data, especially data concerning students. Other states have addressed the issue of access to student data legislatively. The key is to find the appropriate balance between free enterprise and protecting the privacy of minors.



## Staff Overview of Relevant Laws and Related Action in Other States

JCOTS staff provided the Commission with background on cloud computing technology. Staff also noted that two federal laws—the federal Family Educational Rights and Privacy Act (FERPA) and the Children’s Online Privacy Act (COPPA)—are relevant because both address the permissible use of data. Also relevant is Article 5 (§ 22.1-287 et seq.) of Chapter 14 of Title 22.1 of the Code of Virginia, which largely mirrors FERPA. FERPA aims to protect student data and prohibits its release to third parties without parental consent. FERPA does not, however, prohibit a school from contracting with vendors to perform education-related functions and sharing data with such vendors. It is also important to note that FERPA was initially enacted in 1974, when student records were contained in physical file cabinets, not computer servers. Over 100 bills related to student data and student privacy have been introduced in other states in the past two years; to date nine states have enacted legislation.

*Joel R. Reidenberg, Stanley D. and Nikki Waxberg Chair and Professor of Law and Founding Academic Director of the Center on Law and Information Policy, Fordham University*

Professor Reidenberg gave testimony via videoconference regarding the background and current state of information privacy law. With The Center on Law and Information Policy at Fordham University, Professor Reidenberg recently completed a study entitled “Privacy and Cloud Computing in Public Schools.” Professor Reidenberg drew his comments from the research he conducted for the study, and he testified to the landscape of student cloud services and outsourcing practices of school districts. His testimony provided examples of how student information is utilized in data analytics, classroom functions, guidance functions, and communication with parents. A copy of the report is available at <http://law.fordham.edu/center-on-law-and-information-policy/30198.htm>.

Professor Reidenberg highlighted the significance of FERPA as applied to contracts between school districts and vendors. In his view, “educational record” is too narrowly defined, allowing some information to escape federal protection. He remarked that schools may fail to keep adequate data regarding contracts with third parties and that data security is often poor. He also stated that it is essential that school districts have a data policy in place to protect the privacy of the records.

After Professor Reidenberg completed his remarks, Delegate Davis asked if the legislation at hand was getting ahead of recent changes made to COPPA regulations and whether the legislation was necessary. Professor Reidenberg responded that the Federal Communications Commission (FCC) has recently sought to clarify regulations already in place, that COPPA does not necessarily contemplate issues such as use of metadata, and that COPPA does not apply to children over 13.

*Ben Schrom, Products Manager, Google Apps for Education*

*Ron Barnes, Director of State Legislative Affairs, Google*

Ben Schrom provided an overview of Google generally and of the Google Apps for Education suite of tools currently offered to school systems around the country free of charge.

Mr. Schrom stated that Google’s cloud-based tools for education and productivity have over 30 million users and that the products have experienced a 70 percent growth in recent years, the bulk of which has been in the area of K-12 education. Mr. Schrom also emphasized how other Google products such as YouTube and Chromebook can be integrated to improve the learning process. He stated that it is among Google’s goals to provide scalable tools that empower teachers, students, parents, and administrators.

Mr. Schrom stated Google’s position that the data in question belongs to the student and that Google does not collect or use student data for advertising purposes. He specifically noted a policy

announcement made by Google in April 2014 that no advertisement will be allowed in Apps for Education. Previously, the system administrator was allowed to choose whether or not to allow ads, but that option has been removed.

Senator John Miller asked Mr. Schrom if Google has ever collected student data. Mr. Schrom's response was that Google at one time did collect data on the "back end" but that such data was never used. He also stated that such data is no longer collected.

Senator Steve Martin asked Mr. Schrom what secondary purpose such data might be used for and whether the language in the bill caused him any concern as it relates to Google's current business practices. Mr. Schrom replied that because "secondary purpose" is a vague and undefined term, he could not answer the question. He also noted that in the bill's current form, it is unclear whether Google's use of data to improve its products for all users would constitute a prohibited secondary purpose.

Delegate Davis asked how difficult it might be if there were 50 different sets of regulations, dependent upon specific criteria unique to laws adopted in each state. Mr. Schrom remarked that deploying Google Apps for Education in that way would be extremely difficult and that the standardization of the product is what enables Google to scale the product and to provide it for free. Delegate Davis asked if the product was COPPA compliant. Mr. Schrom responded in the affirmative.

Ron Barnes joined Mr. Schrom at the podium. Senator John Watkins asked Mr. Barnes whether Google's contracts with schools set forth a framework regarding liability for data breaches and subsequent notifications to users. Mr. Barnes answered that Google does not enter into contracts with school districts but rather requires that school districts agree to standard "terms of service." Senator Watkins said he would like to follow up whether state law requires notice to user in the event of data breach unrelated to breach of financial information.

Senator Martin again asked how restrictions on secondary purpose would affect Google's service. Mr. Barnes, deferring to Mr. Schrom, stated that since "secondary purpose" is undefined, such limitations are unclear and could affect functions such as spell check and malware blocking.

Delegate Rust asked whether a school system could modify the terms of service agreement, in particular with regard to data breaches. Mr. Schrom responded that in some limited cases, such as those of an extremely large user base, such modifications have been made. He added that in general, however, school systems not comfortable with the terms of service could simply decide not to use the products.

## **Perspectives of Virginia Schools**

### *Chesterfield County Public Schools*

Shawn Smith, Assistant Director of Community Relations for Chesterfield County Public Schools, testified regarding ways in which Chesterfield County utilizes services provided by Google Apps for Education. Mr. Smith drew the Commission's attention to language in the proposed legislation that would prohibit using data to create or correct a household profile and remarked on instances where such language may have a negative impact on how Chesterfield County utilizes the services. Mr. Smith concluded his remarks by stating that Chesterfield County Public Schools takes FERPA very seriously. He stated that he did not know of any specific instance where the use of cloud computing services by Chesterfield County Public Schools has been problematic and that he would be interested to know if other schools had experienced actual problems.

Senator Watkins asked Mr. Smith if a specific individual with Chesterfield County Public Schools was responsible for overseeing student privacy. Mr. Smith responded that such responsibility fell to the



school board attorney and the IT director. Delegate Rust then asked whether parents could opt out of their student's participation in cloud computing services, and Mr. Smith responded that the school system would work with the family in that situation to find a solution.

*Chesapeake Public Schools*

Angela Bezik with Williams Mullen spoke on behalf of Chesapeake Public Schools. She said that SB 599 aligns well with Chesapeake Public Schools' current practices. She stated that Chesapeake opted to not use Google Apps for Education and instead chose a provider with whom they have a signed contract with agreed-upon terms. Delegate Davis asked whether Chesapeake's concerns about cloud computing services were related to data collection, data mining, or data breach. Ms. Bezik responded that Chesapeake was trying to protect against breach, marketing, and information sharing.

Senator Watkins suggested that, in follow-up to this meeting, JCOTS staff contact Henrico County and Fairfax County Public Schools regarding their data and privacy technology policies.

*Paige Kowalski, State Policy and Advocacy, Data Quality Campaign*

Ms. Kowalski testified that the collection of data in the educational setting can have many beneficial purposes and can help answer questions. However, in collecting data, a school should aim to collect that which has value. If complete and outright privacy is the goal, then data should not be collected at all. However, absolute data privacy is neither feasible nor desirable today. Instead, schools should place privacy in the context of the value of data and should seek to be good stewards of that data.

Culture is one big issue regarding use of data. Parents want to trust that schools are doing their due diligence but parents often do not understand what is being done to keep their children's data safe. She emphasized that parents often do not know what is being collected, nor is the value of data communicated to parents. Ms. Kowalski presented essential elements of proper data security and outlined the roll of the states in protecting the privacy of data.

Ms. Kowalski also commented that the current climate around student data has very little transparency, and it is unclear how parents and students benefit in surrendering their data. With regard to SB 599, she asked the Commission to consider how to incentivize both school districts and vendors to use student data correctly.

