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**LAW SCHOOL**  
**VIRGINIA COASTAL**  
**POLICY CENTER**

Coastal Zone Management Narrative “Enforceable Policies” Advisory Committee

**Jan. 24, 2018 Meeting Minutes**

The Coastal Zone Management Advisory Committee met at 11:30 am on January 24, 2018 at the Department of Environmental Quality (DEQ) Headquarters in Richmond to continue discussion of a narrative rewrite of Virginia’s enforceable policies, specifically the statutes and regulations under the authority of DEQ. Present at the meeting were Dave Davis (DEQ), John Fisher (DEQ), Shep Moon (VCZM/DEQ), Amber Foster (DEQ), Larry Gavin (DEQ), Joan Salvati (DEQ), Bettina Rayfield (DEQ), Deborah DeBiasi (DEQ), Drew Hammond (DEQ), Renee Hooper (DEQ), Kelly Meadows (DEQ), Janine Howard (DEQ), Sharon Baxter (DEQ), Arlene Warren (VDH), Mary Mahony (VDH), Keith Skiles (VDH), William Lassetter (DMME), Kerry Kehoe (NOAA), Andrew Larkin (NOAA), Ben McFarlane (HRPDC), Josh Thomas (VCPC), Connor Ciepluch (VCPC), Chris Antione (VCPC), Angela King (VCPC), and Elizabeth Andrews (VCPC). Participating via telephone were Commander Joan Malik (US Navy), Lieutenant Commander Johnathan Blazek (US Navy), Justine Woodward (US Navy), Greg Fleming (Ft. Belvoir), and Julie Wellman (DEQ). The meeting was facilitated by Elizabeth Andrews.

Elizabeth opened the meeting by welcoming everyone and asking the group to approve the September 19, 2017 minutes. They were approved. Shep Moon then explained the purpose of the Advisory Committee.

**INTRODUCTION OF NOAA TRAINING MODULE**

Kerry Kehoe led the committee in a brief assessment of the NOAA training module. The exercise familiarized committee participants with terms of art, such as “enforceable policies.” There was a question put to Kerry about “beneficial” uses perhaps not being a clear standard; Kerry responded that “beneficial” is going toward a recognizable goal, so the word counts as providing a standard. Kerry advised that keeping narrative statements generic would greatly ease this process.

Laura asked a question drawing on California oil and natural gas law as an example. The California localities enacted laws after oil spills prohibiting pipelines on the land. Would such a law be preempted by federal law? Kerry responded that if the policies are not brought to NOAA for approval as enforceable policies, then that remains just a state policy. NOAA is only here to say what laws are able to be included in the CZMA process. NOAA is not second-guessing state

laws as long as they remain at the state level. The CZMA requires NOAA to consider national interests in approving policies. National interests mostly come into play when states make absolute prohibitions because they can conflict with federal law.

Kerry then addressed preemption problems—subject areas where the federal government has domain. State policies may be preempted by federal law either expressly or in their application to certain activities. Preempted policies cannot be used for CZMA review purposes. Since preemption is a constitutional doctrine, it applies regardless of whether NOAA has approved those policies as enforceable policies for CZMA review purposes. However, even if certain policies are preempted, other policies may still be applicable to an activity for CZMA review purposes.

Kerry then addressed the history of the CZMA and the dual incentives to state participation: 1) federal money and 2) state participation to steer the policy process.

Andrew asked whether all DoD actions are assumed to be of national interest. Kerry replied that they are not. DoD actions do not automatically supersede state laws, this process merely means that all parties much strive to achieve a balance between their interests.

Shep asked Kerry to address the definition of “coastal effects.” Kerry explained that coastal effects are the triggers for CZMA review. “Reasonably foreseeable” effects is the standard that NOAA applies. The uses and resources do not have to be in the coastal zone, but impact the coastal zone. For example, activity in federal waters could impact the coastal zone, so it would come under CZMA review.

## **NON-POINT SOURCE WATER POLLUTION**

The committee then moved on to discussion of the draft DEQ Non-Point Source Water Pollution Policies. Joan Salvati led the discussion, which began with septic pump out requirements. The committee debated whether to include certain language from legislation being considered by the Virginia legislature. After discussion, the committee decided to keep the language as a placeholder and made a note to review it at a later date.

Next, Joan addressed the silviculture exemption in the CBPA regulations. Kerry noted that the exemption, here, could be included and NOAA would not kick it out but it may pose an incorporation by reference problem. Commander Malik telephonically inquired if this provision would even affect DoD interests on the bay. A debate occurred between members of the committee over the extent of state influence over federal DoD activities concerning silviculture. Ben recommended deleting the silviculture exemption language and that Joan readdress the remaining narrative language, and the committee agreed.

Joan recommended certain provisions for deletion on pages 3 and 4 of the draft document. The committee agreed with her deletion.

Regarding local administration and buffer zones, Joan recommended deletion of processes language. Shep countered that while the process language should be removed, a portion of the

narrative should remain for clarity's sake. The committee agreed that Joan would review this section and generate the language.

Joan further recommended that a subparagraph under Water Quality Impact Assessments be deleted. Ben raised the issue of state law delegating authority to localities and that the language should note local power's efficacy against the federal government, namely, DoD. Commander Malik replied that she just needs a clear standard to meet and that this would form a viable solution. The committee agreed that Joan would add new language to reflect the assessment standards and make the process easier for end-users like Commander Malik.

For Resource Protection Areas, Joan recommended deleting the three types of RPA explanation and form a briefer, generic narrative. The committee agreed with Joan's assessment.

Toward the end of the document, the committee addressed federal preemption for narrative policies that possibly encroach on railroads and natural resources. Kerry noted that requiring activities to comply with "applicable state permits" is an incorporation by reference and would have to be amended. After Joan consulted with Larry, the committee agreed to the deletion because the document achieves the same result through the storm water continuity checks.

## **CONCLUSION**

The committee approved the draft policies with the changes discussed during the meeting, and asked Joan to provide follow-on language for the final draft. Elizabeth said VCPC would send out the final version to the committee members and asked them to let VCPC know by email that the draft was acceptable, after which VCPC would submit the final draft to DEQ. Elizabeth said VCPC would send out a new doodle poll for the next meeting. The next agency's policies to be addressed is VDH. Since there were no more comments, Elizabeth ended the meeting at 3:30 pm.