

A REPORT BY THE NEW YORK STATE OFFICE OF THE STATE COMPTROLLER

**Alan G. Hevesi
COMPTROLLER**



***DEPARTMENT OF ENVIRONMENTAL
CONSERVATION
DIVISION OF WATER***

***USE OF NON-STATE STAFF TO ACCOMPLISH
CERTAIN PROGRAM REQUIREMENTS***

2004-S-76

DIVISION OF STATE SERVICES

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Alan G. Hevesi
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Report 2004-S-76

Ms. Denise M. Sheehan
Acting Commissioner
New York State Department of Environmental Conservation
625 Broadway
Albany, NY 12233-4750

Dear Ms. Sheehan:

The following is our report on the Department of Environmental Conservation's use of non-State staff to accomplish certain program requirements in the Division of Water. This is the first of two reports that will address this topic. The first report addresses whether the efforts by the Division of Water to secure non-State staff were economical and consistent with State procurement guidelines and whether the non-State staff possess the necessary qualifications to perform their assigned jobs. The other report will address the status of work completed by using non-State staff.

We performed this audit pursuant to the State Comptroller's authority as set forth in Article V, Section 1, of the State Constitution and Article II, Section 8, of the State Finance Law. We list major contributors to this report in Appendix A.

Office of the State Comptroller
Division of State Services

April 27, 2006

EXECUTIVE SUMMARY

DEPARTMENT OF ENVIRONMENTAL CONSERVATION

DIVISION OF WATER

USE OF NON-STATE STAFF TO ACCOMPLISH CERTAIN PROGRAM REQUIREMENTS

SCOPE OF AUDIT

The Department of Environmental Conservation (Department) was created on July 1, 1970 to bring together in a single agency all New York State (State) programs and activities related to the environment. The Division of Water (Division) protects water quality in rivers, lakes, reservoirs and wetlands, as well as aquifers and coastal areas by regulating wastewater discharges, monitoring water quality and controlling surface runoff. The Division uses some non-Department staff from other State agencies as well as non-State entities to perform its duties under grants, contracts, or Memorandum of Understanding (MOU) agreements. These other State and non-State entities are commonly referred to as partner organizations. MOUs are agreements between the Department and State agencies (partner organizations) and are not subject to the formal contract approval process by the State Comptroller's Office as required by several statutes including Section 112 of the State Finance Law. Our audit focused on the two non-State partner organizations which provided 47 of the 57 (or 82 percent) non-State staff at the Division as of January 5, 2005. These partner organizations were: (1) Cayuga Community College (Cayuga CC) and a unit within the college known as the Regional Application Center for the Northeast (RACNE) that provided 24 non-State staff and (2) the New England Interstate Water Pollution Control Commission (NEIWPCC) that provided 23 non-State staff.

Our audit addressed the following questions about the Department's use of non-State staff to meet program requirements in the Division for the period April 1, 1999 through July 14, 2005:

- Did the Division secure non-State staff in a manner that was economical and consistent with established State procurement guidelines?
- Did the Division ensure that non-State staff have the qualifications required to do their assigned jobs?

AUDIT OBSERVATIONS AND CONCLUSIONS

We found that the Division could not document that it had clearly determined that the working arrangements with Cayuga CC/RACNE and NEIWPC were economical and within the State's procurement guidelines. We also determined that the Division did not adequately ensure that non-State staff have the qualifications required to do their assigned jobs.

We determined that the Department's use of a MOU, to obtain the services of Cayuga CC/RACNE was not appropriate because Cayuga CC/RACNE is a non-State entity. Therefore, the Department's use of CC/RACNE required a contract subject to competition and State approval, including approval by the State Comptroller. The MOU was originally for \$1.9 million for the period April 1, 1999 through March 31, 2003. This MOU was amended in 2000 to a total of \$20 million for the period April 2000 through March 2007. Moreover, another non-State entity, a not-for-profit corporation, the Institute for Application of Geospatial Technology (IAGT), was created in May 2001 to take over RACNE's responsibilities. This working arrangement, to be consistent with State law, should also have been achieved based on a competitive, contract process. However, the Department continued to use the MOU that was already in effect. As a result, funds have been paid to a non-State entity, over an extended period, without competition and a properly approved contract. Regarding NEIWPC, we questioned that the federal grant funds used to fund the non-State staff were channeled without appropriation by the State Legislature. We also noted that there was no written agreement between NEIWPC and the Department setting forth the terms of their working arrangement for the grant we reviewed. The deficiencies identified with the two working arrangements may have been avoided had these arrangements been subject to the State's normal contract approval and budgetary controls. (See pp. 17-20)

In addition, we found that the Division's available documentation does not justify why it was unable to use its own staff but instead had to use Cayuga CC/RACNE and NEIWPC staff to perform certain assigned activities. Moreover, the Cayuga CC/RACNE and NEIWPC arrangements involve work that is long-term in nature. In the absence of justifying documentation, this raises further questions about the Department's continued reliance on non-State staffing services. The Department's 2004 Business Plan for the floodplain mapping program shows that it planned to add staff to the program, but it was not clear if the staff would be State staff or non-State staff. The plan also indicated that the majority of engineering services have been the responsibility of one contractor and that it plans to use additional contractors for some of the floodplain mapping work. (See pp. 20-22)

Furthermore, when we compared the cost of the Department's State employees to non-State employees hired by the two primary partner organizations, we determined that Cayuga CC/RACNE's and NEIWPC's professional services are

about as costly, as comparable services available in-house. Our findings also showed that staffing levels in the Division have stayed relatively flat in the last six years. However, the number of positions filled by Division staff has declined by 28 during the period, while the number of available non-State staff has grown from 33 to 57, an increase of 24 during the same period. (See pp. 22-27)

Lastly, we reviewed and compared the qualifications for selected non-State staff to similar Department positions. We found that the qualifications for some IAGT partner organization positions assigned to Division tasks were lower than the comparable State civil service jobs. We also found that the Division does not verify that staff hired by partner organizations actually meet the required qualifications, but instead relies on the partner organizations to do so. As a result, we visited two partner organizations to confirm they verify that staff met required qualifications. Both partner organizations, citing confidentiality restrictions, declined our request to review files to determine if this procedure was followed. One partner organization that we visited indicated it verified applicant references but only spot checked whether they possessed the required educational requirements for workers with a high school diploma and significant work experience. Therefore, we concluded the Division does not obtain sufficient assurance that workers provided by its partner organizations actually possess the qualifications required for the positions they hold. (See pp. 29-33)

COMMENTS OF DEPARTMENT OFFICIALS

A draft copy of this report was provided to Department officials for their review and comment. Their comments are included as Appendix B of this report. We have considered their comments in preparing this final report and have included State Comptroller's Notes as Appendix C to address their comments.

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INTRODUCTION

Background

The Department of Environmental Conservation (Department) was created on July 1, 1970 to bring together in a single agency all New York State (State) programs and activities related to the environment. The Department is responsible for conserving, improving and protecting the State's natural resources and environment. The Department works to control water, land and air pollution to enhance the health, safety and welfare of all the State's residents.

The Division of Water (Division) protects water quality in rivers, lakes, reservoirs and wetlands, as well as aquifers and coastal areas by regulating wastewater discharges, monitoring water quality and controlling surface runoff. The Division also implements programs to improve and protect the State's water resources and to protect the public from flooding. The Division has five bureaus that carry out its programs: the Bureau of Program Resources and Flood Protection, the Bureau of Watershed Assessment and Management, the Bureau of Water Compliance, the Bureau of Water Permits, and the Bureau of Water Resources Management - which the Division added during our audit when it reorganized in May 2005.

According to the Division, 42 Federal and State statutes provide the legal authority for the Division's mandated programs. These include the Federal Clean Water Act, Federal Safe Drinking Water Act, National Flood Insurance Act, and numerous sections of the State Environmental Conservation Law. The Division shares program responsibilities in whole or in part with 25 other entities, which we refer to as partner organizations.

These partner organizations provide staff to perform Department functions under grants, contracts or Memorandum of Understanding (MOU). MOUs are agreements for program activities between the Department and State agencies. Such MOUs are not subject to the contract approval process by the State Comptroller's Office as set forth in several statutes including Section 112 of the State Finance Law. Staff that are provided by non-State partners to work on Department

Programs are hired and employed by the respective non-State organizations, not by the Department. Their salaries are paid directly by their employer. In most cases, these costs are reimbursed by the Department. We also noted that the Department provided for payment of administrative charges to RACNE/IAGT and NEIWPC. According to Department records, as of November 2004, the Division had entered into 25 working arrangements with partner organizations. The agreements span varying periods beginning as early as 1998 and ending as late as 2012. The Division establishes workplans with its partnering organizations detailing the tasks to be performed by the partnering organization. As of January 2005, the Division had 57 non-State staff working in its central office and several of its nine regional offices out of a total staff of 304.

The partner organizations include 20 State agencies and five non-State entities, including three affiliated with Cornell University, as shown in *Table 1*.

Table 1 Summary of Division Working Arrangements with Partner Organizations As of November 2004		
Type of Entity and Agreement	Number	Amount
State Agency - MOUs	20	\$36,029,408
Non-State Entity - MOU	1	20,000,000
Non-State Entity - no MOU	1	2,712,376
Cornell University - MOU	3	4,598,733
Total	25	\$63,340,517

Agreements with Cornell University

The Department has three MOUs with the partner organizations affiliated with Cornell University to provide services. One MOU is with Cornell University’s New York State Water Resources Institute (WRI). Because WRI is part of Cornell University (a non-State entity), the Department should have a formal contract with WRI instead of a MOU. The other two MOUs are with Cornell University’s statutory colleges. The Attorney General’s opinion 2005-F2 issued on September 14, 2005, indicates that agreements between state agencies and Cornell’s statutory colleges should be regarded as contracts between a state party and a non-state party. The Department should take appropriate action with respect to its agreements.

The MOU with WRI is for developing and participating in education and outreach programs in the areas of water research management to further the objectives of monitoring and protecting water resources in the State. The MOU totals \$3 million and covers the period April 1, 2004 through March 31, 2009.

One MOU with Cornell University's statutory college totals \$1 million for the purpose of developing and conducting education and outreach programs for non-point water source protection for municipal officials. The MOU covers the period January 1, 2001 through January 1, 2006.

The other MOU with Cornell University's statutory college is for \$598,733 for the purpose of providing training and certification for pesticide applicators to meet the Department's responsibility under Article 33, Title 9 of the Environmental Conservation Law. The MOU covers the period April 1, 2002 through March 31, 2005.

The remainder of our report will focus on two non-State partner organizations, Cayuga CC/RACNE and the NEIWPC. These two partner organizations provided the largest number of staff, 24 and 23, respectively, of the total 57 non-State employees supplied to the Division, as of January 5, 2005. The other 10 non-State employees are represented by other partnering organizations.

Floodplain Mapping Project

The Federal Emergency Management Agency (FEMA) manages the National Flood Insurance Program and oversees flood mitigation programs. In 1970, the Department's predecessor, the New York State Conservation Department, was designated by the Governor as the State agency responsible for coordinating federal, State and local aspects of floodplain management activities as required under provisions of the National Flood Insurance Program. The Department was selected by FEMA to participate in a pilot program to develop new digital orthoimage flood insurance rate maps. This work is more commonly referred to as floodplain mapping and Division officials told us it requires expertise in aerial photographing and Geographic Information Systems (GIS) mapping. Historically, floodplain maps were hardcopy and were used for about 20 years. According to officials associated with this program,

FEMA wanted to be able to update the floodplain maps on a five-year cycle. As such, the Department entered into an agreement with FEMA in April 2000 to participate in a program to develop digital floodplain maps and flood insurance study products for designated watersheds throughout the State. The Department in turn partnered with Cayuga CC and the newly-formed Regional Application Center for the Northeast (RACNE), located in Auburn, New York, to perform floodplain mapping in compliance with FEMA regulations.