*Mark Schneiderman, Senior Director of Education Policy, Software & Information Industry Association (SIIA)*

Mr. Schneiderman provided testimony regarding the educational benefits of technology and data as well as student privacy and security protections. Mr. Schneiderman emphasized the importance of policy that meets the needs of both current students and future users and expressed concern about SB 599. He said that SIIA agrees that safeguarding student privacy and security was important; however, he believes that current industry best practices already accomplish this without the need for legislation. He believes that SB 599 would actually inadvertently inhibit the provision of core educational functions. Like previous presenters, he said that the "secondary purpose" language of the bill was ambiguous and problematic.

At the close of the scheduled presentations, Delegate Rust invited the audience to provide public comment. None was received.

Delegate Rust suggested scheduling an additional JCOTS meeting regarding SB 599 to gather additional information and have more time for discussion of the issues by the members. He directed staff to contact



the State Board of Education and the Secretary of Education regarding possible participation in the next meeting.

Senator Watkins remarked that the use of technology in schools is extremely important but so is the need to protect the privacy of children as the duty of the Commonwealth to its young citizens.

Delegate Davis asserted that COPPA legislation provides significant protections for students up to the age of 13 and recommended that the Commission consider recommending a bill that extends similar protections to students up to the age of 18 in the Commonwealth.

### **Other Business**

In other business, Delegate Rust informed the members that Delegate Scott Lingamfelter has requested that JCOTS form an advisory committee regarding a review and inventory of specialized equipment at state institutions of higher education and examine the potential for increased efficiency by sharing of equipment by institutions and possibly leasing idle equipment to private entities. Delegate Rust indicated that he would authorize the creation of such an advisory committee, co-chaired by Delegate Lingamfelter and the Honorable Joe T. May.

## **Joint Commission on Technology and Science**

### **Delegate Thomas Rust, Chair**

Lisa Wallmeyer, Executive Director and Senior Attorney

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## **Joint Subcommittee to Formulate Recommendations to Address Recurrent Flooding**

*July 22, 2014*

The Joint Subcommittee to Formulate Recommendations to Address Recurrent Flooding pursuant to HJ 16 (2014) and SJ 3 (2014) held its initial meeting on July 22, 2014, in Richmond. The Joint Subcommittee elected Delegate Chris Stolle to serve as chairman and Senator Mamie Locke as vice-chairman.

### **Role of the Joint Subcommittee and Presentations**

*Jeff Sharp, Senior Attorney, Division of Legislative Services*

Mr. Sharp provided an overview of the role of the Joint Subcommittee, which is tasked with formulating recommendations for the development of a comprehensive and coordinated planning effort to address recurrent flooding, including recommendations for short-term and long-term strategies for minimizing the impact of recurrent flooding. Final recommendations will be presented to the 2016 Session of the General Assembly.

*Brian Moran, Secretary of Public Safety and Homeland Security*

After opening remarks by Chairman Stolle and introduction of the Joint Subcommittee members, Secretary Moran described the ongoing work of the Secure Commonwealth Panel and the Governor's



Climate Change and Resiliency Update Commission. He pledged the cooperation of his office in working with the Joint Subcommittee.

*Col. Paul Olsen, Commander of the Norfolk District, U.S. Army Corps of Engineers*

Col. Olsen, who oversees the district's civil works infrastructure and military construction, described to the Joint Subcommittee the role of his office and the manner in which the office seeks to identify mutual interests with the state and localities so as to better coordinate and cooperate on various projects. Upon questioning, Col. Olsen stated that the Corps and localities are best able to work together on smaller, flexible projects such as shore restoration. Col. Olsen further explained the strategy of retreat/adapt/defend when determining how to best respond to challenges caused by recurrent flooding.

*Jim Redick, Director of Emergency Preparedness and Response for the City of Norfolk and member of the Secure Commonwealth Panel*

Mr. Redick encouraged Virginia to take the lead in determining how best to address the issues facing the Commonwealth related to recurrent flooding. He stressed that with a unified effort, Virginia can set the standard that will be studied by others as these issues move to the forefront. He emphasized that given the long time frame necessary to effectively address recurrent flooding and sea level rise issues and given the speed at which risks are projected to increase, Virginia and its coastal localities should immediately begin comprehensive and coordinated planning efforts. He also recommended that Virginia establish a single point of reference for information where consistent, timely, and accurate information may be readily obtained. After presenting an overview of various other issues facing the Joint Subcommittee, Mr. Redick promised to report further recommendations of the Secure Commonwealth Panel once finalized.

### **Public Comments and Next Meeting**

After a general discussion among Joint Subcommittee members, the Joint Subcommittee opened the floor to comments from the audience, including representatives from the Cities of Norfolk and Virginia Beach, and set a second meeting date for September 10, 2014.

## **Joint Subcommittee to Formulate Recommendations to Address Recurrent Flooding**

**Delegate Christopher P. Stolle, Chair**

Jeff Sharp, DLS Senior Attorney

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## Joint Subcommittee to Study Mental Health Services in the 21st Century

July 21, 2014

The Joint Subcommittee to Study Mental Health Services in the Commonwealth in the 21st Century (the Joint Subcommittee) met for the first time on Monday, July 21, 2014, in Richmond. Following introductions, the Joint Subcommittee elected Senator R. Creigh Deeds to serve as chairman of the joint subcommittee and Delegate Robert B. Bell III to serve as vice-chairman.

### Overview of the Scope and Purpose of the Joint Subcommittee

*Sarah Stanton, Senior Staff Attorney, Division of Legislative Services*

Ms. Stanton, Senior Staff Attorney provided a brief overview of the scope and purpose of the Joint Subcommittee. Senate Joint Resolution 47 (Deeds) (2014) established the Joint Subcommittee for a period of four years and directed the Joint Subcommittee to:

1. Review the work of and coordinate with the Governor's Task Force on Improving Mental Health Services and Crisis Response;
2. Review the laws of the Commonwealth governing the provision of mental health services, including involuntary commitment of persons in need of mental health care;
3. Assess the systems of publicly funded mental health services, including emergency, forensic, and long-term mental health care and the services provided by local and regional jails and juvenile detention facilities;
4. Identify gaps in services and the types of facilities and services that will be needed to serve the needs of the Commonwealth in the 21st century;
5. Examine and incorporate the objectives of House Joint Resolution 240 (1996) and House Joint Resolution 225 (1998) into its study;
6. Review and consider the report *The Behavioral Health Services Study Commission: A Study of Virginia's Publicly Funded Behavioral Health Services in the 21st Century*; and
7. Recommend statutory or regulatory changes needed to improve access to services, the quality of services, and outcomes for individuals in need of services.

In reviewing the need for facility beds at the community level, the Joint Subcommittee is directed to consider whether the current fiscal incentives for expanding regional jail capacity should be eliminated and replaced with a new incentive for construction, renovation, or enlargement of community mental health facilities or programs, which may or may not be co-located with selected jails on a regional basis.

The Joint Subcommittee is also directed to consider the appropriate location of such facilities; cooperative arrangements with community services boards, behavioral health authorities, and public and private hospitals; licensing, staffing, and funding requirements; and the statutory and administrative arrangements for the governance of such facilities. The Joint Subcommittee is directed to give consideration to the development of such facilities or programs on a pilot basis.

The Office of the Executive Secretary of the Supreme Court of Virginia, the Office of the Attorney General, the Offices of the Secretaries of Health and Human Resources and Public Safety, and the staffs of the Senate Finance and House Appropriations Committees are directed to provide technical assistance to the Joint Subcommittee.



The Joint Subcommittee is required to submit an interim report to the Governor and the General Assembly by December 1, 2015, and a final report by December 1, 2017.

