



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 May 31, 2017 at William & Mary Law School 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 Elizabeth Andrews (VCPC), Angela King (VCPC), Kevin Rivera (VCPC), Bettina Sullivan (DEQ), Dave Davis (DEQ), John Fisher (DEQ), Shep Moon (DEQ), Matt Hull (VMRC), Chip Neikirk (VMRC), Tony Watkinson (VMRC), Lewis Gillingham (VMRC), Kelci Block (OAG), Steve Begg (VDOT), and Ben McFarlane (HRPDC). Participating via telephone were Sharon Baxter (DEQ), Laura McKay (DEQ), John Kuriawa (NOAA), Kerry Kehoe (NOAA), Greg Fleming (DoD), and Shannon Alexander (ANPDC).

- Elizabeth opened the meeting by confirming the March 3, 2017 minutes. The March minutes were approved subject to John Kuriawa’s edits which were sent via email.
- Elizabeth motioned to edit the February 10, 2017 minutes based on suggestions from John Kuriawa and Kerry Kehoe. The group agreed.
- The Committee then discussed a NOAA FAQ sheet regarding NEPs. Two questions have been included so far, and more will be added to the FAQ sheet as they arise.
- The group then discussed changing the document from marine life and marine organisms to more fully encompassing terms.
- Elizabeth discussed the issue of incorporation by reference as a recurring problem and inquired as to whether VMRC and NOAA would find particular examples within the document to be acceptable.
 - o Kerry said the potential incorporation by reference in policy A(4)(e) regarding records was not an issue.
 - o Lewis explained there would be differences in opinion regarding how much detail should be included in policies based on each person’s propensities of either lumping or splitting terms.
 - o Shep said that looking at the statutes through a federal lens would help to narrow down the number of policies to be included in NEPs.
 - o Elizabeth explained that a discussion of each individual exception or detail would make the NEP voluminous. NOAA staff agreed saying discussing every single exception would defeat the purpose of developing NEPs.
 - o Shep explained that if possible, the clearest and most succinct version of NEPs would be best.

- Tony highlighted the need for an overarching statement regarding the purpose of these NEPs to prevent confusion: since they exclude statutes and regulations that do not pertain to federal activities, non-federal agencies might be misled by the policies without such a statement.
- The group discussed what activities may or may not arise in the federal context, especially the ones from Chapters 4-7, and how to succinctly incorporate them into NEPs.
 - o “Sustainable harvesting” was offered as a potential substitute of a more detailed list in the fisheries section. Tony suggested “sustainably managed” may be a more appropriate substitute.
 - o Kerry explained the effectiveness of articulating and using the objective purpose of the statute in the NEPs which would more succinctly encompass all of the statutes while incorporating the essential discretionary standards used in the permitting process.
 - o Elizabeth offered to have the VCPC work directly with MRC staff to further develop the first section regarding fisheries in a way that accurately reflected these underlying purposes.
- The Committee began a discussion involving the general use of these NEPs. Kerry, Kelci, Shep, and Elizabeth stressed that these policies must be tied to statutory authority. While they will be used to guide project analysis, all of these policies will need to be derived from statutory authority.
- There was further discussion on what federal activities may fall within the statutes of Title 28.2.
 - o John Fisher pointed to seismic testing projects which may be more common under the new administration as a potential way a federal project may fall within these statutes.
 - o Bettina mentioned a horseshoe crab project that was a federal activity.
 - o Ben pointed to Navy and Coast Guard activities involving fireworks.
 - o Matt Hull indicated § 28.2-618 would also involve federal activities.
- The Committee began a discussion regarding the federal government’s responsibility to acquire permits.
 - o Bettina mentioned that the federal government does acquire permits.
 - o Kerry said that it might be as a matter of comity that they do, even though they aren’t required to.
 - o The Committee discussed the possibility of changing the language in the NEPs indicating illegality to language indicating authorization.
 - o Matt inquired into the standards underlying the permitting process.
 - o Kerry stressed that permits are discretionary but there are standards that are required. He stressed again that in statutes requiring permits, it may be best to articulate the underlying purpose for requiring the permits. Licenses however may be trickier to incorporate into NEPs because they might not hinge on some substantive standard. Other members of The Committee agreed.
 - o Chip suggested the language, “No fish, shellfish, or marine organism shall be taken unless VMRC issues a permit when required, or when a permit is not required the taking is in a sustainable manner.” He indicated that it would be necessary to check the statutory authority for that statement though.