Cayuga CC/RACNE

RACNE was founded by the college Board of Trustees on August 26, 1998. RACNE is a unit within the college, and is funded by the college. RACNE has an advisory council that operates under by-laws enacted by the college's Board of Trustees. In August 2000, without going through a competitive process, the Department entered into an MOU with Cayuga CC/RACNE to undertake digital floodplain mapping.

RACNE officials told us that the center was originally established with National Aeronautics and Space Administration (NASA) sponsorship as part of NASA's Regional Application Center program. The stated purpose of this NASA program is to advance the application of geospatial information technologies developed as part of the space program to benefit society across government, education and commercial sectors. The NASA outreach initiative led to the development of an accredited GIS Associate degree program at Cayuga CC in 2001.

IAGT

In May 2001, Cayuga CC created the Institute for the Application of Geospatial Technology (IAGT), a not-for-profit corporation in the State. At that time, RACNE staff employment was terminated and IAGT selectively hired from the former RACNE employees. According to Cayuga CC/RACNE and IAGT officials, IAGT was created because a larger organization was necessary to handle the work and opportunities available to RACNE. IAGT does the work formerly done by RACNE and provides the administrative and programmatic oversight. RACNE's role was reduced to receiving payments and transferring the funds to IAGT.

Water Pollution Control Activities

In a separate and unrelated program activity, the Department applied for a \$16 million grant from the United States Environmental Protection Agency (USEPA) for water pollution control activities under the Clean Water Act. The Department requested the USEPA to transfer about \$1.5 million of the Department's \$16 million grant to the NEIWPCC to perform outreach and training tasks identified by the Division. NEIWPCC is an interstate commission established by an Interstate Compact in 1947 that authorizes it to serve and assist its member states of Connecticut, Maine, Massachusetts, New Hampshire, New York, Rhode Island, and Vermont to improve their water quality. NEIWPCC is located in Lowell, Massachusetts, and assists member states by coordinating activities and forums that encourage cooperation among the states, educating the public about key water quality issues, supporting research projects, training environmental professionals, and providing overall leadership in water management and protection. NEIWPCC is overseen by 35 Commissioners - five from each member state. New York State's Commissioners include the Commissioners of the Health Department and Department of Environmental Conservation, as well as three individuals not affiliated with the State.

Audit Scope, Objectives and Methodology

We examined the Division's workforce planning process and focused on the procuring of non-State staff to provide necessary expertise and skills to accomplish certain program requirements for the period April 1, 1999 through July 14, 2005. Our audit primarily focused on two of the non-State partnering organizations, Cayuga CC/RACNE and NEIWPCC, that provide the largest number of staff to the Division and received significant State funds. The objectives of our audit were to determine whether the Division's efforts to secure non-State staff (1) are economical and consistent with established State procurement requirements and (2) ensure that non-State staff have the qualifications required to do their assigned jobs.

To accomplish our objectives, we reviewed Federal, State, Department, and Division-specific policies and procedures related to obtaining outside personal services, as well as sections of the State Finance Law. We interviewed officials at the Department, Division, and two of the partnering

organizations. We also reviewed documentation of work performed by two selected partner organizations, some of which we obtained directly from the partnering organizations because the Division either did not have or did not provide such information. We also physically located all Division employees and all but one assigned partnering organization staff working in the Department's central office, three regional offices and one satellite office to confirm their presence at work. Because the use of non-State partner organizations involved unique working arrangements, we consulted with Office of the State Comptroller counsel. In addition, the Office of the Attorney General was asked to review certain situations. We also consulted with personnel in various units responsible for State procurement and expenditures within the Office of the State Comptroller.

We conducted our audit in accordance with generally accepted government auditing standards. Such standards require that we plan and do our audit to adequately assess those procedures and operations included within our audit scope. Further, these standards require that we understand the Department's internal control structure and compliance with those laws, rules and regulations that are relevant to the Department's procedures and operations that are included in our audit scope. An audit includes examining, on a test basis, evidence supporting transactions recorded in the accounting and operating records and applying such other auditing procedures, as we consider necessary in the circumstances. An audit also includes assessing the estimates, judgments and decisions made by management. We believe our audit provides a reasonable basis for our findings, conclusions and recommendations.

In addition to being the State Auditor, the Comptroller performs certain other constitutional and statutorily mandated duties as the chief fiscal officer of New York State, several of which are performed by the Division of State Services. These include operating the State's accounting system; preparing the State's financial statements; and approving the State's contracts, refunds, and other payments. In addition, the Comptroller appoints members to certain boards, commissions and public authorities, some of whom have voting rights. These duties may be considered management functions for purposes of evaluating organizational independence under generally accepted government auditing standards. In our opinion, these management functions do not affect our ability to conduct independent audits of program performance.

Response of Department Officials to Audit

We provided a draft copy of this report to Department officials for their review and comment. Their comments were considered in preparing this final report, and are included as Appendix B.

The Department disagrees with our cost analysis and expresses concerns about the independence of our auditors and their integrity. Department officials agree with certain of our audit recommendations indicating they already have been or will be implementing some of them.

To rejoin the Department's comments we have prepared State Comptroller's Notes as Appendix C to this report.

Within 90 days after final release of this report, as required by Section 170 of the Executive Law, the Commissioner of the Department of Environmental Conservation shall report to the Governor, the State Comptroller and the leaders of the Legislature and fiscal committees, advising what steps were taken to implement the recommendations contained herein, and where recommendations were not implemented, the reasons therefor.

OBTAINING STAFF IN AN ECONOMICAL MANNER CONSISTENT WITH STATE PROCUREMENT GUIDELINES

We found that the Department could not document that it had clearly determined the working arrangements with Cayuga CC/RACNE and NEIWPCC were economical and within the State's procurement guidelines. These two entities accounted for 47 of the 57 (or 82 percent) of the Division's non-State staff. We determined that the MOU with Cayuga CC/RACNE was not appropriate because it was between the Department and a non-State entity, and therefore the agreement should have been a contract subject to competition and the approval of the State Comptroller. When IAGT was created as a not-for-profit corporation in May 2001 to take over RACNE's responsibilities, the agreement again should have been subject to competition and a properly approved contract. Regarding NEIWPCC, we questioned that the grant funds were channeled without appropriation by the State Legislature. In addition, there was no written agreement between NEIWPCC and the Department setting forth the terms of their working arrangement for the grant we reviewed.

We also found that the Department did not have documentation to justify why it was unable to use its own staff but instead had to use Cayuga CC/RACNE and NEIWPCC staff to perform certain assigned activities. In addition, the Cayuga CC/RACNE and NEIWPCC arrangements involve work that is long-term in nature. Department planning documents show that it planned to add staff to the program, but it was not clear if the staff would be State staff or partner organization staff. Also, the plan indicates that the majority of engineering services have been the responsibility of one contractor and that the Department planned to use additional contractors. Furthermore, based on our analysis of available information, we conclude that RACNE/IAGT's and NEIWPCC's professional services are about as costly as comparable services available in-house. Additionally, we found that payments for RACNE/IAGT included an administrative overhead rate of 8 percent in 2000, subsequently increased to 15 percent in 2005. NEIWPCC's

grant agreement likewise provided for the recovery of its indirect costs.

Working Arrangements with RACNE/IAGT and NEIWPCC

In June 1980, the New York State Attorney General concluded that agencies and departments of the State of New York may not enter into a formal contract with each other, on the basis that they do not have any distinct legal character apart from the State. However, the opinion stated that State agencies, departments and other State units may enter into interagency memoranda or agreements concerning matters of substance. Such agreements cannot contain standard provisions normally used in a formal contract, and in the case of a disagreement between the units, such units cannot sue the other but would have to settle the dispute inside the State government. Based on this opinion, MOUs have evolved as an appropriate form of mutual agreement between two State agencies and can enable agencies to partner on projects that have mutual interest and benefit. An MOU should only be used where appropriate (i.e., between two State agencies) because such agreements are not subject to review and approval by the Office of the State Comptroller. If the working arrangement is not with a State agency, the Department must comply with Section 112 of the State Finance Law, which requires that contracts exceeding \$15,000 be first approved by the State Comptroller. Furthermore, Section 163 of the State Finance Law states that procurements shall be competitive except where there is justification that the services are available from a single or sole source.

We concluded that it was not appropriate to use an MOU for the working arrangement between the Department and Cayuga CC/RACNE, because community colleges, although affiliated with the State University of New York, are considered local government entities rather than State agencies. The MOU was originally for \$1.9 million for the period April 1, 1999 through March 31, 2003 and was subsequently amended in 2000 to a total of \$20 million for the period April 2000 through March 2007. A formal contract should have been used, in accordance with the Attorney General's opinion and the State Finance Law. In addition, when the not-for-profit corporation IAGT assumed the responsibilities of RACNE in May 2001, the Department continued using the MOU with Cayuga CC/RACNE, instead of

procuring the services using a competitive process and entering into a properly approved contract. As a result, funds have been paid to a non-State entity, over an extended period, without competition and a properly approved contract. RACNE/IAGT records show that about \$14.4 million of the \$20 million agreement has been spent as of February 14, 2005.

In response to our finding, Department officials maintain that they entered into an MOU because they considered Cayuga CC/RACNE to be a State agency as part of the State University of New York. Division officials further told us that during the processing of the MOU, they consulted with the Department's in-house Counsel's Office and Contract Unit as to whether Cayuga CC was considered a part of the State University, and whether an MOU was the appropriate form of agreement. Division officials noted that representatives of both these groups signed a clearance sheet for the MOU indicating that they considered an MOU appropriate and within the requirements of Department procedures. Department officials acknowledge that in light of the creation of IAGT, which is a not-for-profit corporation, there should be a formal contract and are currently working with the Office of the State Comptroller to establish such a contract. However, the current arrangement with IAGT is inappropriate and needs to be converted to a contract in a timely fashion and subject to competition for any work to be done in the remaining counties across the State.

Effective October 1, 2003, NEIWPCC entered into a grant agreement with the USEPA for \$2,712,376 to obtain Section 106 Clean Drinking Water Act funds. This amount includes about \$1.5 million in grant funds designated for the Department that were transferred by USEPA to NEIWPCC at the Department's request. We reviewed the written agreements and documents related to NEIWPCC's grant, which calls for NEIWPCC to provide up to 26 full-time equivalent staff to the Department for the three year period ending September 30, 2006. Under this grant, NEIWPCC submits workplans, budgets and quarterly reports to the USEPA, and the Division receives a copy of the workplans and quarterly reports. Twenty-two of NEIWPCC's 24 assigned staff (as of June 14, 2005) are located at the Division's offices and perform work under the supervision of Division staff. (The number of NEIWPCC's assigned staff fluctuates, depending on the point in time we are doing the audit test or gathering data.)

NEIWPCC officials advised us that NEIWPCC is responsible for all grant funds they receive from USEPA including the portion of the Department's grant that is transferred to them. In addition, the grant agreement is between the USEPA and NEIWPCC, and the USEPA distributes the federal funds directly to NEIWPCC. The Office of the State Comptroller's Legal Services has determined that it would have been preferable as a matter of fiscal policy to have the total amount of the Department's grant paid to the Department, and then the \$1.5 million payment made to the NEIWPCC so that it follows the State's normal legislative appropriation process for federal grants.

Selection of Cayuga CC/RACNE and NEIWPCC

Workforce Planning

We asked Division officials about their workforce planning process and their decision to use non-State staff as opposed to Department staff. Division officials assert that the Division accomplishes its workload through an annual work planning process. According to Division officials, each year they assess what portion of the annual workload can be accomplished by assigning or reassigning available State staff within the constraints of its personal services budget and approved staff target levels. The Division then attempts to meet workload shortfalls with other resources such as seeking approval of waivers for vacant positions or through its non-personal services budget, which is the source of funds used to pay for non-State staff. Division officials stated that in general, they consider the ready availability of Division employees with the skill sets required to perform required tasks; the existence of required Civil Service titles; the hiring freezes in place and indications from the Division of the Budget as to the likelihood of receiving waivers; and the length of time and effort involved with obtaining a waiver. However, Division officials could not provide historical documentation of the factors they considered at the time, in selecting Cayuga/RACNE or NEIWPCC.