**PRESENTATION: Recent Changes in Laws Governing Involuntary Commitment and the Delivery of Mental Health Services**

*Allyson Tysinger, Senior Assistant Attorney General, Office of the Attorney General*

Ms. Tysinger provided an overview of the current emergency custody, temporary detention, and involuntary commitment processes in the Commonwealth and recent changes in the laws governing those processes enacted during the 2014 Session of the General Assembly, which included:

- Increasing the period of time during which an emergency custody order must be executed from six hours after issuance to eight hours after issuance and extending the duration of an emergency custody order from 4 hours with an optional two-hour extension to a period of up to eight hours with no provision for an extension. (SB 260 (Deeds)/HB 478 (Villanueva))
- Requiring the law-enforcement agency executing an emergency custody order to notify the community services board responsible for conducting the evaluation as soon as is practicable after taking the person into custody. (SB 260 (Deeds)/HB 478 (Villanueva)) Requiring that every person who is subject to emergency custody or temporary detention be given a written summary of the emergency custody or temporary detention process and the statutory protections associated with those processes. (SB 260 (Deeds)/HB 478 (Villanueva))
- Establishing a web-based acute psychiatric bed registry to contain information about available acute beds in public and private inpatient psychiatric facilities and residential crisis stabilization units to facilitate identification and designation of facilities for temporary detention of individuals who meet the temporary detention criteria. All state facilities, community services boards, and private inpatient providers licensed by the Department of Behavioral Health and Developmental Services must report data to the bed registry, and the registry must provide access to information about available beds for individuals who meet the criteria for temporary detention to community services boards, inpatient psychiatric facilities, residential crisis stabilization units, and health care providers working in emergency rooms or other facilities rendering emergency medical care. (SB 260 (Deeds)/HB 1232 (Cline))
- Requiring a community services board, upon receiving notification of the need for an evaluation, to contact the state facility serving the area in which the community services board is located and notify the state facility that the individual will be transported to the facility upon issuance of a temporary detention order if an alternative facility cannot be identified within the eight-hour emergency custody period. Upon completion of the evaluation, the community services board must provide information about the individual to the state facility to allow the state facility to determine the services the individual will require upon admission. During the eight-hour emergency custody period, both the state facility and the community services board shall seek an alternative facility for temporary detention. If an alternative facility is identified, the community services board shall designate the alternative facility in the preadmission screening report. A state facility may not fail or refuse to admit an individual who meets the criteria for temporary detention order unless an alternative facility agrees to accept the individual. No person for whom a temporary detention order has been issued shall be released prior to transfer to a state facility or other alternative facility. (SB 260 (Deeds)/HB 293 (Bell, R.B.))

- Requiring that the Department of Behavioral Health and Developmental Services submit an annual report on June 30 of each year to the Governor and the Chairmen of the House Appropriations and Senate Finance Committees setting forth the number of notifications of individuals in need of facility services by community services boards, the number of alternative facilities contacted by community services boards and state facilities, and the number of temporary detentions provided by state facilities and alternative facilities, the lengths of stay for such detentions, and the cost of such detentions. (SB 260 (Deeds)/HB 293 (Bell, R.B.))
- Allowing a community services board to change the designated facility of temporary detention at any point during the period of temporary detention, provided the community services board has determined that the alternative facility is a more appropriate facility given the specific security, medical, or behavioral needs of the person. Transportation to the newly designated facility shall be provided by the law-enforcement officer or alternative transportation provider who has custody of the person when the change is made. If the person has already been transported to an initial facility of temporary detention before the change is made, the community services board must require the magistrate to enter an order specifying an alternative transportation provider or local law-enforcement agency to transfer the individual to the new facility. (HB 1172 (Bell, R.B.))
- Allowing any willing law-enforcement agency, not just the primary law-enforcement agency of the jurisdiction where the person resides, to provide transportation for a person subject to an emergency custody order. (HB 323 (O'Bannon))
- Increasing the period of temporary detention from 48 to 72 hours (SB 260 (Deeds)/HB 574 (Yost))

During the 2014 Session, the General Assembly also:

- Directed the Governor's Task Force on Improving Mental Health Services and Crisis Response to identify and examine issues related to the use of law enforcement in the involuntary admission process and to consider options to reduce the amount of resources needed to detain individuals during the emergency custody period, including the amount of time spent transporting individuals. Options should include developing crisis stabilization units in all regions and contracting for retired officers to provide transportation. The Task Force is directed to report its findings to the Governor and the General Assembly by October 1, 2014. (SB 260 (Deeds)/HB 478 (Villanueva))
- Required the Department of Behavioral Health and Developmental Services to review the requirements related to qualifications, training, and oversight of individuals performing preadmission screening evaluations and to make recommendations for increasing the qualifications, training, and oversight of evaluators. The Department is required to report its findings to the Governor and the General Assembly by December 1, 2014. (SB 261 (Deeds)/HB 1216 (Bell, R.B.))
- Directed the Secretaries of Public Safety and Health and Human Resources to encourage the dissemination of information about specialized training in evidence-based strategies to prevent and minimize mental health crises. Such strategies shall include CIT training and Mental Health First Aid. Information shall be made available to law enforcement, first responders, emergency room personnel, school personnel, and other interested parties. (HB 1222 (Watts))



**PRESENTATION: Overview of the Commonwealth's Publicly Funded Mental Health System**

*Debra Ferguson, Ph.D., Commissioner, Department of Behavioral Health and Developmental Services*

Commissioner Ferguson provided an overview of the Commonwealth's publicly funded mental health system, including a statement of core principles and information on the number of public and private service providers, the distribution of service providers, and the services continuum. She stated that community services boards, which compose the public service system, are required by statute to provide emergency services and preadmission screening and discharge planning services. When funds are available, community services boards must provide case management services. Community services boards may also provide a range of mental health and substance abuse services either directly or through contracts with private providers. Commissioner Ferguson noted that there is a lot of variation in the type of services provided by community services boards in the Commonwealth and that performance contracts between the Department and community services boards are the main tool by which the Department oversees the work of the community services boards.

Commissioner Ferguson also described recent changes that have taken place at the Department. She noted that the Department's emphasis was on prevention and early identification of and intervention for individuals in need of mental health services as a method of reducing the need for emergency services. Other activities include tightening of regional protocols for admissions, revising medical screening and assessment guidance, extending the timelines for emergency custody and temporary detention, improving communication during the civil commitment process, launching the online psychiatric bed registry, and establishing regular mental health law "brown bag lunches" to discuss issues with stakeholders. The Department has also developed a process for reporting temporary detention order exceptions, requiring community services boards to submit data monthly. Commissioner Ferguson reported that between January 1 and April 30, 2014, there were 37 cases in which a temporary detention order was sought but not obtained because a willing facility could not be identified. Of these 37 individuals, approximately half were instead admitted for medical treatment instead of being taken into emergency custody, two were subjected to a second temporary detention order, two received an individual crisis plan rather than being taken into custody, and three were voluntarily admitted for services. Only six of the 37 left custody without any sort of followup or plan, with four leaving before a plan could be implemented and two leaving custody against medical advice. Commissioner Ferguson noted that with recent changes in the law, which became effective on July 1, these six individuals would not have been released from custody. Instead they would have been transferred to the state facility. Commissioner Ferguson also reported that during the same period there were a substantial number of cases in which a temporary detention order was obtained and executed but only after more than six hours had elapsed. In many of these cases, she noted, the delay was due to the need for medical treatment before the order could be executed. The Department will continue to monitor these situations.

In closing, Commissioner Ferguson described a number of challenges facing the Department and the publicly funded mental health service system, including an underdeveloped system of prevention and early intervention services; lengthy community waiting lists; inconsistency in the availability of intensive supports such as PACT, housing, and employment services in the Commonwealth; an underdeveloped peer support services delivery system; limited availability of mid-level crisis supports such as crisis stabilization services and CIT secure assessment centers; the low income threshold for Medicaid, which presents challenges for providing services for uninsured and underinsured; and limited funding for community mental health services.

**PRESENTATION: Civil Commitment Laws: A Survey of the States**

*John Snook, Deputy Director, and Katheryn Cohen, Legislative and Policy Council, Treatment Advocacy Center*

Mr. Snook and Ms. Cohen provided an overview of commitment laws in other states, including background on the commitment process in the United States, trends and developments in treatment laws nationally, how Virginia compares to other states, and opportunities for Virginia to improve its commitment process. Mr. Snook and Ms. Cohen noted that though Virginia has a "gravely disabled" standard for involuntary commitment, like most other states, anecdotal evidence indicates that involuntary commitment is not available until an individual is actually in crisis. They reported that many states are beginning to address this type of problem by incorporating a "need-for-treatment" standard that can prevent crises from occurring and help stabilize individuals with mental health treatment needs. Mr. Snook and Ms. Cohen also spoke about mandatory outpatient treatment requirements. Virginia, like many of the 45 states that have mandatory outpatient treatment statutes, uses a single standard for both involuntarily inpatient and mandatory outpatient treatment. Mr. Snook and Ms. Cohen noted that in states with this type of standard, mandatory outpatient treatment is less likely to be utilized. Some states have addressed this problem by implementing different standards for inpatient and outpatient treatment. As a result, the number of orders for mandatory outpatient treatment has increased while the number of involuntary commitments has decreased. States that have implemented this approach, including New York, Ohio, Tennessee, and Massachusetts, report that the change has freed up voluntary services by making the system more efficient and has reduced the cost of mental health services.

