



U.S. DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Office for Coastal Management
Silver Spring Metro Center, Building 4
1305 East-West Highway
Silver Spring, Maryland 20910

Ms. Bettina Rayfield, Manager
Environmental Impact Review
and Long Range Priorities Program
Virginia Dept. of Environmental Quality
1111 E. Main Street
Richmond, VA 23219

Dear Ms. Rayfield,

Thank you for the June 5, 2020, request for approval of changes incorporating narrative enforceable policies into the Virginia Coastal Management Program pursuant to the National Oceanic and Atmospheric Administration (NOAA) Coastal Zone Management Act (CZMA) regulations at 15 CFR part 923, subpart H.¹

NOAA's Office for Coastal Management approves the request subject to the qualifications below.

NOAA's regulations require that the state post this decision by the Office for Coastal Management for public notice.² The public notice should state that as of the date of this decision letter the enforceable policies identified in the attached Table of Approved Changes shall be applicable in reviewing federal actions pursuant to the federal consistency requirements of the CZMA and its implementing regulations found at 15 CFR part 930.³ Please send a copy of the public notice to the Office for Coastal Management for our records to close out this file.

PUBLIC AND FEDERAL AGENCY COMMENTS

The Office for Coastal Management received comments on the submission. A response to comments is attached to this letter.

CHANGES APPROVED

See the attached Table of Approved Changes to the Virginia Coastal Management Program.

¹ This program change request was submitted under NOAA's revised CZMA program change regulations at 15 CFR part 923, subpart H (84 Federal Register (FR) 38118 (Aug. 6, 2019)). The Office for Coastal Management's 30-day decision due date of July 6, 2020, was extended to October 5, 2020.

² 15 CFR § 923.81(e)(5), as described at 84 FR 38133 (Aug. 6, 2019).

³ 15 CFR § 923.81(f), as described at 84 FR 38133 (Aug. 6, 2019).

CLARIFICATIONS, QUALIFICATION AND EXCEPTION

As noted by commenters and the response of the Commonwealth to those comments, the drafting of the narrative enforceable policies was completed prior to legislative enactments by the 2020 Virginia General Assembly. As stated by the Commonwealth in its response, those changes to the statutory authorities underlying the narrative enforceable policies were not intended to be included in the submission of the program change approval request, and cannot be applied for CZMA review purposes. NOAA reviewed the 2020 legislative changes and finds that they would not require modification of the text of the narrative enforceable policies as the standards within the narrative policies are still found in the underlying statutory authorities. NOAA approves the narrative enforceable policies with the following clarifications, qualification and exceptions.

1. Subsequent to the submission of this program change approval request, the state submitted technical corrections to the citations in the submission, and a minor wording change to the proposed invasive species policy with the striking of the word “take” from the proposed policy after it was found that the word does not appear in the underlying statute. The Office for Coastal Management finds that these changes are insubstantial and do not affect how the state would apply these standards. The Table of Approved Changes incorporates these technical corrections.
2. In the 2020 legislative changes, there is a budget initiative related to compensatory mitigation. This change could not be an enforceable policy if it had been submitted as a program change and does not affect the Office for Coastal Management’s denial of the compensation provisions in the program change submission. Under the CZMA federal consistency authority, a state cannot require a federal agency or an applicant for a federal authorization to pay compensation to mitigate adverse impacts to determine consistency or on which to base an objection. A state and applicant might mutually agree to use compensation to mitigate coastal effects, but the compensation cannot be used as part of an enforceable policy. Therefore, the compensation requirements in narrative policy I. Tidal and Non-Tidal Wetlands, Tidal Wetlands, and Non-Tidal Surface Waters, Including Wetlands, are not approved as enforceable policies for CZMA purposes.
3. In the 2020 legislative changes, there is prohibition on offshore oil and gas activities. This change could not be an enforceable policy if it had been submitted as a program change and does not affect the Office for Coastal Management’s decision for this program change. It is a long-standing NOAA position that this could not be approved as an enforceable policy as it discriminates against one industry and is not consistent with national interest objectives in the CZMA.
4. In the 2020 legislative changes, there is a change to the Living Shorelines provision where applicants shall consider Living Shorelines where practicable. The Commonwealth has noted that the Living Shorelines policy included in the program change submission is not an enforceable policy and has removed it from the list of narrative enforceable policies. The Commonwealth could consider adding the 2020 legislative Living Shoreline change as an enforceable policy at a later time.

5. The state had also designated the General Policy regarding environmental protection, and the policy pertaining the protection of state park as non-enforceable in the Table of Proposed Changes. These also have been removed from the revised Narrative Enforceable Policy document. The state may resubmit the state parks protection policy as it appears that it would likely be approvable as an enforceable policy.

As a standard qualification applying to all program changes, states may not incorporate enforceable policies by reference. If an approved enforceable policy refers to another statute, regulation, policy, standard, guidance, or other such requirement or document, the referenced policy must be submitted to and approved by the Office for Coastal Management as an enforceable policy in order to be applied under the federal consistency review provisions of the CZMA. No referenced policy may be applied for CZMA federal consistency review purposes unless the Office for Coastal Management has separately reviewed and approved it as an enforceable policy.

Thank you for your cooperation in this review. Please contact John Kuriawa at 410-267-5668, if you have any questions. For future correspondence regarding these program changes, please refer to the assigned file number, VA-2020-1.

Sincerely,

Adam Stein
Chief, Stewardship Division (Acting)

Attachments:
Table of Approved Changes VA-2020-1
Response to Comments