Justification for Selecting Cayuga CC/RACNE and NEIWPCC

Division officials cited the lack of sufficient Departmental staff, resources and technical expertise as their justification for selecting Cayuga CC/RACNE for the floodplain mapping

project. Division officials cited RACNE's skills and expertise as a primary reason for their selection. However, the Division has not provided evidence of RACNE's expertise in GIS technologies and floodplain mapping at the time they were selected. Without the availability of such documentation, we question how the Division assessed RACNE's expertise in light of other possible alternatives to obtain digital floodplain maps.

We visited Cayuga CC to meet with college, RACNE, and IAGT officials to discuss the history of their relationship and their expertise with floodplain mapping. RACNE and IAGT officials told us that RACNE was created as a result of an outreach initiative that NASA named the Regional Application Center program and through which it obtained NASA funding, computer equipment, software, satellite downlink stations and a high bandwidth line that enabled them to work with the large files related to GIS applications. IAGT officials also said that their access to the NASA satellite technology at the time made them unique compared to other organizations. We obtained information from RACNE and IAGT officials on RACNE's history, geospatial technology assets and background, which demonstrates a certain level of expertise in geospatial technology.

Although during the audit the Division officials identified factors that could be considered in their staffing decisions and reasons for selecting RACNE/IAGT for the digital floodplain mapping project, Division officials provided us with no historical documentation of the circumstances that actually existed at the time that actual decisions were made to use non-State staff and to select RACNE/IAGT. The Division provided documents related to work planning. However, the documents did not show the results of any workload planning or consideration of the factors they cited such as whether a portion of floodplain work could have been done by Department staff, the time required to pursue new civil service titles or whether other potential vendors were considered. In addition, RACNE/IAGT officials did not provide documentation of why they were selected by the Department. Furthermore, we note that a former Division official was instrumental in the selection of Cayuga CC/RACNE and that for a time this individual served as an advisor to Cayuga CC/RACNE. We conclude that the Division either did not prepare or did not retain documentation of the specific reasons supporting its strategic business decisions at the time.

In addition, the nature of the work with RACNE/IAGT and NEIWPCC does not appear to be short-term in nature. For example, we were advised by RACNE/IAGT officials that the mapping eventually has to be done in most of the State's 62 counties. We believe this is a long-term project, considering the floodplain mapping has been started in only three counties over the past six years. The Department's 2004 Business Plan shows that it plans to continue map maintenance beginning in fiscal year 2007. However, the plan does not indicate whether State staff will be used to carry out the map maintenance. NEIWPCC's workplan contains a total of 24 tasks consisting of 8 tasks relating to Public Participation and Stewardship and 16 tasks for Water Quality Management. Twelve of the 24 tasks are of an ongoing, routine nature rather than to provide a specific deliverable or product. Such tasks include: assisting Division program staff to incorporate results of public involvement and stewardship programs into water programs and policies; attending meetings of county coordinating committees; and assisting the Division in the support functions for various Water Quality program activities.

Another important aspect of the floodplain mapping project is whether the Division should have a long term reliance on an external entity, rather than having the technology, expertise and trained staff in-house. The Division should have protected itself against the possibility that its ability to successfully complete, and ultimately to update the floodplain maps, could be jeopardized if access to RACNE/IAGT's technology and certain staff were ever disrupted.

Division officials told us that they do not have a strategic plan. The Department has a 2001 strategic plan that includes use of partnerships and proposes a strategy for appropriate agency staffing and retaining of institutional knowledge. The 2004 Business Plan shows that the Department plans to use additional contractors for some of the floodplain mapping work.

Division Staffing Levels

We obtained information on the Division's overall staffing levels and examined its ability to fill vacant job positions in recent years. We found that the Division has no difficulty filling State positions up to its authorized fill level. However, it is using non-personal service funds to hire non-State staff to maintain their overall staffing levels.

We found that staffing levels in the Division have stayed relatively flat in the last six years as shown in *Table 2*. The number of State and non-State staff peaked in the 2002-03 fiscal year at 320 but declined since then. Division officials also told us that they lost State employees due to the retirement incentive in 2002 and that those positions were no longer available to be filled based on Department staffing limits. Overall, *Table 2* shows that the number of positions filled by Division staff has declined by 28 during the period, while the number of available non-State staff has grown by 24 during the same period.

Table 2 Division of Water Available Staff to Accomplish Work Load Fiscal Years 99-00 through 04-05			
State Fiscal Year	Total Staff Available	Positions Filled by Department Employees	Number of non-State Staff
1999-00	308	275	33
2000-01	302	282	20
2001-02	315	286	29
2002-03	320	276	44
2003-04	307	265	42
2004-05	304	247	57

The decline in the Division's level of State employees shows that it has added fewer State personnel and has turned instead to other entities as a method of adding staff to fulfill its program services. To establish the accuracy of the staffing levels and to inquire about the activities they are assigned to, we selected a sample of 174 of 247 State employees and 49 non-State staff of 57 from the Division's records as of January 5, 2005 for the Department's central office, and offices at Herkimer, Schenectady, Stonybrook and Avon. We located all but 1 part-time non-State staff who was not at work at the time of our testing.

Budget Waivers

Division officials had further advised us that State positions may only be filled with an approved waiver from the Division of Budget and that delays in the approval of waivers make it difficult to maintain their level of State staff. However, Division of the Budget approval is not needed to acquire external staff because they do not fill State positions, and therefore, can be obtained more quickly than State employees.

We obtained documentation of the Department's requests for hiring waivers to determine how timely they were approved by the Division of the Budget. During the six fiscal years we reviewed, the Department submitted waivers for 2,256 positions of which 134 were for the Division. Of the 134 waivers, 91 were "restricted" which means that the positions must be filled by a State employee, and the remaining 43 were "unrestricted" (e.g. non-competitive positions) and may be filled with a non-State employee. We found that all of the 134 waivers received Division of the Budget approval. We estimate that the waivers were approved relatively quickly, generally within about two weeks of submission. This data suggests that the Division does not experience delays in receiving approval of hiring waivers for State employees, and therefore does not appear to be a significant reason for the Division to increase its use of non-State staff.

Comparison of State and Non-State Compensation

Division officials state that they consider the costs associated with using State employees versus vendors when deciding which to use to accomplish their program requirements. However, as noted in the previous section of our report, Division officials maintain that cost analysis is not done per individual vendor, but is based on the overall program planning needs of the Division on an annual basis. We requested documents that support the factors considered, including costs, as part of the annual workload planning process. However, Division officials have not provided them.

We obtained and analyzed some limited information on the cost of the services acquired through RACNE/IAGT and NEIWPCC. We determined that both RACNE/IAGT's and NEIWPCC professional services are about as costly as comparable services available in-house.

Table 3 shows that services obtained from RACNE/IAGT are about as expensive as comparable civil service positions for the four positions that we found to have comparable State job descriptions. In addition to the cost shown in Table 3, the Division supplies RACNE/IAGT with work space and equipment, maintains records of employee time and activities, and directs and supervises students and contractors selected by RACNE/IAGT. Additionally, we found that payments to RACNE/IAGT included an administrative overhead rate of 8 percent in 2000. The administrative rate was increased to 15 percent in 2005.

Table 3 Comparison of Costs between RACNE/IAGT and Comparable State Positions			
Description	RACNE/IAGT	State Civil Service**	Difference
Salaries for four comparable positions *	\$201,500.00	\$211,020.50	\$(9,520.50)
Fringe Benefit Rate	32.10%	41.99%	
Fringe Benefits	64,681.50	88,607.51	(23,926.01)
Total Salary and Fringe Benefits	266,181.50	299,628.01	
Administrative Fee	15.00%	0	
Administrative Costs	39,927.23	0	39,927.23
Total Costs for four positions	\$306,108.73	\$299,628.01	\$6,480.72

* The four RACNE/IAGT positions include: Flood Mapping Specialist, Assistant Dam Safety Engineer, Environmental Engineer 1, and Senior Environmental Engineer. The civil service positions include: Environmental Program Specialist 1 (two positions), Environmental Engineering Technician 3, and Environmental Engineer 1.

**Based on average salary for the salary grade.

We compared the salaries and fringe benefits for NEIWPCC staff with comparable civil service positions and found the costs were somewhat higher. We found that the salaries and fringe benefits for 19 NEIWPCC staff plus indirect costs (administrative charges) totaled \$1,301,262 compared to costs totaling \$1,332,204 for comparable civil service positions. The difference is about \$31,000 or about 2 percent lower than average state salaries.

Our evaluation of workplans and assigned tasks further shows that some of the services RACNE/IAGT provides to the Division do not involve GIS work or require skills that are not commonly

possessed by Department employees. RACNE/IAGT records show that 6 of the 24 staff perform GIS related work, which requires certain skills and expertise as well as access to appropriate technology. Two additional staff are assigned to floodplain mapping in the central office. However, 11 of the remaining 16 staff are assigned to functions that do not appear to differ from assignments of typical Department employees. For example, seven staff are surveyors assigned to regional offices, and two are engineers assigned to regional offices. Also, one engineer is assigned to dam safety, and another engineer is assigned to water permits, programs that do not appear to be related to the floodplain mapping project. While the Department does not have a GIS title specifically, it does have environmental engineers and surveyors that could potentially have been trained to perform certain tasks assigned to some of the IAGT personnel.

In addition, we found that, according to NEIWPCCC's grant application, NEIWPCCC was providing staff to the Division for tasks of an ongoing, routine nature rather than to provide a specific deliverable or product as shown in the following examples: work closely with program decision makers to develop public participation and stewardship outreach work plans; assist program staff to incorporate results of public involvement and stewardship programs into water programs and policies; attend meetings of county coordinating committees; perform ambient water quality surveys; and assist the Department in the support functions for various water quality program activities.

The effect of using non-State staff to perform routine, ongoing functions that in-house staff are capable of doing is to substitute non-State for State staff, at a cost that is not significantly different. Again, Division officials could not provide us with documentation to support this decision or its cost effectiveness.

Recommendations

1. Take steps to convert the current arrangement with IAGT to a contract in a timely manner and obtain competition for digital floodplain maps in the remaining counties across the State.

(Department officials replied to our draft report that they began implementing the recommendation prior to the start of the audit.)

Auditor's Comments: The recommendation calls for the Department to obtain competition. However, the Department has requested a single source contract for IAGT. OSC has attempted to give the Department time to transition to a competitive process by allowing use of a single source contract for now.

2. Re-examine and document the need to continue the use of working arrangements with non-State organizations. When it is determined that services are needed from an outside source, take steps to ensure the format used complies with State procurement guidelines.

(Department officials stated that they had already taken steps to competitively procure those portions of the flood plain mapping program that had moved beyond the pilot stage. They indicate that they will continue to examine overall program needs, consider if State employees can be available to perform tasks and will follow State procurement guidelines.)

3. Require an annual needs assessment and cost/benefit analysis for acquiring services from each external vendor or entity.

(Department officials replied to our draft report that they will continue current assessment and cost analysis and will ensure planning documents are kept in accordance with record retention requirements. They also stated that if the Comptroller issues statewide guidance, the Department will incorporate it into the planning process.)

Recommendations (Cont'd)

Auditor's Comments: We believe our audit provides a framework that the Department can adopt to assess cost/benefit; a management responsibility that the Department is primarily responsible for.