Mr. Snook and Ms. Cohen ended their presentation with a few recommendations for the Commonwealth, including recommendations that the Commonwealth clarify and consolidate its commitment standards, train service providers on and update treatment standards to promote consistent implementation, consider revising the mandatory outpatient treatment standards and procedures to increase use of mandatory outpatient treatment, and monitor the outcomes of recent changes to the emergency custody and temporary detention time frames to determine whether longer time periods reduce the number of involuntary commitments.

**Work Plan for the 2014 Interim**

The Joint Subcommittee discussed its work plan for the remainder of the 2014 interim. The Joint Subcommittee will establish a number of work groups to focus on a range of topics and issues. Additional information about the work groups will be made available in advance of the next meeting.

**Joint Subcommittee to Study Mental Health Services  
in the 21st Century**

**Senator R. Creigh Deeds, Chair**

David Cotter, DLS Senior Attorney

Sarah Stanton, DLS Senior Attorney

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## Joint Subcommittee to Study Staffing Levels and Employment Conditions at the Department of Corrections

*August 28, 2014*

The Joint Subcommittee to Study Staffing Levels and Employment Conditions at the Department of Corrections met at the Greenville Correctional Center (GCC) in Jarratt on August 28, 2014, with Senator Dave W. Marsden, chair, presiding. Members of the Joint Subcommittee introduced themselves. Staff members from the GCC also introduced themselves and stated their positions at the facility.

### **Presentation: Overview of Operations, Programs, and Staffing at Greenville Correctional Center**

*Colonel William Jarratt, GCC*

Colonel Jarratt gave a PowerPoint presentation about GCC facilities, programs, and staffing. GCC, a Security Level 2/3 facility, is the Commonwealth's largest prison with approximately 3,355 beds. Its on-site facilities include two mental health units, a sex offender residential treatment unit, a bed segregation unit, a 50-bed infirmary, a 300-offender work center, a library, and four kitchens. GCC has several vocational and educational programs related to carpentry, horticulture, upholstery, graphic arts, HVAC, and GED credentials. In addition, GCC has three Virginia Correctional Enterprises shops where inmates manufacture furniture, which helps them obtain employment upon their release.

Regarding security staffing, Colonel Jarratt stated that GCC's goal is to maintain a safe environment for both staff and inmates, noting that a safe environment allows inmates to focus on rehabilitation rather than on protecting themselves. Colonel Jarratt stated that GCC lacks an adequate number of employees to achieve this goal with a normal work schedule. He explained that GCC uses an Institutional Post-Audit System to chart staffing requirements and schedule employees. He reported that typically a significant number of allotted GCC staff are unavailable, noting that, among other reasons, 10 to 33 employees are on disability leave at any given time. Colonel Jarratt stated that in July 2014, 43 allotted security staff positions were vacant and 79 allotted security staff members were unavailable (either attending training or on various types of leave).

Colonel Jarratt stated that GCC staffing shortages have led the Department of Corrections (DOC) to pay a significant amount of overtime wages, including \$166,000 in July 2014 alone. He explained that in scheduling employees for overtime hours, GCC first accepts volunteers and as a secondary method uses a draft system. He explained that employees may be required to work four additional hours beyond their normal shifts but must be off work at least eight hours between such shifts, with a maximum of 30 overtime hours per pay cycle. Colonel Jarratt explained that employees are compensated for overtime hours with monetary payment or, with their permission, compensation hours. He explained that a lot of overtime hours are logged by transportation staff, as GCC averages eight to 10 transportations per day, each of which requires at least two correctional officers. Joint Subcommittee member Donald Baylor suggested that the number of officers required for such trips and other tasks under the Post-Audit System may need to be revisited.

Colonel Jarratt reported a significant rate of employee turnover and provided the following annual percentages: 21.6% of correctional officers, 8.7% of senior correctional officers, 9.3% of correctional sergeants, and 4.8% of correctional lieutenants. He stated that the average length of employment at GCC is nine years. Colonel Jarratt cited the following reasons for GCC's high turnover rate: length and timing of shifts, low pay, stress, safety concerns, weaknesses in the employee selection process, Code



violations, competition with law enforcement and other security services, ineffective supervisors, lack of career prospects, lack of occupational prestige, and inadequate training or education.

### **Tour of Greenville Correctional Center**

Warden Eddie Pearson led the Joint Subcommittee members on a tour of GCC.

### **Stakeholder Testimony**

Thirteen current and retired DOC employees from various prison facilities across the Commonwealth testified about their employment experiences with DOC and made recommendations for staffing improvements. A common theme throughout this testimony was that staffing shortages exist in most of the Commonwealth's prison facilities. Multiple employees testified that they are often, if not always, shorthanded. The employees testified that this results in dangerous day-to-day situations. For example, one employee testified that in many instances, a single correctional officer must control an entire dining hall of 80 to 100 inmates. Another employee testified that correctional officers no longer staff the tower over the recreational yard of 300 inmates, a post that is supposed to serve as an avenue for help in case of an emergency. Several other employees also testified about other situations in which they alone are required to man certain posts that should be staffed by multiple officers. The employees voiced concern that this is dangerous and that if an attack or other disturbance occurred, "something bad could happen" before additional officers could arrive to help.

Employees in managerial positions testified that staffing shortages also prevent them from performing the duties of their positions. Specifically, managers testified that they are not able to supervise and coordinate their correctional officers because they must perform duties typically performed by lower-level staff. Employees also testified that they are often required to work additional hours beyond their scheduled shifts and come in on their days off. One employee suggested that the overtime structure and caps be reformed so that employees desiring overtime may fill those spots, rather than forcing other employees to work who are not interested in working additional hours. The employees testified that there is simply "too much work for too few people," which increases stress and lowers morale.

Several employees also testified that inmates are given too much control and too many amenities, noting inmates possess iPods, PlayStations, and other nonessentials. The employees asserted that the prison environment has become too therapeutic, noting staff is being asked to act more as "counselors" than as security officers. Employees further testified that in many instances inmates are not charged for wrongful conduct within the facility toward staff or other inmates but simply are asked to write a paragraph about the event as punishment, a task they often delegate to other inmates, and consequently, the offender learns nothing from the incident. One employee testified that the days of DOC's "security, custody, and control" model are gone.

All employees testified that their pay is too low. The employees stated that despite inflation and an increase in the cost of living, income levels for DOC employees have remained the same. Several employees stated that they must work part-time jobs in addition to their employment with DOC in order to fully support their families. Several employees further stated that without decent pay, it is difficult for DOC to attract capable employees. Moreover, many suitable employees leave DOC for higher-paying jobs with the federal government, local or state law enforcement, or other security positions after obtaining their one-year certification. One employee testified that DOC is wasteful with its funds in other respects, asserting that at least one prison facility uses a Ford F250 for surveillance that gets less than 10 miles per gallon, rather than using a more fuel-efficient vehicle. The employees further testified that there are little or no incentives for productivity and that promotions are often based on favoritism.



Employees also requested that they be provided a forum for voicing their collective concerns to prison management, administration, and DOC. Several employees stated that they currently have no avenue for voicing their opinions and, instead, are penalized and experience retaliation when they speak up for themselves on matters such as the overtime draft system.

Finally, many employees testified about health concerns associated with DOC employment. Employees testified that the food available to them at work is “terrible” and has little nutritional value, which they cited as factors in weight gain, diabetes, heart problems, and other health issues. Employees noted that such health problems raise safety concerns, as employees are required to control inmates who spend much of the day exercising and lifting weights. Employees testified that the staff dining center has been closed in at least one of the Commonwealth’s prison facilities and that employees are asked to use the same water and ice dispensers as inmates. Employees asserted that this practice is unsanitary because inmates clean bowls and other items in these machines and often spit into them.