- The Committee then began a discussion regarding the level of detail within draft enforceable policy A(3). Kerry said he did not see a problem with including that level of detail within the section.
- During a discussion of draft enforceable policy A(4), the Committee questioned the applicability to federal activities.
 - o Bettina did not think any federal activities would apply.
 - o Elizabeth stated that § 28.2-804 does not contain an enforceable policy being that the statute just lists the responsibilities of the state health commissioner. She also agreed to discuss policy A(4) further with VMRC.
- As the Committee moved on to policy A(5) regarding tributyltin, Chip said he believed the Navy was exempt from this requirement. Tony inquired as to whether the CZMA might have subjected certain federal dredging projects to review. Ben questioned further whether all federal vessels were exempt, even outside of the Navy. John Kuriawa suggested that this policy may not be necessary as a NEP. Shep suggested a further analysis before excluding these statutes from NEPs. Kelci agreed to look at the exemption to determine relevance and forward it to the group.
- The Committee then began a discussion of policy A(6). Elizabeth explained that the situation prompting this statute may have passed, but asked if it might still involve federal activity.
 - o Chip suggested retaining this section in NEPs.
 - o Ben suggested a rewording of section 6 that would not include reference to the International Council for the Exploration of the Sea because it is implied.
 - o Bettina explained that much of this section doesn't involve the permit itself, but rather the process and requirements of the permit.
 - o Chip concluded that this section should be limited to the first sentence
- The group began a discussion of section policy B(1) and highlighted the recurring permitting issue.
 - o Chip pointed to § 28.2-1205 and advocated for inclusions of its factors into the NEPs. Ben refocused the primary issue to the statute's purpose and suggested further rewording of the exceptions.
 - o Group agreed that the VCPC will work on rewording.
- In a discussion of policy B(2), Ben suggested a potential rewording such as "The sand resources of the Chesapeake Bay should be sustainably managed."
 - o Ben further inquired into whether there are any dredging projects that require a permit. If there are not, he suggested an omission of the reference to the permit requirement completely.
 - o Bettina argued this was not an enforceable policy, and that it's not requiring a person to do something, just requiring a person to report it.
 - o Tony pointed out that this was just about expediting a process. Kelci agreed, saying that this section is just discussing how long you have to review, not the criteria for review.
 - o Group agreed that policy B(2) should be excluded.
- Ben claimed that the second sentence of policy B(3) might not apply to federal consistency, and the NEP should be cut off after the first sentence. The group agreed.
- NOAA said that they had no preference as to whether the NEPs contained the phrase "it is illegal" or "No one shall".

- The Committee recapped what should be done for the first section. MRC will work with VCPC to develop a shortened version of the NEPs. There was potential for consolidation of policies, especially policies 1 and 2, but Ben suggested even further consolidation. Policy (4) can likely be removed. Policy (5) can stay, but its application needs to be checked. Policy (6) needs to be reworded to encompass the purpose of the policy.
- Elizabeth suggested giving VMRC and VCPC time to go through changes that were discussed before the next meeting. The Committee could then move on to sand dunes and wetlands sections following that. Bettina asked to include streams in the discussion of wetlands. A Doodle poll will be sent out for the week of July 17th to assess everybody's availability.
- Finally, Shep suggested additional homework for the group including a review of the CZMA federal consistency overview about narrative policies and MD's finalized narrative policies to use as a comparison. VCPC will send these documents out with the doodle poll.