4. Document the decision making process including but not limited to:
 - Cost benefit analysis;
 - Specific deliverables; and
 - Length of agreements and contracts.
5. Work with the Department of Civil Service to develop titles for future skill set needs.

(Department officials replied to our draft report that they have and will continue to work with the Department of Civil Service where appropriate to develop long term titles and when the cost effectiveness is proven and does not duplicate skills or experience of partners.)

Auditor's Comments: The Department should document its efforts.

QUALIFICATIONS OF NON-STATE STAFF

We found that the Division works with its partner organizations to set job qualifications, such as educational and work experience for employment, to carry out Division assigned tasks and participates in the selection of job applicants for available positions. However, the required job qualifications for some employment positions were lower for RACNE/IAGT than the comparable State civil service jobs. We also found that the Division does not verify that staff hired by partner organizations actually meet the required qualifications, but instead relies on the partner organizations to do so. Division officials maintain that as long as assigned tasks are satisfactorily completed, verification of credentials of partnering organizations is not necessary. Our understanding is that RACNE/IAGT verified that its staff met required qualifications and NEIWPC verified references but only spot checked whether applicants possessed the required educational requirements for workers with significant work experience. Neither partner organization provides evidence that it confirms job qualifications, thus the Division does not have sufficient assurance that workers provided by its partner organizations actually possess the qualifications required for the positions they hold.

Comparison of Department and Non-State Qualifications

The Division establishes workplans with its partnering organizations detailing the assigned tasks to be completed by a partnering organization. The tasks assigned determine the number and kinds of staff hired by the partnering organization. The workplans can be amended to reflect changes in funding, priorities or other factors. Tasks to provide a specific deliverable can be extended beyond the original estimate if there are delays in completion. Some tasks can be accomplished within a workplan, but others can take several years and span multiple workplans.

We analyzed whether the required job qualifications for the staff provided by RACNE/IAGT and NEIWPC are specified in any existing agreements, and how the required job qualifications

were established for the positions. RACNE/IAGT's agreement stated that the entity will work in conjunction with the Division to select qualified staff, and NEIWPC's grant agreement did not contain any references to staff qualifications or hiring practices.

We requested the Department of Civil Service to assist us in comparing the partner organizations' job requirements with the civil service positions. However, the Department of Civil Service declined our request. As a result, we compared the qualifications and salaries for RACNE/IAGT and NEIWPC professional positions to the State civil service requirements for comparable positions and pay grades. Our comparison of job descriptions established by the partner organizations with the civil service job descriptions for similar jobs produced mixed results.

RACNE/IAGT had 11 job titles for staff assigned to Division projects. Six of them were not comparable to State civil service titles because there are no civil service titles assigned to the Division of Water that required GIS or grant administration expertise. The remaining five RACNE/IAGT job descriptions were comparable to the State civil service job descriptions for an Environmental Engineer and an Environmental Program Specialist. Our comparison showed that the required qualifications for three of the RACNE/IAGT job titles were lower than their comparable civil service titles. For example, the civil service Environmental Engineer 1 position requires an Engineer-In-Training Certificate (i.e. passing Part A of the professional engineer's licensing examination) while the comparable RACNE/IAGT positions do not. As discussed earlier in the report, we found that RACNE/IAGT salaries were similar to the State salaries. The differences in required job qualifications for the positions in our comparison suggest that some of the RACNE/IAGT positions may be filled with less qualified staff than required for similar work done by Division employees.

NEIWPC has four different job title series which encompass all staff members working across all its member states. NEIWPC's job descriptions for a specific title such as Environmental Analyst 1 may vary depending on the duties for a specific position. We reviewed the qualifications for 20 NEIWPC staff assigned to the Division. For 19 staff, we found State civil service job descriptions that were similar. Our comparison showed that NEIWPC's required qualifications

were at least as high as comparable State civil service positions at similar salary levels. For example, requirements for a State Environmental Engineering Technician 3 ranged from a high school diploma and three years qualifying experience to a bachelor's degree in engineering technology. NEIWPCC's similar position, Environmental Analyst 1, requires a bachelor's degree in civil, sanitary, or environmental engineering and one year of experience in a professional capacity, or an associate's degree and three years experience. A State Environmental Program Specialist 2 requires a bachelor's or high level degree in environmental planning, science, economics or studies or two to three years experience depending on the prior position held. A comparable NEIWPCC Environmental Analyst 1 requires a bachelor's degree in environmental science and three years experience with one year experience as a supervisor in a professional capacity. Therefore, a side-by-side comparison suggests that the NEIWPCC positions should be filled by professional staff that are at least as qualified as the Department staff. We were unable to find a comparable State civil service job description in the Division for the remaining one NEIWPCC staff.

Partner Organization Hiring Practices

Division and partner organization officials told us that the hiring process is collaborative, with Division officials playing an active and integral role in hiring non-State staff. The Division sets the specific needs for staff skill sets based on the tasks to be accomplished. Both IAGT and NEIWPCC advertise for the specific skill sets, receive the applications and resumes, and schedule and hold interviews. Division officials review the resumes and participate in the interviews and make hiring recommendations to the partnering organization. Division officials base their decision for selecting candidates on an interview, review of their qualifications, and recommendations from the partner entity. The partner organization will then hire the selected staff if the applicant is willing to accept the available salary. If not, another candidate may be selected.

Division officials stated that they rely on the partnership organizations to verify an applicant's job qualifications. Division officials do not perform separate background checks or verify the credentials of the applicants selected for hire. IAGT officials told us that they verify the applicant's qualifications. We

requested documentation to support that IAGT verified the qualifications of its employees. IAGT officials stated they could not share this information because it would violate RACNE's by-laws concerning confidentiality of personnel records, but they provided us with a description of the job requirements and each staff person's qualifications (excluding positions for a consultant and a program manager). However, we were unable to confirm whether RACNE/IAGT staff actually possess the required qualifications for their positions.

NEIWPCC officials told us that candidates sign an application that is legally binding and that they check the applicant's references, previous jobs and occasionally check educational backgrounds. NEIWPCC officials also told us they keep notes on the qualifications that they verify. Recently, NEIWPCC began to ask candidates to include a copy of their transcripts with their application. We requested to review the documentation to support that NEIWPCC verified its employees' qualifications. NEIWPCC officials stated that they were unable to provide the information because it would violate its confidentiality policy for personnel records. Therefore, given the existing processes and confidentiality restrictions, we believe that there is a risk that applicants may not possess the required educational level that they claim.

NEIWPCC officials provided copies of their staff resumes. We compared the resumes to the qualifications per their job descriptions for a judgmental sample of 20 of 24 staff assigned to the Division projects as of our site visit in June 2005 to determine if their reported qualifications met their job description. Our sample included the 20 full time employees and excluded four staff that were part time or had already left employment. The resumes showed that all 20 staff reportedly met the required qualifications per their job descriptions.

Recommendations

6. Require the partnering organizations to verify the educational, experience, license and other credentials for the staff they hire and assign to Division projects.

Recommendations (Cont'd)

7. Periodically obtain independent confirmation that partner organizations verify the staff educational, experience, licensing and other qualifying credentials.
8. Establish partnering organization job qualifications that, at a minimum, meet qualifications for equivalent Department positions.

(Department officials replied to recommendations 6, 7, and 8 that the statewide procurement requirements do not indicate that the qualifications of a vendor's employees have to be checked. They add that there is no indication the audit disclosed any negative results because they did not check the qualifications.)

Auditor's Comments: We believe that the recommendations should be part of the Department's contract monitoring responsibility and would be good practice for ensuring no negative results will arise from contractor performance.

MAJOR CONTRIBUTORS TO THIS REPORT

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Denise M. Sheehan
Commissioner

December 15, 2005

Ms. Carmen Maldonado
Audit Director
Office of the State Comptroller
Division State Services
State Audit Bureau
123 Williams Street – 21st Floor
New York, NY 10038

Dear Ms. Maldonado:

The New York State Department of Environmental Conservation had the opportunity to review and respond to the Comptroller's draft report 2004-S-76 "Use of Non-State Staff to Accomplish Certain Program Requirements." The following pages contain the Department's response to the draft report. It is broken into five sections.

- Summary of Concerns
- General Program Comments
- Specific Comments
- Cost-Benefit Comments
- Response to Recommendations

Thank you for the opportunity to respond to the draft report. If you need to discuss any of this response, please contact me at (518) 402-9147.

Sincerely,

William L. Herman

Attachment

The New York State Department of Environmental Conservation's (Department) response to the Comptroller's (OSC) draft report 2004-S-76 "Use of Non-State Staff to Accomplish Certain Program Requirements" is presented below and broken into five sections.

- Summary of Concerns
- General Program Comments
- Specific Comments
- Cost-Benefit Comments
- Response to Recommendations

Summary of Concerns

While the Department agrees that auditing the Division of Water's (DOW) use of non-State employees and how they assist the Department in achieving its mission is a laudable endeavor, the Department takes umbrage that the audit appears to have started with a set of predetermined "findings." Throughout the process, there has been an effort by OSC to only find the side of the story to support these findings and an attempt to disregard all information that refutes the predetermined findings. Despite repeated demonstration by this Department that some of the predetermined findings contained in the preliminary reports were incorrect, the draft report continues to make assertions that are simply not supported.

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Note
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A particular concern is that OSC continues to purposely or inadvertently make incomplete comparisons of State and non-State personal service costs. OSC persists in falsely claiming that non-State employees are "at least as costly as comparable services" that could be provided by State employees. This is simply not the case. Using OSC's own methodology, the Department provided the cost analysis to OSC two months ago to refute this position, but OSC continues to ignore the information. Moreover, to support its incorrect stance, OSC incorporates the false premise that State employees with comparable skill sets are readily available or would be easily recruited to perform the "comparable" tasks.

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Throughout the draft report insinuations and oblique comments are made in an attempt to paint a false reality. In one innuendo, the report contends a "sweetheart" deal without substantiating it, without identifying the alleged employee and without demonstrating a negative result from the alleged action. This is a serious allegation that had never been raised during the course of the audit and was not contained in any preliminary report. If OSC can demonstrate that there was an impropriety, then it should directly state who, what, when and how and not make allusions to what could have happened.

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Note
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As stated above, it appears that OSC initiated this audit with its findings already drafted and then sought only those select facts that supported its conclusions. The result is an audit which is essentially a series of contrived "findings" which do not comply with basic audit practices and principles.

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Note
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Response to OSC Draft Report 2004-S-76, "Use of Non-State Staff to Accomplish Certain Program Requirements"

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* See State Comptroller's Notes, pages 59-60

General Program Comments

As noted in the OSC's audit, DOW is a complex organization with a large number of Federal and State mandates. The DOW includes a myriad of long-term institutionalized core water quality and flood protection programs. In addition, over the last several years additional program responsibilities including geographic initiatives such as the New York City Watershed as well as statewide initiatives such as the storm water control and floodplain mapping programs have come under the DOW's purview.

In order to ensure that New York State continues to be a nationally recognized leader in program delivery, DOW, on an annual basis, prepares a comprehensive plan which prioritizes and assigns both personal and non-personal services. To achieve this goal, the annual plan consists of a combination of Federal, State and local funding sources to provide maximum benefit. DOW seeks to maximize available opportunities to address the many priority needs, which is a reflection of increased environmental and flood protection awareness and expectations of local partners and individual citizens.

DOW contends that certain core program activities should be performed by Department employees. DOW also supports partnering with Federal, State and local entities for those activities which can be appropriately performed or shared effectively. This continues to be part of the DOW's foundation in achieving goals by leveraging skill sets and available funding. In fact, in its Clean Water Permit Process Audit (2001-S-18), OSC recommended that the Department "[d]evelop methods for increasing the number of high-risk permits that are reviewed annually, such as obtaining assistance from the United States Environmental Protection Agency (EPA) staff in performing technical reviews or contracting for services." However, in this audit, the Department is criticized for taking such action.