### **2014 Work Plan**

The meeting continued with discussion of the 2014 work plan for the Joint Subcommittee. Among other issues, the Joint Subcommittee discussed improving staffing numbers and conditions, along with obtaining the necessary funding, in an effort to keep state correctional facility staff and the public safe. The Joint Subcommittee also discussed potential efforts related to the overtime issues, proper punishment for inmate threats to prison staff, the balance between “penalty” and “rehabilitation” efforts, and avenues for communication between DOC staff and administration.

## **Joint Subcommittee to Study Staffing Levels and Employment Conditions at the Department of Corrections**

**Senator David W. Marsden, Co-Chair**

**Senator Emmett W. Hanger, Jr., Co-Chair**

David May, DLS Attorney

Sarah Stanton, DLS Senior Attorney

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[dls.virginia.gov/interim\\_studies\\_docstaffing.html](http://dls.virginia.gov/interim_studies_docstaffing.html)

## **Dr. Martin Luther King, Jr. Memorial Commission and Emancipation Proclamation and Freedom Monument Subcommittee**

*August 7, 2014*

The Dr. Martin Luther King, Jr. Memorial Commission held its second meeting of the 2014 legislative interim on August 7, 2014, in Richmond to meet jointly with its Emancipation Proclamation and Freedom Monument Subcommittee, elect new leaders, reorganize, reassess the status of the Commission’s work, select an artist for the Emancipation Proclamation and Freedom Monument, and establish a strategy for accomplishing other matters before the Commission.

### **Election of Chairwoman and Vice Chairwoman**

With a quorum present, the Commission elected Delegate Jennifer L. McClellan and Senator Mamie E. Locke as chairwoman and vice chairwoman, respectively. In light of time constraints to meet the

Commission's self-imposed 2015 deadline for completion of the Emancipation Proclamation and Freedom Monument and the need to review the process and other actions necessary to go forward with the monument, including a fundraising campaign and the selection of an artist, members agreed to Chairwoman McClellan's recommendation that the date for the monument completion be changed from 2015 to 2019 to coincide with the commemoration of the 400th anniversary of historic events in 1619.

### **Emancipation Proclamation and Freedom Monument**

Ed Gully, Director of the Division of Engineering and Buildings, Department of General Services, and Don Mark, Deputy Chief of Staff to Richmond Mayor Dwight C. Jones, reviewed the status of and the state's and city's processes for erecting the monument. It had been agreed previously that the monument would be located on Brown's Island in the city; therefore, maintenance and repair of the monument must be negotiated in the contract with the city. The Commission voted to request that Chairwoman McClellan contact Mayor Jones in writing on behalf of the Commission to make final arrangements for the siting of the monument.

A motion was adopted to reconsider the Commission's vote at its May meeting by which it delayed the decision of selecting an artist. A lengthy discussion ensued concerning the requirements and specificity of the enabling budget language; the monument's significance, purpose, and message; the audience(s) to which the models should appeal; the type and duration of materials and level of maintenance required for each proposed model; and which model has the potential of meeting the Commission's goals, with and without further design modifications.

The Commission also agreed to request that Commission member Kirk Schroder file the appropriate applications and forms with state and federal agencies to begin the process of establishing the tax-exempt organization to begin fundraising for the monument and other related matters.

The Commission voted to narrow its selection of artists to Burt Pinnock at Baskervill Studios and Carlos Davis at M.J. Synergy Studios and to request that each artist respond to several questions and modify his model accordingly as follows:

#### *Burt Pinnock, Baskervill Studios*

- Use a material for the model that will endure and be as maintenance free as possible.
- Demonstrate how the materials for the model can be used to create human forms and images.
- Place medallions around and/or within the structure and on the seating wall that relate the story of slavery and emancipation.
- Revise the model to be free flowing and perhaps consider a different shape.
- Make appropriate modifications to the model to facilitate the filtration of light at night and on cloudy/overcast days.
- Submit the revised cost for the modifications and maintenance on the monument.

#### *Carlos Davis, M.J. Synergy Studios*

- Remove the podium on which the man is standing.
- Replace the man with a more life-sized or "slightly" larger statue.



- Make the girl a part of the family and change the attire of the man, woman, boy, and girl to represent the tattered dress of slaves in 1865.
- Depict the girl reading a book relevant to the era of emancipation.
- Show the man's shackles broken and on the ground, not behind him, or depict him as stepping over his shackles on the ground out of slavery into freedom.
- Show the woman and children also with broken chains to depict emancipation accurately.
- Show scars on the man's back.
- Use a material for the model that does not have to be refrigerated.
- Depict the woman emoting with her arms outstretched to demonstrate her jubilation for freedom.
- Include medallions leading to and around the monument that relate the history of slavery and emancipation.
- Use materials that will endure and be as maintenance free as possible.
- Submit revised cost for the modifications and new materials.

The Commission requested staff to notify the finalists of the decision regarding the selection of an artist. The two finalists will be asked to present the modifications to their models at the Commission's November 5, 2014, meeting.

### **1619 Conference: The Making of America**

Dr. Cassandra Newby-Alexander, professor of history and director of the Joseph Jenkins Roberts Center for African Diaspora Studies at Norfolk State University, and Dr. Eric W. Claville, J.D., M.L.I.S., Assistant Professor/Pre-Law Advisor, Department of Political Science and History and Director, Hampton University Pre-Law Institute (HUPLI) at Hampton University, presented the plans for the third 1619 Conference: The Making of America, to be held on September 18-20, 2014, at Norfolk State University and Hampton University. The conference includes historical portrayals, scholarly presentations, workshops, and performances to appeal to a wide audience of historians, educators, students, scholars, and the public. A request was made that the Commission cosponsor the conference to which the Commission agreed.

### **Next Meeting**

The Commission agreed to meet again on November 5, 2014, in Richmond.

### **Dr. Martin Luther King, Jr. Memorial Commission**

#### **Delegate Jennifer L. McClellan, Chairwoman**

Brenda H. Edwards, DLS Senior Research Associate

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## Virginia Sesquicentennial of the American Civil War Commission

*August 5, 2014*

The Executive Committee of the Virginia Sesquicentennial of the American Civil War Commission met on August 5, 2014, in Richmond with Speaker of the House William Howell, chair, presiding. Speaker Howell welcomed Delegate Mark Keam, who was recently appointed to the Executive Committee to fill the vacancy caused by the resignation of Delegate Algie T. Howell, Jr.

### **Sesquicentennial Tourism Marketing Grant: Award Recommendations**

*Angela Wiggins, Virginia Tourism Corporation*

*Cheryl Jackson, Executive Director*

Five applications were received during the Spring 2014 round of grants funded through the Sesquicentennial Tourism Marketing Program. Two were recommended by the grant review team for approval as follows:

1. Alleghany Highlands Chamber of Commerce and Tourism  
*Salem Raid – ‘Narrow Escape at Island Ford Bridge’ – Civil War Trails historical marker and Civil War signage for Visitor Center*
  - Amount of award, \$1,700; amount of match from recipient, \$1,700
  - Funds will be used to create signage, including a Civil War Trails historical marker describing the escape of 2,500 Union raiders at Island Ford Bridge and an interior display at the Alleghany Highlands Chamber of Commerce and Tourism that will highlight the events of the Civil War in the area.
2. Dinwiddie County Sesquicentennial Committee  
*Marketing Dinwiddie’s Commemoration of the Civil War Sesquicentennial*
  - Amount of award, \$3,069.50; amount of match from recipient, \$3,069.50
  - Grant funding will be used to support advertising and marketing of activities and events related to Dinwiddie County’s commemoration of the Civil War sesquicentennial, specifically to the 2014 Speakers Series.

The two recommended applications were approved unanimously.

A third application (below) was considered separately, as it had no recommendation from the review committee due to a question of eligibility. Battle reenactments are ineligible for grant funding, and members were unclear how the battle demonstration in the Franklin County application differed from a reenactment. The committee considered the application and unanimously agreed that it not be approved.

3. Franklin County Sesquicentennial Committee  
*Franklin County Civil War Days*
  - Amount of award, \$2,500; amount of match from recipient, \$2,500
  - Grant funds will be used in the creation of marketing materials and advertisements to highlight the commemoration of the Civil War Sesquicentennial in Franklin County, including related attractions and the Franklin County Civil War Days event, in an effort to increase heritage related tourism locally and throughout the state.



Two additional applications were not recommended for approval on the basis of eligibility and scoring. Staff from the Virginia Tourism Corporation will work with those applicants to strengthen future applications.

