



WILLIAM & MARY LAW SCHOOL

VIRGINIA COASTAL POLICY CENTER

Coastal Zone Management Narrative “Enforceable Policies” Advisory Committee Minutes

The Coastal Zone Management Advisory Committee met at 1:00 pm on July 18, 2017 at the Department of Environmental Quality Headquarters to continue discussion of a narrative rewrite of Virginia’s enforceable policies, specifically the statutes and regulations under the authority of VMRC. Present at the meeting were Daniel Piefer (CBF), Lauren Pudvah (CBF), Dave Davis (DEQ), John Fisher (DEQ), Shep Moon (DEQ), Kerry Kehoe (NOAA), Elizabeth Andrews (VCPC), Kevin Rivera (VCPC), Matt Hull (VMRC), and Tony Watkinson (VMRC). Participating via telephone were Bettina Sullivan (DEQ), Ben McFarlane (HRPDC), Kelci Block (OAG), Lewis Gillingham (VMRC), and Chip Niekirk (VMRC).

- Elizabeth opened the meeting by asking the group to approve the May 31, 2017 minutes. They were approved.
- Kerry Kehoe gave an overview of Enforceable Policies. He guided the group through a NOAA training module to teach the group how to identify enforceable policies.
 - o The module highlighted seven guidelines for identifying potential problems in enforceable policies:
 - § 1) Policy must include mandatory language
 - § 2) Policy must contain a clear standard
 - § 3) Policy cannot be preempted by federal law
 - § 4) Policy must regulate federal agencies, lands, or waters
 - § 5) Policy cannot discriminate against a particular coastal user or federal agency
 - § 6) Policy cannot hinder the national interest objectives of the Coastal Zone Management Act
 - § 7) The policy cannot incorporate other policies or requirements by reference
 - o Elizabeth inquired as to the specificity required for a standard to be deemed a clear standard
 - § Kerry explained that a clear standard can be open and ambiguous enough to capture a range of circumstances, but should not be so muddled that there is no enforceable standard. He explained that the policy in the

module (“Dredged material shall be put to beneficial use to the extent it is practicable to do so”) would be a sufficiently clear standard, even though it contains imprecise terms such as “beneficial use” and “practicable”.

- § Elizabeth asked if it is relevant whether or not a policy is written in terms of what people must do or if it is written in terms of what the government agency must do. Kerry responded that it is not an issue when it is still giving guidance for the ultimate decision. When drafting these policies, however, you should be wary of statements that are only directives for policy making though.
- The group then began a discussion of federal preemption.
 - § Kerry explained that there are different types and degrees of federal preemption. Sometimes the state may have some review authority over federal projects.
 - § Kerry further explained that just because something is preempted, it doesn’t mean that there aren’t other policy areas that can be considered – e.g., a state is preempted from prohibiting an energy project but may be able to review ancillary wetlands impacts of the project.
 - § Tony inquired as to whether the federal government is required to comply with a state’s wetlands statutes. Matt Hull explained that often times when the federal government complies with state statutes it is because there is an express waiver of sovereignty.
- The group then began a discussion of when something is regulating federal agencies, lands, and waters which is not allowed in an enforceable policy.
 - § Kerry explained that it should not be assumed that a statute is calling out a federal agency simply because it refers to the public and that the statute should explicitly mention the federal government in order to meet this requirement.
 - § The group recognized the wide range of possible situations where something could apply to federal agencies, lands, and waters. Shep suggested trying to run specific cases through the draft policies at the end of the process to make sure that the NEPs are helpful.
- The group then began a general discussion of federal consistency. Tony asked if a permit is the ultimate test of consistency, or if the CZMA could require more after a permit has been granted.
 - § Kerry explained that being that permitting statutes and the CZMA are independent authorities they could have different requirements.
 - § Tony questioned when federal consistency review should occur during the project approval process.
 - § John Fisher pointed out that a permit may give the feds a way out if it is granted prior to federal consistency review.

- § Kerry explained that federal consistency review is going to involve a much broader group of policies than the permitting process. He also explained that while even though they are technically considered at separate times in the project approval process, in the real world setting they are often considered at the same exact time.
 - § Elizabeth pointed out that if you conduct federal consistency review prior to the permitting process, you may be in effect preempting the permitting requirements.
 - § Elizabeth inquired as to when other states sequence federal consistency review and permit approval. Kerry explained that often times the feds do not need to get a permit, and getting a permit is a ‘check off’ for federal consistency.
 - § Kerry explained that while federal agencies are the ones who start the consistency review process, they can enter into a written agreement with the state to stay the process.
 - The group then discussed the rule regarding national interest objectives of the CZMA.
 - § Kerry explained that NOAA will not approve policies that work in a piecemeal manner to create an absolute prohibition on a project.
 - The group wrapped up the overview of narrative enforceable policies with a discussion of the necessary detail to include in these policies.
 - § Shep suggested including enough detail to cover the cases that are likely to occur in the initial drafts rather than trying to cover all conceivable cases.
 - § Kerry agreed that you do not need to go too far down the road of hypotheticals.
- The group then began a discussion of Tony Watkinson’s draft of NEPs, the policy statements from the 1986 Environmental Impact Statement, Maryland’s NEPs, and the Environmental Law Institute’s analysis of each category.
 - Kerry explained that even though the statutes that were the basis for the 1986 policy statements may no longer be present in the code, something could still be a good narrative enforceable policy so long as there is sufficient authority listed to support it. The NEP language does not need to be pulled from the code verbatim.
 - Elizabeth asked whether or not the policies can incorporate the fishery management plans by reference. Matt expressed concern that the fishery management plans may not be enforceable. Shep suggested pulling a common goal of from the various fishery management plans to create an enforceable policy. Matt said that the common goal of all fishery management plans was likely to prevent overfishing.
 - Tony pointed to Maryland’s NEPs including time of year restrictions. Kerry explained that from an administrative convenience perspective, it might be

convenient to include some time of year restrictions to avoid the need for constant clarification.

- Kelci argued that there is probably no need for TBT to be included in the NEPs because its use is already illegal on the federal and the state level. The federal ban on TBT is set by the EPA, and inclusion of it in our policies would not help to do anything. The group agreed.
- The group agreed to organize a smaller group meeting with VMRC rather than another large advisory meeting. The draft NEPs that the smaller group develops will be sent out to the full group.