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Note
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For many years DOW maintained a robust contracting inventory of partnership contracts, Memoranda of Understanding (MOUs) and Memoranda of Agreement (MOAs), using Federal and State monies, including the Environmental Protection Fund and Clean Water/Clean Air Bond Act funds to effectively share in either the reimbursement of project costs or maximize complimenting skill sets. For example, between April 1, 1999 and June 30, 2005, in Bond Act funding alone, DOW encumbered nearly \$190 million for 159 projects. The majority of these contracts were executed by the Comptroller and were not subject to the level of detail or proposed standards now recommended for two not-for-profit partnership entities. These contracts assist the Department in meeting Federal grant commitments to ensure current and future funding is not jeopardized as well as assisting local partners with the implementation of water quality or flood protection programs.

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Note
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The United States Congress appropriated funding directly to the Department for the pilot digitized floodplain mapping program, which was the first such effort in the nation, and which ultimately was used as the basis for the nationwide standards now in place. As part of the initiative to digitize floodplain mapping, satellite information from the National Aeronautics and

Space Administration (NASA) was to be used. Related to this initiative, NASA searched for universities with the expertise and capability to advance the application of geospatial information technologies (GIT) to benefit society across government, education and commercial sectors. NASA then established a select group of GIT centers across the nation. Of that very limited group, only one was within New York State - Cayuga Community College. Based upon the limited number of select groups identified by NASA, the Department chose to work with the New York-based entity and entered into an MOU for GIT services associated with Cayuga Community College. At the time, both the Department and the Community College believed that an MOU was the appropriate mechanism to use for the service arrangement because the Community College was viewed as part of the State University of New York (SUNY) system. Consistent with the Department and Community College understanding, OSC has continued to review and approve payments under the MOU since 1999.

The conclusion that certain colleges, including community colleges, are not considered part of the SUNY system for contracting purposes was a complex and, for the past few years, an evolving legal issue. Consistent with the evolution and prior to the engagement notice for this audit, the Department began competitive procurement for portions of the floodplain mapping tasks that had moved beyond the pilot stage. In May of 2004, months before the OSC engagement letter indicating that an audit will commence, DOW followed up on earlier discussions with the Department's Bureau of Contract and Grant Development regarding the competitive procurement of engineering, surveying and GIS services related to statewide floodplain mapping. As a result, Department employees met with OGS on July 19, 2004 to discuss the possibility of obtaining these services via OGS term contracts. Three term contracts are now in place for these services.

In addition, the Department submitted a single source contract reporter exemption request to OSC for those services on November 23, 2004 which should remain with the Institute for the Application of Geospatial Technology (IAGT). This request is still pending at OSC. OSC requested copies of all work plans associated with the MOU which the Department provided in February 2005. OSC asked follow up questions in May 2005, to which we responded on August 12, 2005. On September 21, 2005, OSC asked for a plan/outline for phasing out work performed by RACNE/IAGT and a timeline for the new procurement to enable them to complete their review of the exemption request. Since the Department had already procured competitive services for a portion of the work, the Department attempted to contact OSC for clarification. These attempts have not been successful.

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Obviously, this information was readily available to and was shared with the auditors, yet based upon the wording of the first two recommendations in this audit; one would incorrectly presume that the Department has taken no action to convert any of the MOUs to contracts.

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Note
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The other not-for-profit entity targeted in the audit is New England Interstate Water Pollution Control Commission (NEIWPCC). NEIWPCC is an interstate commission that was established in 1947 by an Act of Congress, and New York State membership in NEIWPCC was approved by the New York State Legislature. Nearly sixty years later, the Commission continues to serve an invaluable purpose because virtually New York State's entire eastern watershed is inexorably intertwined with the western New England's watershed. DOW is a

* See State Comptroller's Notes, page 61

Commission member and continues to partner with NEIWPCC in an effort to leverage both Federal funds and resources. In addition, NEIWPCC applies and receives its funding directly from the EPA. These EPA grants have extensive requirements with which NEIWPCC complies, including a single annual audit. EPA oversees the award of their grants; therefore, these grants fall under the purview of the Federal government who has the authority to initiate Federal audits. Finally, NEIWPCC provides similar services to the New England states and New York to ensure consistency and serves as a common voice for the member states.

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Note
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In recent Department Labor-Management Committee meeting minutes, PEF union representatives were paraphrasing portions of this draft report and its related preliminary reports. These documents are considered works in progress and supposedly are not released for public viewing. The Department is concerned that PEF members and a PEF shop steward were integral members of the OSC audit team and this fact has not been disclosed as a conflict as required by the General Accounting Office's Government Auditing Standards Sections 3.04 and 3.07. Sections 3.04 and 3.07 cover auditor independence. At a minimum, this potential conflict and its impact upon independence and objectivity of the OSC audit team should be mentioned and some qualification be presented by OSC in the audit report.

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Note
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From: General Accounting Office - 03-673G Government Auditing Standards

Section 3.04

Auditors and audit organizations have a responsibility to maintain independence so that opinions, conclusions, judgments, and recommendations will be impartial and will be viewed as impartial by knowledgeable third parties. Auditors should avoid situations that could lead reasonable third parties with knowledge of the relevant facts and circumstances to conclude that the auditors are not able to maintain independence and, thus, are not capable of exercising objective and impartial judgment on all issues associated with conducting and reporting on the work.

Section 3.07

The audit organization should have an internal quality control system to help determine whether auditors have any personal impairments to independence that could affect their impartiality or the appearance of impartiality. The audit organization needs to be alert for personal impairments to independence of its staff members. Personal impairments of staff members result from relationships and beliefs that might cause auditors to limit the extent of the inquiry, limit disclosure, or weaken or slant audit findings in any way. Auditors are responsible for notifying the appropriate officials within their audit organizations if they have any personal impairments to independence...

* See State Comptroller's Notes, pages 61-62

Specific Comments

The following are specific comments the Department has regarding wording and findings contained in the draft report. The format gives the thrust of each issue, followed by the Department's comments.

1. Subject: Report leaves out a key DOW responsibility, one that is the main subject of this report.

Comment: The report notes that, “[t]he Division of Water (Division) protects water quality in rivers, lakes, reservoirs and wetlands, as well as aquifers and coastal areas by regulating wastewater discharges, monitoring water quality and controlling surface runoff.” This language is selective and leaves out the flood protection program referenced in the majority of the report.

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Note
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2. Subject: Comments throughout the report regarding the RACNE MOU or NEIWPCC's receipt of funds are inflammatory and misleading.

Comment: NEIWPCC: MOUs involve a transfer of funds and it is not an appropriate agreement in the case of NEIWPCC which receive its funding directly from EPA. The Department does have two MOAs with NEIWPCC.

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Note
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RACNE: There should be a reference to the Attorney General's decision which says contracts cannot exist between State agencies, not just the reference to the contract laws. More importantly, procurement of services in this area concerns a complex legal issue that was evolving during the period covered by this audit. In fact prior to the audit, the Department had already moved to competitively procure those portions of the floodplain mapping program that had moved beyond the pilot stage. Even today, only three qualified partners were selected and two of those use the same sub-partner as IAGT. Furthermore, based on OSC's verbal guidance concerning the tasks remaining, the Department started to move toward a contractual relationship in November 2004.

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Note
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3. Subject: Comments concerning costs are selective and contain errors as well as continue to ignore administrative overhead costs and information previously provided by the Department to OSC.

Comment: OSC continues to ignore the analysis provided by the Department that, using OSC's own methodology indicates State employees are more expensive than partner employees. While OSC includes the administration fee as part of the analysis for DOW's non-State partners, OSC omits the equivalent indirect costs on the State employee side of the comparison. On September 14, 2005, the Department provided a document to OSC, using OSC's own methodology correcting the omission in OSC's cost analysis. The draft report issued on November 8, 2005 fails to mention the correction that the Department

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Note
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provided to OSC. By selectively using or manipulating submitted data and comments, it appears that there is no OSC standard operating procedure for such comparisons because the methodology used to compare the two entities differed.

Furthermore, the report compares selected titles by cost rather than task. In addition, OSC's report contains many errors in the actual titles and salary comparisons. OSC also used current salary rates for the partner organizations, which include normal cost-of-living increases, etc. since date of hire but then selectively compared them to State hiring rates, rather than going back to the date of hire and adjusting the hiring rate to reflect a comparable years-in-service analysis. OSC's comparison was only to State positions. Based on OSC's findings regarding the need for a contract, the comparison should have been made to private and/or interstate commission salaries as well.

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4. Subject: Comments concerning qualifications are inflammatory and include baseless conclusions.

Comment: The Department does not wish to replace State employees but uses partners to maximize and leverage skill sets and funding. Current OSC contract procurement requirements do not require an evaluation of each individual assigned to perform work. Instead ranges of titles and/or employees that will be used on a project are evaluated and work is subsequently based on performance. Falsifying a job application is illegal. Responsibility to be honest rests with the employee. No problem was (1) identified that caused OSC to check qualifications of any individual; (2) nor was there a problem identified by OSC that resulted from a single hire. Furthermore, despite making these statements there is no indication that OSC actually checked any qualifications or discovered anything amiss or identified a detrimental impact.

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Note
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5. Subject: Comments regarding continued reliance on non-State staffing; long term reliance on external entity, etc.

Comment: OSC did not recognize and/or report that the scope of the work plan associated with the contract has changed since 1999. In 1999, all Cayuga Community College/RACNE tasks dealt with floodplain mapping. As the floodplain mapping projects moved out of the pilot stage, Cayuga Community College/RACNE's involvement with floodplain mapping has decreased. In recent years, Cayuga Community College/RACNE has been more involved with New York City watershed tasks and less with floodplain mapping. Today, the New York City watershed tasks represent the majority of Cayuga Community College/RACNE's work for the Department.

OSC alludes to the fact that retirements created the need for partnerships but these agreements were in existence prior to the last retirement incentive. The partnership with NEIWPC dates back to October 1, 1992, the partnership with Cayuga Community College/RACNE dates back to April 1, 1999 and the large departure of staff taking

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Note
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* See State Comptroller's Notes, pages 59 - 60 and 62

advantage of the retirement incentive occurred on March 31, 2003. OSC did not demonstrate that retirees were replaced by State employees or that partnerships were used on a long-term basis to perform the work previously done by State employees. The Department provided documentation that it has State employees assigned to the program areas associated with this audit. OSC seems to be recommending that State employees can be annually reassigned to other processes, titles, specialties and locations.

6. Subject: Comments regarding staffing levels and waivers are inconsistent, selective, contradictory and incorrect. OSC seems to be unaware of Federal and State grant and budget requirements.

Comment: OSC seemed unaware of Federal grant regulations and auditing processes or the Federal register. Perhaps more importantly, OSC fails to recognize that one of the implications of the entire process is that if grant work is not done, Federal funds are lost which thereby jeopardizes State employees. The State budget process and the Division of Budget (DOB) guidelines are highly restrictive regarding interchange between non-personal service (contract costs) and personal service (State employees). OSC notes that State staffing levels have been reduced significantly but then alludes that somehow the Department could have exceeded those lower approved fill levels. In addition, waivers are granted only for specific positions and only after the Department demonstrates the need to fill the positions. This process is not automatic, with positions generally being approved in groupings. The need to provide services however, is on-going and the Department must ensure continuity of service.

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Note
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There is also an allusion to the fact that the loss of employees due to the retirements during the 2002-03 retirement incentive preceded the two agreements which were the focus of the audit. In fact both of these agreements were not designed to replace State employees and both were in place for several years prior to the retirements (See Comment 5, above). In addition, OSC presented no documentation to support their insinuation that these agreements were used on a long-term basis to perform work previously performed by those retirees.