### **Final Reporting and Economic Impact Analysis of the Sesquicentennial**

*Xiaobing Shuai, Senior Economist, Chmura Economics and Analytics (Chmura)*

Xiaobing Shuai presented a proposal for an economic and fiscal impact analysis of the Civil War sesquicentennial in Virginia. Chmura conducted similar studies for the Jamestown 2007 commemoration and the Virginia Tourism Corporation. The study will aim to capture all commemoration activities in the state, including those organized by the Commission and by local committees. Data from local community events and programs will be collected through the Sesquicentennial Leadership Recognition award application. Chmura will conduct intercept surveys at upcoming events to estimate visitor spending and will provide an estimate of tax revenue generated by sesquicentennial programs.

The Executive Committee agreed to move forward with the economic and fiscal impact study proposal from Chmura, which was approved unanimously.

### **Staff Report**

#### *(i) Civil War 150 HistoryMobile*

The HistoryMobile has visited 149 events across 94 localities in Virginia, Maryland, West Virginia, Pennsylvania, and Georgia. Nearly 125,000 people (over 45,000 of whom are students), from all 50 states and 27 other countries, have visited the HistoryMobile. Applications for tour stops in 2015 are due September 5. Feedback for the HistoryMobile continues to be overwhelmingly positive.

#### *(ii) 2014 Signature Conference, The American Civil War in a Global Context*

The 2014 Signature Conference was held at George Mason University on May 31. There were approximately 400 attendees from 11 states. Feedback from presenters and attendees was good, although some noted that several presenters read directly from papers. The DVD recording of the program was released in mid-July and a book from the conference papers and presentations will be published in early 2015.

#### *(iii) Exhibit: An American Turning Point*

The Virginia Historical Society reported that the gallery exhibition, *An American Turning Point: The Civil War in Virginia*, has been viewed by 122,147 visitors in eight venues since opening in February 2011. The full exhibition is currently at the William King Museum in Abingdon, where it will be displayed until February 2015 before traveling to its final location in Appomattox. The panel exhibit has traveled to more than 35 venues, with an estimated audience of nearly 22,000.

#### *(iv) 2015 Signature Conference, Causes Won and Lost: The End of the Civil War*

Planning is underway for the final Signature Conference, which will be held April 18, 2015, at the University of Virginia. Registration opens November 1, 2014, and is expected to fill quickly.

#### *(v) Sesquicentennial Finale Concert and Sesquicentennial Leadership Recognition Award*

The Sesquicentennial Finale Concert with the Richmond Symphony will be held on May 25, 2015 (Memorial Day) at the Carpenter Theatre. A program for recipients of the Sesquicentennial Leadership Recognition Award is scheduled to take place prior to the concert.

Members reviewed the budget proposed by the Richmond Symphony and directed staff to proceed with statewide broadcast of the program through PBS affiliates in Virginia, as well as recording the concert for release on DVD. Members directed staff to continue refining the budget and planning the program, noting, however, that the contract with the Richmond Symphony should not include revenue-sharing with the RSO if the Commission offers the DVD for sale.

*(vi) Fiscal update*

Ms. Jackson noted that \$3,349,781 of unexpended Commission balances were reverted to the General Fund in FY14. In FY15, \$1 million of the remaining unexpended balance was transferred to the World War II 75th Anniversary Commemoration Commission (2014 Spec. Sess. I Acts, c. 2). The 2014-16 Appropriation Act extends the Sesquicentennial Commission to July 1, 2016.

*(vii) Approval of logo requests*

Nine applications for logo usage have been received since the previous meeting, eight of which were given provisional authorization and recommended for approval by the Executive Committee. One application from Brunswick was not recommended for approval on the basis of the use of terminology that is inconsistent with that used by the Commission. Applications recommended for approval:

1. Warren Heritage Society (Flyer for “1864: The Year of the Burning” museum exhibit)
2. Warren Heritage Society (Flyer promoting 152nd anniversary of the Battle of Front Royal lecture and battlefield tour)
3. Warren Heritage Society (Flyer promoting 152nd anniversary of the First Battle of Winchester lecture and battlefield tour)
4. Mecklenburg Sesquicentennial Committee (Website promoting the Civil War walking tour of Mecklenburg)
5. Bed & Breakfasts of the Historic Shenandoah Valley (Website promoting Civil War tourism in the area)
6. Abingdon Convention and Visitor’s Bureau (Materials promoting the installation of *An American Turning Point* at the William King Museum and a visit by the Civil War 150 HistoryMobile)
7. Belle Grove Plantation (Print ad promoting the sesquicentennial of the Battle of Cedar Creek)
8. The American Civil War Museum (Link to Commission website from the new American Civil War Museum website)

The eight recommended logo requests were approved unanimously.

## Next Meeting

The Executive Committee is scheduled to meet on October 15 at 3 p.m. in the 6th Floor Speaker’s Conference Room of the General Assembly Building.

## Sesquicentennial of the American Civil War Commission

**Speaker William J. Howell, Chair**

Cheryl Jackson, Executive Director

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## State Water Commission

*June 23, 2014*

The State Water Commission held its first meeting of the 2014 interim on June 23, 2014, in Richmond, with Delegate Thomas Wright, chair, presiding. The meeting included a discussion of (i) Virginia's response to the release of coal ash into the Dan River from ponds owned by Duke Energy and Virginia's coal ash policies; (ii) Senate Bill 671 (Senator Barbara Favola); and (iii) the role universities can play in providing water-related expertise to state agencies and the legislative bodies.

### Coal Ash Policies

*David Paylor, Director of the Department of Environmental Quality (DEQ)*

On February 2, 2014, coal ash and contaminated water was discharged into the Dan River from a broken stormwater pipe at a Duke Energy facility near Eden, North Carolina. The broken pipe was located under a coal ash containment pond. The release of the ash was halted in early February and removal of the ash continues.

In May, an enforcement agreement was entered into by Duke Energy and the Environmental Protection Agency (EPA). The agreement required Duke Energy to, among other things:

- Perform a comprehensive assessment;
- Determine the location of coal ash deposits; and
- Remove the deposits located along the Dan River, as deemed appropriate.

An EPA ash survey of bottom sediment along the 70-mile length of the river has found no location exceeding 20 percent ash content.

A second agreement was signed in June by Duke Energy, DEQ, the North Carolina Department of Energy and Natural Resources, and the U.S. Fish and Wildlife Service authorizing the Natural Resource Damage Assessment and Restoration Program to evaluate the impact of the spill and to ultimately restore affected natural resources. There will be public participation in the planning of the restoration effort.

Virginia's actions will include DEQ's monthly monitoring of water quality and sediment in the river. The Department is coordinating, with the Dan River Association, additional testing at several locations. According to Mr. Paylor, the information collected should be helpful in identifying the need for follow-up monitoring by DEQ. Fish tissue collection has begun at the first of eight sites, and Virginia's enforcement actions are being evaluated.

Mr. Paylor described Virginia's policies and regulatory structure with respect to coal ash. Coal ash is generated from the burning of coal. It is generally disposed of on-site or "beneficially reused." Ash consists mostly of various oxides and trace amounts of arsenic, selenium, mercury, and other metals. Its composition varies depending on the type of coal used, its origin, the burning regime, and the air pollution control equipment. The amount of coal ash generated has steadily increased over the last three years, with 2.73 million tons generated in 2013. There are three alternatives for managing the ash: (i) disposal in eight landfills; (ii) placement in 12 active surface impoundments (ponds), at seven facilities operated by Dominion, American Electric Power, Celanese LLC, and MeadWestvaco; and (iii) beneficial reuse as structural fill, concrete, or wallboard and in agricultural-related uses.



Surface impoundments are constructed with a natural clay liner. Ash is transported with water to the impoundment. The solids settle and the overflow-water is discharged to surface water pursuant to a Virginia Pollutant Discharge Elimination System permit (VPDES). The permit limits and requires monitoring of pH and of such pollutants as oil and grease, total suspended solids, and metals. Any discharges are tested for toxicity. Ground water monitoring is also required. The inspection and oversight of the impoundment is the joint responsibility of DEQ, which regulates the discharge through the VPDES permit, and the Department of Conservation and Recreation (DCR), which regulates the berm under its dam safety program. Once an impoundment reaches its design capacity, it is closed by dewatering, the berm structure is breached, and a permanent cap or cover is installed. The DEQ is currently evaluating options for closure of these ponds, which involves a closure procedure similar to that for an industrial landfill that would include post-closure monitoring, maintenance, and institutional controls.