7. Subject: Comments regarding Attorney General's opinion regarding Cornell University are incomplete and misleading.

Comment: The cited Attorney General's decision was issued on September 14, 2005, after the audit period ended on June 30, 2005. It is inappropriate to assume that the Department could have foreseen the decision during the period covered by the audit. Even OSC's preliminary report made note that the status of the Cornell MOUs was unclear and being reviewed by the Attorney General. Because of the pending review, OSC was unable to make a determination at that time regarding the appropriateness of an MOU or contract. Once the Department received the Attorney General's opinion the Department immediately began to address the matter.

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Note
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8. Subject: Comments concerning the Division's work planning process include contradictory statements.

Response to OSC Draft Report 2004-S-76, "Use of Non-State Staff to Accomplish Certain Program Requirements"

7

* See State Comptroller's Notes, page 62

Comment: Documentation was provided for the last several years, including analysis of indirect cost recovery rates. Prior year costs would have only been more economical as rates have increased. OSC provided no proof that partnership costs in 1999 were more expensive.

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Note
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9. Subject: Comments are inflammatory and baseless in various parts of the draft.

Comment: The language used in the report (e.g., “may have been avoided, because the Division either did not have or did not provide, preferred method, believe there is a risk,” etc.) appears to have been chosen to (1) give the reader a sense that a better approach was known by the Department but not taken and (2) that today OSC has come to the rescue and identified a better approach without proving problems exist with the approach taken by the Department. OSC has not shown there was any adverse impact to the Department as a result of the arrangements for services or that if OSC was involved there would have been a different outcome. In fact, during the audit period, OSC continued to review and approve payments to RACNE. Simultaneous requests by several units of OSC requesting to meet with the partnering entities did lead to confusion and frustration during the audit process. Although the various OSC units were involved in the same meeting, and received different documents, OSC selectively used and refused to use some documents. OSC began to request and receive correspondence directly from the Department’s partners. The Department was not represented at all of these meetings. Personnel records are appropriately maintained by the hiring agency. Other records, although gathered from the partner agency were located at 625 Broadway.

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Note
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10. Subject: The report provides standard boilerplate language disclosing possible conflicts by the Comptroller but fails to mention an apparent conflict that exists with the OSC audit team.

Comment: Typically a Conflict of Interest Statement is completed by auditors when assigned to an audit. Among other things, the Conflict of Interest Statements is a tool to review possible circumstances that might make it difficult, if not impossible, for an auditor to render an independent and objective review. If a possible conflict exists but the audit directors feel that the possible conflict can be overcome, then the audit should note the possible conflict and qualify the findings. In this particular audit, at a minimum the report should include a statement that union members, including a shop steward were on the audit team and OSC should provide an assurance that the union had no influence on selecting the audit, choosing the audit team or the conclusions reached by the audit.

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Note
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11. Subject: General concerns about the recommendations and providing the reasons for not implementing.

Comment: Recommendations 6, 7 and 8 set a different standard than those currently contained in OSC guidelines and procedures. These standards are not consistent with those employed by OSC on the hundreds of other partnership contracts executed during the audit time frame including Environmental Protection Fund, Clean Water/Clean Air Bond Act, and others (See response to Recommendations 6, 7 and 8).

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Note
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Response to OSC Draft Report 2004-S-76, “Use of Non-State Staff to Accomplish Certain Program Requirements” 8

* See State Comptroller's Notes, pages 59 - 60 and 61-63

12. Subject: Comments concerning historical documentation of the factors include selective reasoning.

Comment: Based upon the limited number of select groups identified by NASA, the Department chose to work with the only identified New York based entity and entered into a MOU for GIT services associated with Cayuga Community College. All other possible partners were from out of State. Selection by NASA of Cayuga Community College and FEMA of the Department for pilot projects attests the expertise possessed by Cayuga Community College/RACNE/IAGT.

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This leads to several questions:

- Is OSC recommending that the Department should have selected a partner from out of state?
- Did OSC find that the technology, expertise was not at IAGT?
- Is there another entity OSC found that was comparable?

It is irresponsible to intimate that something might be better without identifying that there was a problem with the existing situation or providing a specific example of what is better.

13. Subject: OSC notes that the Division has not provided evidence of RACNE's expertise in GIS technologies and floodplain mapping at the time they were selected.

Comment: The Department disagrees with this finding. At several meetings, the Department has provided OSC with time lines and other documents. Documentation of IAGT's expertise and the role of work done under the MOU and set to nationwide standards were submitted. Moreover, prior to the audit and with OSC's involvement in the procurement process, the Department had already moved those portions of the floodplain mapping program that had progressed beyond the pilot stage and could be competitively bid to competitive procurement.

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As explained in the General Comments Section of this response, Cayuga Community College/RACNE was recognized as having this expertise by NASA.

14. Subject: RACNE/IAGT did not provide documentation of why they were selected by the Department.

Comment: This is not RACNE/IAGT's responsibility.

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Note
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15. Subject: The implication that a former DOW official influenced partner selection is intended to be an inflammatory statement.

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Note
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* See State Comptroller's Notes, pages 60 and 63

Comment: This is a new item, not previously mentioned in any of the preliminary reports by OSC and in fact supports the Department’s contention that its relationship with RACNE was a true partnership intent on meeting the needs of both entities.

16. Subject: OSC raises a concern whether “the Division should have a long term reliance on an external entity, rather than having the technology, expertise and trained staff in-house.”

Comment: After witnessing the large number of employees taking advantage of the retirement incentive offered a few years ago, the risk cited by OSC is no greater than the risk of having State employees in other fields of expertise. This also raises the concerns discussed in Subject 5 above.

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Note
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17. Subject: The report continues to contain contradictory statements and mathematical errors regarding employee and partner information.

Comments: Three examples are given below.

- OSC notes that it physically located all assigned partner employees (page 11 of the report) and then goes on to say that it found all but one partner employee (page 19).
- The footnote to Table 3 (page 21) notes that a Senior Project Specialist New York City Watershed position was a comparable position to a State title. The report then indicates (page 25) that the Senior Project Specialist New York City Watershed position, referred to as the grant administrative specialist, did not have a comparable State title.
- A discussion of eleven RACNE/IAGT positions begins at the top of page 22. Within the same paragraph, when providing more detail about the eleven positions, twelve are listed.

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Note
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18. Subject: While OSC notes that the Department does not have GIS title, OSC makes unsubstantiated claims that Department environmental engineers and surveyors could potentially have been trained to perform certain tasks assigned to some of the IAGT personnel.

Comment: OSC claims to have performed a review of all State employees and work planning and OSC goes on to indicate that the Department has environmental engineers and surveyors that could potentially have been trained to perform certain tasks assigned to some of the IAGT personnel. Although making these statements OSC does not identify:

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Note
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- To which engineers OSC is referring.
- To what tasks OSC is referring.
- Upon what finding OSC is basing this.

Without OSC providing specific examples and pertinent details, the Department cannot agree with the validity of this statement or act on the finding.

* See State Comptroller's Notes, pages 60 and 63

Moreover, this alleged finding does not reflect a logical reassignment of employees to specialty fields; engineers cannot easily or routinely be reassigned to do other work just because there is a need in another title or location of the State.

19. Subject: The draft report identifies the OSC audit team that worked on the report but fails to note that the team members include union members and a shop steward.

Comment: The Department is concerned that the current draft report does not disclose, nor is any information provided as to how this could have impacted OSC's audit team's independence and objectivity. Given the General Accounting Office's Government Auditing Standards, in particular Sections 3.04 and 3.07 on auditor independence, at minimum, this information should be mentioned and some qualification be presented by OSC in the audit report.

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Note
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Cost-Benefit Comments

Perhaps the most egregious shortcoming in this draft report is the careless calculations comparing State versus non-State personal service costs. OSC includes the administrative overhead costs for the Department's partners, but does not include the administrative overhead costs for State employees. The apparent predetermined position taken by OSC on these costs is based upon an erroneous supposition that there are no indirect variable overhead costs associated with the State workforce. The Department strongly disagrees with OSC's position as these indirect cost recovery rates are used not only to support procurement of Federal grant funds but are used during expenditure reporting to receive Federal grant funding. The EPA routinely reviews and approves these rates as part of the grant awards process. Moreover, it is puzzling why OSC would not consider these costs when comparing State employee costs to non-State employee costs when OSC has reviewed the indirect cost recovery rates associated with other Department program audits and did not question them.

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The Department is again providing the balanced analysis that considers overhead rates for both State and non-State vendors and again demonstrates that for the program area covered by this report, State employees are more expensive than the non-State employees. This is the same analysis that was provided to the OSC auditor-in-charge, both as a physically mailed letter and as an electronic attachment to an email, on September 16, 2005.

The information leading to this conclusion appears to have been consciously excluded from OSC's preliminary report. In addition, while the Department requested this information in its response to the preliminary report, this information was not provided by OSC. At the closing conference, Department staff asked if this conclusion would be included in the draft report and OSC staff indicated it would. The Department again requested that OSC provide it with the information used to reach this conclusion so the Department could review it. Only then did OSC agree to provide the analysis that supposedly substantiated this claim. Upon finally receiving OSC's analysis, this Department determined that using OSC's own methodology, OSC incorrectly and unfairly accounted for State employee costs by not including administrative

Response to OSC Draft Report 2004-S-76, "Use of Non-State Staff to Accomplish Certain Program Requirements"

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* See State Comptroller's Notes, pages 59 - 60 and 61 - 62

overhead costs associated with State employees, the same administrative overhead costs that EPA and the Federal Emergency Management Agency (FEMA) has accepted as an appropriate cost associated with certain Federal grant programs. Continuing along this path, OSC chides the Department for an increase in administrative overhead costs paid to vendors. Even with the increase, the administrative overhead rate paid to the referenced vendors is only two-thirds that of the administrative overhead rate associated with State employees.

The essence of the September 16, 2005 cost comparison letter from the Department to OSC is presented below. A copy of the letter is included with this response as Attachment A.

Essence of the September 16, 2005 letter:

The Department does not agree with the premise of a State title to non-State title comparison. Still, the Department did review the cost comparison document and have concerns that the calculation of State employee costs is missing a key cost factor. In particular, the comparison is missing indirect personal service costs. This indirect personal service costs include support staff outside and inside the Department. Indirect costs from outside the Department include support from the Department of Civil Service, the Division of Budget, Governor's Office of Employee Relations and others. Indirect costs from inside the Department include staff support from the Division of Management and Budget Services, Executive Office, Bureau of Legal Affairs and others.

The Department's cost accounting system classifies, segregates, and accumulates its expenditures from the Office of the State Comptroller's (OSC) Central Accounting System into annual direct and indirect cost pools. Department indirect costs are typically for staff, support and other functions that cannot be identified specifically with a single project, activity or objective. The Department's personal and non-personal service (OTPS) expenditures, classified as indirect cost, originate from nine Divisions, some of which are noted above.

A summary of the Department's expenditures classified for SFY 2004-05 and the calculation of the Department's approved indirect cost rate are calculated in Figure 1 below.

Figure 1

<u>Classification</u>	<u>Amount</u>
(1) Indirect Personal Service and Eligible OTPS Expenditures	\$ 77,596,342
(2) Direct Personal Service Expenditures	234,419,455
DEC's Indirect Cost Rate for 2004-05:	
(1) Indirect Personal Service and Eligible OTPS Expenditures	\$ 77, 596,342
+ (2) Direct Personal Service Expenditures	\$234,419,455
EPA-Approved Indirect Cost Rate for 2004-05	33.10%

The Department acknowledges that many, but not all, of both RACNE/IAGT and NEIWPC partner employees share Department facilities (e.g., office space, heat, lights, equipment and other resources). Such costs are classified as OTPS indirect costs and represent a considerable portion of the Department's total federally approved indirect cost rate. For this analysis, the Department does not include the OTPS indirect expenditures. Therefore, as part of this analysis, the Department adjusted the federally approved indirect cost rate downward, by

excluding eligible OTPS. A summary of indirect personal service costs for 2004-05 is shown in Figure 2 below.