As a result of the Tennessee Valley Authority coal ash spill incident, in June 2010 the EPA proposed new regulations for the disposal of solid and hazardous wastes. According to Mr. Paylor, coal ash does not meet the criteria as hazardous waste. He indicated that two options are being considered, both of which allow the continued use of the impoundments. The first would give the facility five years to retrofit the impoundment with a liner system or close it. Retrofitting would be so expensive that closing the pond would be the only realistic alternative. The second option would be to allow the use of the impoundment until the design capacity is reached.

The DEQ is currently working with owners to develop a long-term strategy for phasing out these impoundments. The agency is also examining possible post-closure requirements, including ground water assessments.

In 2013, the EPA and DEQ concluded a structural integrity assessment of the coal ash impoundments in Virginia. None received an unsatisfactory rating. The EPA raised a number of issues regarding the impoundments, and the owners provided responses to EPA's concerns. Both the EPA and DEQ reviewed the companies' responses to the assessment. To date, there have been no known releases at these facilities, and owners have followed up on EPA recommendations.

In response to questions, Mr. Paylor noted that the only dredging that has occurred as a result of the Dan River spill is near the Schoolfield Dam on the river and that about 25 percent of the dredged material was ash. He said that he would be surprised if any additional deposits are found that would justify dredging activity.

*Mr. Clyde Cristman, Director of the Department of Conservation and Recreation (DCR)*

Mr. Cristman discussed his agency's role in regulating impoundments. Under the Dam Safety Act, DCR regulates more than 2,000 impounding structures, including 13 coal combustion residue impoundments. An impoundment is a man-made structure that retains or stores water or other materials and is either (i) greater than 25 feet in height with a capacity greater than 15 acre-feet or (ii) greater than 6 feet in height with a capacity greater than 50 acre-feet. A dam owner is liable for damage to the property of others or injury to persons, including the loss of life resulting from the operation or failure of the dam. All DCR dams are considered to be high hazards unless otherwise noted.

The dam owner is required to submit to DCR the following information that is prepared by a professional engineer: (a) construction and alteration plans, (b) inspection reports, (c) a dam break inundation map and the associated study, (d) a hazard classification determination, and (e) emergency action plans.



*Dr. Marissa J. Levine, State Health Commissioner*

Dr. Levine described the role of the Virginia Department of Health (VDH) and the Office of Drinking Water (ODW) in protecting drinking water at the site of the coal ash spill. The spill was detected on February 2, and ODW was notified of the event on February 3. Since then, the ODW has been working closely with the staff of the treatment plants in Danville, South Boston, and Clarksville. She assured the Commission members that the water treatment plants' filters have effectively removed the coal ash and protected the area's drinking water supply. The ODW continues to participate in weekly planning sessions, the review of data, and the monitoring of the removal of coal ash deposits. The finished drinking water quality is not exceeding maximum contaminant levels. The VDH recreational advisory for users of the Dan River is still in effect. Also still in effect are long-standing VDH and North Carolina Division of Public Health fish consumption advisories for certain species due to mercury and PCBs. Baseline testing of fish has already been done, and the review of this data indicates no need to change the existing advisory as a result of the spill. Both states' health agencies are working with their respective state environmental regulatory agency to review fish tissue data over time and update the advisories as needed. The Pittsylvania/Danville and Southside Health Districts have posted advisory notices at public entry points to the Dan River. Even though "no ongoing health concerns" have been identified, VDH is developing a health consultation to further evaluate chemical results from EPA sediment water sampling at the Kerr Reservoir. Once drafted, the consultation will be reviewed and certified by the U.S. Agency for Toxic Substances and Disease Registry.

### **Reporting of Water Usage (SB 671)**

Chairman Thomas Wright explained that SB 671, patroned by Senator Barbara Favola, has been referred to the Commission by Senator Phillip Puckett, former Chairman of the Senate Committee on Agriculture, Conservation and Natural Resources, for its review. The bill requires electric generating stations seeking a Virginia Water Protection Permit to submit an estimate of the amount of water that will be withdrawn and consumed for the life cycle of the fuel used by the proposed generating station. In his letter to the Commission, Senator Puckett has raised several issues related to the availability and accessibility of water supply information to the public and asked the Commission to examine this further.

*Dawone Robinson, Virginia Policy Director, Chesapeake Climate Action Network (CCAN)*

Senator Favola, who was unable to attend the Commission meeting, designated Mr. Dawone Robinson to speak in support of the legislation. The CCAN is a § 501(c)(3) nonprofit organization dedicated to studying the impacts of climate change in the Chesapeake Bay region. Mr. Robinson noted that one of the impacts of a changing climate is reduced water resources for domestic and industrial uses. He characterized the legislation as "a first step towards a renewed interest in studying water scarcity in the Commonwealth and the impact on citizens." According to Mr. Robinson, a 2005 study by the U.S. Geological Survey reported that 41 percent of all freshwater withdrawals nationally were for the purpose of operating a thermoelectric power facility. His organization takes the position that it is sound public policy for utilities to fully report all water uses related to satisfying the variety of energy needs, and he argued that such information should be one of the factors in the determination of whether to approve the operation of energy facilities. He emphasized that the relationship between energy consumption and water availability is a crucial policy matter.

After several meetings attended by Mr. Robinson, Senator Favola, officials of DEQ, and representatives of the utility industry, the following three issues emerged:

- Although power plants are the largest source of water withdrawals in the United States, water withdrawn for irrigation represents nearly one-third of the water supply consumed;
- A study of SB 671 should include other entities in addition to the power industry. Because most of the water withdrawn for an onsite plant is used for cooling and returned to nearby water bodies, other industries that consume large amounts of water should be part of any analysis; and
- Such information is not easily accessible to the public.

Mr. Robinson asked the Commission to study whether the information that is required to apply for a Virginia Water Protection Permit is “comprehensive and adequate in order for DEQ to make a fully informed decision whether to issue the permit.” Specifically, he requested that the study determine whether the estimates of water withdrawal and consumption provided by large entities, including electric generating facilities, are sufficient to make an informed public policy decision. He stressed that it is important when examining water scarcity and consumption that the public have access to this type of information.

*Scott Kudlas, Director of the Office of Water Supply, Department of Environmental Quality (DEQ)*

Mr. Kudlas responded to Mr. Robinson’s concerns by providing an overview of the management of water use in Virginia. He described the programs the state uses to manage its water resources, both surface and ground water, which include the Virginia Water Protection Permit to regulate the amount of surface waters withdrawn, the Ground Water Withdrawal Permit to regulate ground water withdrawals in areas of depleted aquifers, water withdrawal reporting, and water supply planning. These tools are essential in (i) protecting in-stream flow for both in-stream and off-stream beneficial uses, (ii) ensuring aquifer availability and productivity, and (iii) maintaining water levels sufficient for aquifer users. The goal is to “make sure what is going out doesn’t exceed what is coming in.” This is accomplished by conducting a cumulative impact analysis (CIA). The analysis involves (a) maintaining a “water budget” for every stream in the state and (b) using modeling to determine the impact of each surface and ground water withdrawal. The DEQ staff also works cooperatively with other states to evaluate and manage proposed uses in shared watersheds. In modeling cumulative impacts, the agency looks at such factors as precipitation, evaporation, transpiration, runoff, inflow and outflow, and percolation over time, as well as the impact of changes on land use.

The agency does have a history of dealing with power plants and has developed models for simulating water use. One of the most significant factors in DEQ evaluations of withdrawal permits is the level of water evaporation. Because the current laws require that DEQ maintain a certain level of in-stream flow to support a number of in-stream and off-stream uses, DEQ has been engaged in both short-term and medium-term water budgeting. A budgeting approach involves the use of such tools as the VWP permit, which sets limits on the level of water withdrawn over the 15-year term of a permit, and water conservation measures during drought conditions in order to ensure adequate in-stream and off-stream flow. Because of the mandate for water supply planning over the next 30 years, DEQ also has developed a long-term water budgeting model that incorporates projected water demands through 2040. Information generated from local/regional water supplies indicates that there will be an increasing demand for water clustered along the I95/I64 corridor, the Shenandoah area, and the Roanoke/Smith Mountain Lake area.