Figure 2

Department's Indirect Cost Rate (Adjusted) for 2004-05:	
(1) Indirect Personal Service and Eligible OTPS Expenditures	\$ 77,596,342
Less: Eligible Indirect OTPS Expenditures	\$ 20,738,534
Adjusted Indirect Cost Pool	\$ 56,857,808
+ (2) Direct Personal Service Expenditures	\$234,419,455
EPA-Approved Indirect Cost Rate (Adjusted) for 2004-05	24.25%

Recognizing that the cost comparison supplied by OSC did not include any indirect costs associated with State employees, the cost comparison tables for RACNE/IAGT and NEIWPC were adjusted and are shown in Figures 3 and 4 below.

Figure 3

Comparison of Costs Between IAGT/RACNE and Comparable State Positions - OSC			
Description	IAGT/RACNE	State Civil Service	Variance
Salaries for five comparable positions	\$252,500.00	\$231,224.00	\$21,276.00
Fringe Benefit Rate	33.71	41.99	
Total Fringe Benefits	\$85,117.75	\$97,090.96	-\$11,973.21
Total Salary & Fringe Benefits	\$337,617.75	\$328,314.96	\$9,302.79
Administrative Fee	15.00	0.00	
Total Administrative Costs	\$50,642.66	\$0.00	\$50,642.66
Total Costs	\$388,260.41	\$328,314.96	\$59,945.45
Comparison of Costs Between IAGT/RACNE and Comparable State Positions - DEC			
Description	IAGT/RACNE	State Civil Service	Variance
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Total Salary & Fringe Benefits	\$337,617.75	\$328,314.96	\$9,302.79
Administrative Fee	15.00	24.25	
Total Administrative Costs	\$50,642.66	\$79,616.38	-\$28,973.71
Total Costs	\$388,260.41	\$407,931.33	-\$19,670.92

Figure 4

Description	NEIWPC	State Civil Service	Variance
Salaries for 19 comparable positions	\$832,376.00	\$834,524.00	-\$2,148.00
Fringe Benefit Rate	35.94	41.99	
Total Fringe Benefits	\$299,155.93	\$350,416.63	-\$51,260.69
Total Salary & Fringe Benefits	\$1,131,531.93	\$1,184,940.63	-\$53,408.69
Administrative Fee	15.00	0.00	
Total Administrative Costs	\$169,729.79	\$0.00	\$169,729.79
Total Costs	\$1,301,261.72	\$1,184,940.63	\$116,321.10

Description	NEIWPC	State Civil Service	Variance
Salaries for 19 comparable positions	\$832,376.00	\$834,524.00	-\$2,148.00
Fringe Benefit Rate	35.94	41.99	
Total Fringe Benefits	\$299,155.93	\$350,416.63	-\$51,260.69
Total Salary & Fringe Benefits	\$1,131,531.93	\$1,184,940.63	-\$53,408.69
Administrative Fee	15.00	24.25	
Total Administrative Costs	\$169,729.79	\$287,348.10	-\$117,618.31
Total Costs	\$1,301,261.72	\$1,472,288.73	-\$171,027.01

Response to Recommendations

The following presents the Department's response to each recommendation contained in the draft report.

Recommendation 1: Take steps to convert the current arrangement with IAGT to a contract in a timely manner and obtain competition for digital floodplain maps in the remaining counties across the State.

Response to Recommendation 1: The Department began implementing this recommendation prior to the start of this audit. The Department is surprised that OSC fails to note this as part of the recommendation. This recommendation should read: "The Department should continue taking steps . . ."

* Note 8

Response to OSC Draft Report 2004-S-76, "Use of Non-State Staff to Accomplish Certain Program Requirements"

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* See State Comptroller's Notes, page 61

Recommendation 2: Re-examine and document the need to continue the use of working arrangements with non-State organizations. When it is determined that services are needed from an outside source, take steps to ensure the format complies with State procurement guidelines

Response to Recommendation 2: Prior to the start of this audit, the Department had already taken steps to competitively procure those portions of the floodplain mapping program that had moved beyond the pilot stage. DOW will continue to examine its overall program needs as part of its annual comprehensive planning efforts. It will also continue to consider if State employees can be made available to perform the required tasks. In the future, should DOW procure services from non-State entities, DOW will follow State procurement guidelines.

Recommendation 3: Require an annual needs assessment and cost/benefit analysis for acquiring services from each external vendor or entity.

Response to Recommendation 3: The Department will continue its current assessment and cost analysis and ensure that work planning documents are kept in accordance with records retention standards. If the Comptroller issues statewide guidance, the Department will incorporate them into their annual work planning process.

Recommendation 4: Document the decision making process including but not limited to:

- Cost benefit analysis
- Specific deliverables; and
- Length of agreements and contracts.

Response to Recommendation 4:

- Cost benefit analysis. OSC's method of comparing costs on an individual by individual basis applies a different standard than current statewide OSC contract procurement procedures. The Department will perform its cost benefit analysis on a per entity basis, including indirect cost rates and other routinely accepted costs associated with doing business.
- Specific deliverables. The Department will continue assessing deliverable needs on an annual basis and will start to add more specific deliverables into the comprehensive work planning cycle. When purging work planning files, the Department will move documentation associated with agreements into an appropriate MOU/MOA/contract file.
- Length of agreements and contracts. The Department will continue assessing "need" on an annual basis and will start to document the length of agreement into its work planning cycle, rather than just the contracts and associated contract scopes. When purging work planning files, the Department will move documentation associated with agreements into appropriate MOU/MOA/contract file.

Recommendation 5: Work with the Department of Civil Service to develop titles for future skill set needs.

Response to Recommendation 5: The Department has worked and will continue to work with the Department of Civil Service where it is appropriate to develop long-term Department titles and where the cost effectiveness to doing so is proven and does not represent duplicate skill sets or fields of expertise more appropriately performed by other partners.

Recommendation 6: Require the partnering organizations to verify the education experience, license and other credentials for the employees they hire and assign to Division priorities.

Response to Recommendation 6: OSC's statewide procurement requirements do not require partnering organizations to verify the education experience, license and other credentials for the employees they hire and assign to Division priorities. This recommendation applies a different standard than what is currently required through OSC's statewide procurement requirements. Upon issuance of OSC guidelines on a statewide basis, the Department will incorporate them into their annual work planning process. Furthermore, OSC has failed to demonstrate that any negative impact occurred by not adopting different standards than those that apply to all other agencies.

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Note
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Recommendation 7: Periodically obtain independent confirmation that partner organizations verify the staff educations, experience, licensing and other qualifying credentials.

Response to Recommendation 7: OSC's statewide procurement requirements do not require agencies to periodically obtain independent confirmation that partner organizations verify the staff educations, experience, licensing and other qualifying credentials. This recommendation applies a different standard than what is currently required through OSC's statewide procurement requirements. Upon issuance of OSC guidelines on a statewide basis, the Department will incorporate them into their annual work planning process. Furthermore, OSC has failed to demonstrate that any negative impact occurred by not adopting different standards than those that apply to all other agencies.

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Note
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Recommendation 8: Establish partnering organization job qualifications that at a minimum, meet qualifications for equivalent Department positions.

Response to Recommendation 8: OSC continues to miss the point. The Department partners for services that deliver or help deliver a product. The Department does not partner to replace employees.

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Note
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Response to OSC Draft Report 2004-S-76, "Use of Non-State Staff to Accomplish Certain Program Requirements"

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* See State Comptroller's Notes, page 63

OSC's statewide procurement requirements do not require that partnering organizations have job qualifications that at a minimum, meet qualifications for equivalent Department positions. The Department does not intend to begin routinely contracting out work for which there are equivalent Department positions. In addition, this recommendation applies a different standard than what is currently required through OSC's statewide procurement requirements. Upon issuance of OSC guidelines on a statewide basis, the Department will incorporate them into their annual work planning process. Furthermore, OSC has failed to demonstrate that any negative impact occurred by not adopting different standards than those that apply to all other agencies.

Attachment A

New York State Department of Environmental Conservation

Office of Internal Audit, 12th Floor

625 Broadway, Albany, New York 12233-1060
Phone: (518) 402-9147 • FAX: (518) 402-9145
Website: www.dec.state.ny.us



September 16, 2005

Ms. Deb Spaulding
Auditor-In-Charge
State Audit Bureau
Office of the State Comptroller
110 State Street-11th Floor
Albany, New York 12236

RE: Cost Comparison of State and non-State Staff with Regards to Report 2004-S-76

Dear Ms. Spaulding:

Thank you for sharing the cost comparison information concerning State and non-State staff on certain projects for the New York State Department of Environmental Conservation (Department).

As previously noted, the Department does not agree with the premise of a State title to non-State title comparison. Still, we did review the cost comparison document and have some concerns that the calculation of State staff costs is missing a key cost factor. In particular, the comparison is missing indirect personal service costs. This indirect personal service costs include support staff outside and inside the Department. Indirect costs from outside the Department include support from the Department of Civil Service, Budget Division, Governor's Office of Employee Relations and others. Indirect costs from inside the Department include staff support from the Division of Management and Budget, Executive Office, Bureau of Legal Affairs and others.

The Department's cost accounting system classifies, segregates, and accumulates its expenditures from the Office of the Comptroller's (OSC) Central Accounting into annual direct and indirect cost pools. Department indirect costs are typically for staff, support and other functions that cannot be identified specifically with a single project, activity or objective. The Department's personal and non-personal service (OTPS) expenditures, classified as indirect cost, originate from nine Divisions, some of which are noted above.

A summary of the Department's expenditures classified for SFY 2004-05 and the calculation of DEC's approved indirect cost rate are calculated in Figure 1 below.

<u>Classifier</u>	<u>Amount</u>
(1) Indirect Personal Service and Eligible OTPS Expenditures	\$ 77,596,342
(2) Direct Personal Service Expenditures	234,419,455
DEC's Indirect Cost Rate for 2004-05:	
(1) Indirect Personal Service and Eligible OTPS Expenditures	\$ 77, 596,342
÷ (2) Direct Personal Service Expenditures	\$234,419,455
EPA-Approved Indirect Cost Rate for 2004-05	33.10%

Figure 1

The Department acknowledges that both RACNE/IAGT and NEIWPC contractor employees share Department facilities (e.g., fixed costs such as office space, heat, lights, equipment and other resources). Such costs are classified as indirect, OTPS by the Department and represent a considerable portion of the Department's Federally approved indirect cost rate. While OTPS indirect costs have a fixed and variable component, our analysis does not consider the variable component of the indirect OTPS expenditures. Therefore, we adjusted the Federally approved indirect cost rate downward, by excluding eligible OTPS. A summary of indirect personal service costs for 2004-05 is shown in Figure 2 below.

<u>Department's Indirect Cost Rate (Adjusted) for 2004-05:</u>	
(1) Indirect Personal Service and Eligible OTPS Expenditures	\$ 77,596,342
Less: Eligible Indirect OTPS Expenditures	<u>\$ 20,738,534</u>
Adjusted Indirect Cost Pool	\$ 56,857,808
÷ (2) Direct Personal Service Expenditures	\$234,419,455
EPA-Approved Indirect Cost Rate (Adjusted) for 2004-05	24.25%

Figure 2

Recognizing that the cost comparison supplied by OSC did not include any indirect costs associated with State employees, the cost comparison tables for RACNE/IAGT and NEIWPC were adjusted and are shown in Figures 3 and 4 below.

Comparison of Costs Between IAGT/RACNE and Comparable State Positions - OSC

Description	IAGT/RACNE	State Civil Service	Variance
Salaries for five comparable positions	\$252,500.00	\$231,224.00	\$21,276.00
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Comparison of Costs Between IAGT/RACNE and Comparable State Positions - DEC

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Total Costs	\$388,260.41	\$407,931.33	-\$19,670.92

Figure 3

Comparison of Costs Between NEIWPC and Comparable State Positions - OSC

Description	NEIWPC	State Civil Service	Variance
Salaries for 19 comparable positions	\$832,376.00	\$834,524.00	-\$2,148.00
Fringe Benefit Rate	35.94	41.99	
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Administrative Fee	15.00	0.00	
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Total Costs	\$1,301,261.72	\$1,184,940.63	\$116,321.10

Comparison of Costs Between NEIWPC and Comparable State Positions - DEC

Description	NEIWPC	State Civil Service	Variance
Salaries for 19 comparable positions	\$832,376.00	\$834,524.00	-\$2,148.00
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Total Fringe Benefits	\$299,155.93	\$350,416.63	-\$51,260.69
Total Salary & Fringe Benefits	\$1,131,531.93	\$1,184,940.63	-\$53,408.69
Administrative Fee	15.00	24.25	(1)
Total Administrative Costs	\$169,729.79	\$287,348.10	\$117,618.31
Total Costs	\$1,301,261.72	\$1,472,288.73	\$171,027.01

Figure 4

As always, the Department is committed to working with the OSC and others to improve the Department's operational effectiveness and efficiency.

If you have any questions, please do not hesitate to contact Bill O'Toole or me at 402-9147.

Sincerely,



William L. Herman

Attachment

cc: H. Hamilton
S. Allen
✓ B. O'Toole
T. Kulzer

State Comptroller's Notes

1. This audit of the Department, like all of our audits of State agencies, was conducted in accordance with all of the rigors of generally accepted government auditing standards. Under these standards, auditors must maintain the highest degree of integrity, objectivity and independence. They must conduct themselves in a way that will serve the public interest, honor the public trust and uphold their professionalism. The audit organization is also responsible for having a quality control system to provide reasonable assurance of compliance with the standards. Furthermore, the standards require the audit organization to obtain an independent peer review to provide an opinion as to whether the organization's system of quality control is designed and being complied with to provide reasonable assurance of conformance with professional audit standards. During our field work we attempted to obtain and examine all relevant information before drawing conclusions and preparing findings. Where appropriate, based on agency responses, we amend our findings and conclusions for inclusion in the draft report. The audit was subject to and passed our internal quality control system review before being issued as a draft. In addition, our audits and our audit operations have successfully undergone external peer review many times over the years under the tenure of various Comptrollers. We see no need to amend the audit report with regards to matters of audit staff or management independence.

The Department's assertion that our findings are predetermined is an insult to the professionalism of our unionized staff auditors as well as our non unionized supervisors and managers who were assigned to this audit and are personally identified as major contributors to the work. These dedicated professionals understand the importance of adhering to auditing standards. It is absurd and simply wrong to state that these individuals would bias the audit with predetermined findings and would risk their professionalism and credibility.

2. In the absence of a Department prepared cost comparison between State employees and non-State employees prior to entering into a working arrangement with partnering organizations, we developed such a cost comparison during the course of our audit. Department officials provided additional information and we updated our cost data for partnering organization employees and modified our analysis, but it nevertheless showed that when average salary levels are applied, partnering organization employees were about as costly as State employees. In response to the draft report, Department officials now ask that we add indirect costs, attributable to agency operations (e.g., legal) and to central agency support services (e.g., Division of the Budget) to our cost basis for State employees. Department officials provided us with an indirect cost rate of 24 percent that it states was developed and used to recognize such additional costs for billing certain Federal grant programs.

We question the Department's use of an indirect cost rate in this particular situation for several reasons. The primary reason is that we believe that most agency indirect operating costs are largely independent of whether a State employee or a partnering

organization employee is used. In the situation examined during this audit, the indirect costs identified by the Department will continue to exist regardless of whether State or non-State employees are hired. Also, the Department's response does not show that its indirect costs actually went down by hiring partner organization employees instead of using State employees. Moreover, based on our observations of how the Department actually makes use of the partner organization employees, the Department's State employed supervisors must track the projects assigned to partner organizations and, in those instances where partner organization employees work within Department offices essentially as year-round temporary employees, must provide day-to-day direct supervision of such outside employees as happens with current State employees. In addition, given the manner in which partner organization employees are used within the Department, logic suggests that indirect charges attributable to in-house and central agency support services should be applied to some degree to partner organization employees, not just State employees as suggested by the Department officials in their response.

Based on a search of the Internet for information as to how other states have addressed cost comparisons, we found that Texas has put in place a formal process for analyzing the cost benefit of using State employees versus contract workers. The methodology is fully described in a report issued by the Office of the Texas State Auditor, entitled *Best Practices and Guidelines For Effectively Using a Contract Workforce*, dated March 1999. Our review of the Texas methodology shows it does not include the indirect cost of State employees. Rather, the Texas methodology compares out-of-pocket costs for payroll, benefits and fees paid to contract workers, to payroll and fringe benefits paid to State employees, similar to the comparison we presented in this report. For these reasons, we find no basis for acceptance of the 24 percent indirect cost rate the Department asks be added to State employees in a cost comparison with non-State employees. It should also be noted that for the 2004-05 fiscal year, the Division of the Budget approved indirect billing rates of 3.48 percent for non-Federal funds and 3.22 percent for Department Federal funds.

3. Regarding the availability of State employees, we do not claim that State employees are readily available. However, we do point out that some staff provided by partnering organizations perform functions similar to typical Department employees such as surveyors and dam safety engineers. We further note that the Department has regional offices located across the State, where both State employees and some partnering organization staff are located.
4. We do not imply that there is a sweetheart deal or that an impropriety occurred. We included the history and the relationship in the interest of disclosure.
5. We do not criticize the Department for contracting for services. Rather, we cite deficiencies in the Department's process for obtaining services from selected partnering organizations.

6. The two agreements addressed in our audit report were not executed as contracts subject to the review and approval of the Office of the State Comptroller.
7. Responding to our draft audit report, Department officials stated that they have attempted to contact OSC for clarification regarding the single source contract, but have not been successful. Our Bureau of Contracts told us that they have been in contact with Department officials. The week of February 27, 2006, the Bureau of Contracts received information in response to a request made by the Bureau of Contracts on September 21, 2005.
8. The report states that the Department is working with the Office of the State Comptroller to establish a contract. We believe the recommendation is still valid because the process has not yet been completed. The Department has not been timely in its response to questions posed by OSC's Bureau of Contracts. Thus, we have been forced to cut off payments on two separate occasions because of unsatisfactory progress towards a contract.
9. The Department is a partner with NEIWPC in a number of activities and we do not question the relationship. However, upon visiting NEIWPC we were advised that the federal reporting process did not require information on the specific tasks performed by NEIWPC staff for the Department. In the absence of such information it could not be determined the extent to which Division program requirements were met through the use of NEIWPC staff.
10. We take exception to the Department's insinuation that our audit staff shared our preliminary audit findings and/or the draft audit report with union representatives. We followed up with our staff and have confidence that these documents were provided to only Department authorized officials. We call upon the Department to further investigate this matter and to determine if Department personnel shared these documents in an unauthorized manner.

We also take exception to the Department's concern that our unionized auditors may have a personal impairment constituting a potential conflict of interest in conducting this audit and, in accordance with generally accepted government auditing standards, this warrants a qualification to our audit report. As pointed out previously in note 1, our audits are accomplished by a team of unionized staff and are overseen by non unionized audit management. This combination of audit professionals have successfully completed literally thousands of independent audits performed according to professional standards addressing issues over which unions, management, private contractors and not-for-profits had interests. This includes audits of unionized employee time, attendance and payments; contractor disallowances; management compliance with laws and rules and a host of other topics. In each case, care is taken to assure independent and objective audit results are rendered. This has been confirmed by our independent external peer reviews. This audit was similarly conducted with the highest standards and integrity.

The Department notes that auditing standards require that audit organizations should have an internal quality control system to help determine whether auditors have any independence impairment that could affect their impartiality. In fact, as described in note 1, this audit was subject to and successfully passed our internal quality control system review that assesses compliance with auditing standards. Also, our official quality procedures require that our auditors sign statements annually attesting to their independence. Furthermore, these procedures specify that at the start of every audit, all employees should make their immediate supervisor aware of any independence problems. It is interesting that the Department presupposes that unionized auditors present a bias for the audit, but does not point out that the audit managers who oversaw and approved the audit work and the audit report are not unionized.

11. In our report, we state that the Department is responsible for the flood protection program.
12. Our conclusion regarding the NEIWPCCC grant is that it would be preferable fiscal policy to have the funds go through the normal legislative appropriation process for Federal grants.
13. In our report, we disclose the New York State Attorney General's 1980 opinion on this matter.
14. The Department questions our use of hiring rates rather than actual years of service for State employees. We modified our analysis to use average salary levels because both State employees and partner organization staff include employees of various length of service. Also, Table 3 on page 25 now is based on four positions to improve comparability of costs.
15. As our report indicates, we were denied access to partnering organization personnel records containing qualifications due to privacy restrictions.
16. We do not assert that retirements created the need for partnerships. However, according to Division officials, retirements did affect the number of available State positions as we state in our report. We also noted that some partner organization staff performs work similar to that performed by Department employees. We do not state whether this work was previously performed by Department employees, or that State employees should be reassigned annually.
17. As we state in our report, Department records show that the number of State employees in the Division have declined and partnering organizations employees have increased. The Department's comments imply that partnering organization staff was hired because State positions are limited and partner staff can be hired sooner than State position waivers can be obtained, thereby preventing the loss of Federal funds. However, our analysis shows that all of the Department's waivers were approved generally within two weeks of submission.

18. We did not intend to give the impression that the Department could have foreseen the result of the Attorney General's opinion. We disclosed the date of the Attorney general's opinion in the report to update the information and reflect that an opinion was issued.
19. We did not imply that the Department knew of a better approach, but did not take it. While there were multiple requests, the Department must recognize that several OSC units have an interest in assuring that transactions are accurate and valid. It further asserts that it was not party to all meetings with partner organizations. Department personnel did accompany us on one visit. However, they chose not to accompany us on two other visits. As for the records at 625 Broadway, the auditors learned that the records were at that location during their meeting with RACNE/IAGT officials at Cayuga Community College.

We continued to make payments to RACNE to give the Department time to comply with contract and bidding requirements. OSC Bureau of Contracts has agreed to make payments to RACNE until March 31, 2006. OSC has advised the Department it will require a contract for any payments beginning April 1, 2006.

20. Our point is not which vendor was selected, or their level of expertise, but whether the justification for their selection was documented at the time of selection.
21. We did not imply that RACNE/IAGT was responsible for providing documentation of their selection. Our purpose was to disclose that we could not obtain historical documentation to support the selection of RACNE/IAGT from any source, including RACNE/IAGT.
22. We believe that the risk involves more than just the loss of employees due to retirements. The loss of employees due to retirement is predictable and therefore, can be managed to a certain extent through workforce planning measures. However, the Department's use of essentially non-state staff to carry out assigned tasks and in some instances to supervise State employees may raise legal issues. For example, any actions and omissions of partner organization employees who appear to the public to function in an employer-employee relationship on behalf of the Department in carrying programs and activities assigned to the Department may result in potential liability for the State. As mentioned in our report, the Department makes use of partner organization employees for tasks related to dam safety and water permits. However, we also report that the Department does not independently confirm the qualifications of such employees, but relies solely on partner organizations to hire qualified individuals. Furthermore, our requests for documentation to support the qualifications of such employees were denied. In the event of a legal issue, the recourse over partnering organization employees creates a somewhat ambiguous legal question because the Department does not have direct control over such employees but relies on their work.
23. We have revised the report to reflect information provided in the Department's response.

24. We continue to believe that it is important for the Department to have assurance that staff providing services are properly qualified. It is simply good business practice.