Mr. Kudlas concluded his remarks by noting that the goal of the VWP program is to preserve sufficient in-stream flows to protect existing beneficial uses of each water body. He stated that DEQ has been and is currently evaluating impacts from water users, including power generators, over various time scales. With respect to making such information available to the public, he indicated that DEQ permits are available to the public during the permit review process, as are summary annual reports of water use and permit data. In response to several questions from Commission members, he assured the Commission that DEQ was collecting enough information, especially data on the use of water for power generators, to make informed decisions. The only area in which data is underreported involves the amount of water used for irrigation; however, each year, reporting of this type of information is increasing. He assured the Commission that the information that is missing is a relatively small component of the overall water supply plan. Upon the conclusion of Mr. Kudlas's presentation, Chairman Wright informed members of the Commission that he had discussed with Mr. Paylor the need for a more comprehensive response to the issues raised in Senator Puckett's letter regarding SB 671 and that DEQ will provide such a report to the Commission at a subsequent meeting.

### **Virginia Water Resources Research Center**

*Dr. Stephen Schoenholtz, Director of the Virginia Water Resources Research Center (VWRRC)*

Dr. Schoenholtz provided a brief overview of the history of the VWRRC, also referred to as the Water Center. In 1964, Congress passed the Federal Water Resources Research Act with the goal of promoting water research and education. A year later the VWRRC was established at VPI-SU. Its mission is to (i) provide research and educational opportunities to future water scientists, (ii) encourage studies of practical solutions to water resource problems, and (iii) facilitate the transfer of water resources information to policy and decision makers. In 1982, the General Assembly enacted legislation that established the VWRRC and tasked it with facilitating and stimulating research that:

1. Deals with policy issues facing the General Assembly;
2. Supports the state water resources agencies; and
3. Provides water planning and management organizations with tools to increase efficiency and effectiveness of water planning and management (§ 23-135.7:9).

Dr. Schoenholtz described some of the water-related challenges facing the state, including (i) the nexus between energy, food, and water; (ii) climate change; (iii) drought, flooding, and storms; (iv) aging water infrastructure; (v) stormwater management; (vi) restoration of the Chesapeake Bay; (vii) water supply planning; and ground water quantity and quality. The Water Center is poised to provide the technical expertise, with its vast array of university faculty throughout Virginia, to the General Assembly and state agencies. He provided several past and current examples where faculty members have worked with state agencies to address a range of water-related issues. He informed the Commission that VPI-SU was in the process of establishing a new undergraduate B.S. degree in Water Resources Policy and Management. This degree is the first of its kind not only in Virginia but in the entire United States. He believes that this will establish VPI-SU and Virginia "as leaders in education for a rapidly emerging field vital to everyone." The planned launch of the degree is January 2015.

### **Next Meeting**

The next meeting of the State Water Commission is expected to be in the fall, at which time the Commission will receive reports from DEQ on (i) management strategies for protecting groundwater

resources in Eastern Virginia and (ii) its response to issues raised in Senator Puckett's letter regarding SB 671.

## **State Water Commission**

**Delegate Thomas C. Wright, Jr., Chair**

Martin G. Farber, DLS Senior Research Associate

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*[dls.virginia.gov/commissions/swc.htm](http://dls.virginia.gov/commissions/swc.htm)*



## Legislative Meeting Calendar: October 2014

October 1	9:30 a.m.	Administrative Law Advisory Committee Executive Order 17 Work Group	6th Floor Speaker's Conference Room, GAB
	10 a.m.	House Courts of Justice Criminal Law Subcommittee	Ferrari Room, Brandt Student Center, Shenandoah University, Winchester
October 6	1 p.m.	Commonwealth Council on Childhood Success	East Reading Room, Patrick Henry Building
October 7	10 a.m.	Joint Commission on Technology and Science (JCOTS) Higher Education Equipment Advisory Committee	Occoquan Room 110A, George Mason University - Prince William Campus, Manassas
	2 p.m.	Virginia Board of Workforce Development Workforce Investment Act Committee	House Room 2, The Capitol
October 8	10 a.m.	Joint Commission on Health Care	Senate Room A, GAB
	11 a.m.	Administrative Law Advisory Committee Model State Administrative Procedure Act (MSAPA) Work Group	House Room 2, The Capitol
	noon	Administrative Law Advisory Committee	House Room 2, The Capitol
	1 p.m.	House Committee on Agriculture, Chesapeake and Natural Resources retreat	Natural Bridge Hotel and Conference Center
	1 p.m.	Joint Commission on Health Care Behavioral Health Care Subcommittee	Senate Room A, GAB
	1:30 p.m.	Joint Subcommittee to Evaluate Tax Preferences	House Room D, GAB
October 9	8:30 a.m.	House Committee on Agriculture, Chesapeake and Natural Resources retreat	Natural Bridge Hotel and Conference Center
October 14	9:30 a.m.	Joint Legislative Audit and Review Commission (JLARC) Study Priorities Subcommittee	11th Floor Conference Room, GAB
	10 a.m.	Joint Legislative Audit and Review Commission (JLARC)	Senate Room A, GAB
October 15	9:30 a.m.	General Laws Special Joint Subcommittee Studying the Virginia Public Procurement Act Workgroup 1	House Room 1, The Capitol
	10 a.m.	Virginia Housing Commission Common Interest Communities Workgroup	House Room C, GAB

**Legislative Meeting Calendar: October 2014 (continued)**

October 15	1:30 p.m.	General Laws Special Joint Subcommittee Studying the Virginia Public Procurement Act Workgroup 2	House Room 1, The Capitol
	3 p.m.	Virginia Sesquicentennial of the American Civil War Commission Executive Committee	6th Floor Speaker's Conference Room, GAB
October 16	9:30 a.m.	Senate Finance Committee	10th Floor Meeting Room, GAB
October 20	9:30 a.m.	House Appropriations	9th Floor Appropriations Room, GAB
	1 p.m.	Virginia Commission on Youth	House Room C, GAB
	1 p.m.	Joint Commission on Technology and Science (JCOTS) Identity Management Advisory Committee	3rd Floor East Conference Room, GAB
October 21	10 a.m.	Virginia Code Commission	6th Floor Speaker's Conference Room, GAB
	10 a.m.	Virginia State Crime Commission	Senate Room A, GAB
October 22	10 a.m.	Joint Commission on Technology and Science (JCOTS)	House Room D, GAB
	1:30 p.m.	Joint Commission on Technology and Science (JCOTS) Nanosatellites Advisory Committee	House Room C, GAB
October 29	1 p.m.	Virginia Housing Commission	Governor's Housing Conference, Norfolk Waterside Marriott, Norfolk
October 30	9:30 a.m.	Senate Finance Committee Health and Human Resources Subcommittee	10th Floor Meeting Room, GAB
	1 p.m.	Senate Finance Committee Public Safety Subcommittee	10th Floor Meeting Room, GAB
October 31	1 p.m.	Committee on District Courts	Judicial Conference Room, Supreme Court Building

*Meetings may be added at any time; please check the General Assembly and DLS websites for updates.*



## Other Legislative Commissions and Committees

The following legislative commissions and committees also hold regular meetings during the interim. Visit their websites to obtain full information regarding their meeting dates, agendas, and summaries.

**Virginia State Crime Commission**

[vscc.virginia.gov/meetings.asp](http://vscc.virginia.gov/meetings.asp)

**Joint Commission on Health Care**

[jchc.virginia.gov/meetings.asp](http://jchc.virginia.gov/meetings.asp)

**Joint Legislative Audit and Review Commission (JLARC)**

[jlarc.virginia.gov/meetings.shtml](http://jlarc.virginia.gov/meetings.shtml)

**Virginia Commission on Youth**

[vcoy.virginia.gov/meetings.asp](http://vcoy.virginia.gov/meetings.asp)

**House Appropriations Committee**

[hac.virginia.gov/](http://hac.virginia.gov/)

**Senate Finance Committee**

[sfc.virginia.gov/](http://sfc.virginia.gov/)

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Complete information on meetings during the 2014 interim is available on the website of the Division of Legislative Services (<http://dls.virginia.gov/commissions.html>).

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