

**Routine Program Changes  
To  
Commonwealth of Virginia Coastal Management Program**

**Request for Concurrence  
January 2010**

Fisheries and Habitat of the Tidal Waters  
Code of Virginia Title 28.2, Chapter 2 - General Provisions

Submitted by: The Commonwealth of Virginia  
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## **INTRODUCTION**

The following constitutes a request by the Commonwealth of Virginia for the National Oceanic and Atmospheric Administration (NOAA) Office of Ocean and Coastal Resource Management (OCRM) to concur in a Routine Program Change to the Commonwealth of Virginia's Coastal Management Program (CMP).

The Commonwealth of Virginia has revised the Commonwealth's enforceable policies in Code of Virginia Title 28.2, Chapter 2. The enforceable policies contained in Title 28.2, Chapter 2 authorize the Marine Resources Commission (Commission) to promulgate rules and regulations; manage the state's marine, shell and finfish resources; and require and issue licenses for the taking of saltwater fishery resources.

In accordance with requirements for Routine Program changes as set forth in Coastal Zone Management Act (CZMA) 306(e), 15 C.F.R. §923.84, and the guidelines for Routine Program Changes contained in OCRM's Program Change Guidance from July 1996, the Commonwealth of Virginia has prepared the following analysis of the changes. The analysis: (A) explains why the proffered changes to the State CMP are Routine Program Changes and not Amendments as described in 15 C.F.R. §923.80(d); and (B) identifies the enforceable policies affected, describes the nature of each program change, and examines the impact the change has on the existing management program.

## **ANALYSIS**

The Commonwealth submits amendments to Title 28.2, Chapter 2 as a Routine Program Change. The statutory sections governing the Commission's authority to promulgate and enforce rules and regulations and establish licenses were approved as part of the CMP in 1986. This submission updates each of these provisions to reflect minor statutory changes to the program since that time.

### ***(A) Routine Program Change***

Pursuant to CZMA §306(e) and 15 C.F.R. §923.84, this analysis of the submitted change notifies OCRM of the Routine Program Change and explains why the program change will not result in an Amendment. Under 15 C.F.R. §923.80(d), amendments are defined as substantial changes in one or more of the five listed coastal management program areas:

- (1) uses subject to management;
- (2) special management areas;
- (3) boundaries;
- (4) authorities and organization; and
- (5) coordination, public involvement, and the national interest.

OCRM's Program Change guidance states that a substantial change is a high threshold based on a case-by-case determination. Such determination is made by reviewing

indicators of substantial change, such as whether new or revised enforceable policies address coastal uses or resources not previously managed, or make major changes in the way a state CMP manages coastal uses or resources. OCRM's Program Change guidance also states that an explanation why a proposed change will not result in an Amendment should describe the elements of the State CMP that are affected.

The sections submitted for this Routine Program Change are the provisions that specifically address the Commission's authority to promulgate and enforce regulations to 1) establish and regulate licenses it deems necessary to promote the seafood and marine resources of the state; 2) establish and prescribe penalties; and 3) promote and conserve seafood and marine resources. The statutory provisions being submitted are primarily a recodification giving new section numbers to the statutory provisions already approved by NOAA in the original CMP in 1986. At the time Virginia's CMP was approved, the Fisheries Management Program was located in Va. Code § 28.1-1 *et seq.* In 1992, Title 28.1 was recodified to Va. Code 28.2-100 *et seq.* The 1992 recodification subdivided some of the previous sections into separate subsections and also consolidated multiple sections into new sections.

The changes to these sections do not substantially affect the uses subject to management under the CMP, special management areas, boundaries, authorities and organization of the CMP, or coordination, public involvement, and national interest.

### ***(B) Effect of Changes on Program***

There have been minor changes in the language confirming the Commission's authority to promulgate rules and regulations. Changes to affected sections are identified in the attached table, which identifies the original program sections and changes in language; and the effects are further described here by section number and a brief legislative chronology.

The Commission's general rulemaking power (former § 28.1-9) was recodified to Section 28.2-103, and cross-referenced to Title 28.2, Chapter Two, including Section 28.2-201. Section 28.2-201 (replacing former Section 28.1-23), vests the Commission with authority to adopt regulations it determines to be necessary to promote the general welfare of the seafood industry and to conserve and promote the seafood and marine resources of the Commonwealth. The recodification simply replaces the language "shall have authority to make such regulations" with "may promulgate regulations," maintaining consistency with former § 28.1-23. Additional minor updates to Section 28.2-201 concern the Commission's authority to provide for tidal fisheries license and permit fees, and capping fee increases at three year intervals to \$5 or a graduated percentage rate of the Consumer Price Index. The Commission is required to place license money collected in the Marine Fishing Improvements Fund and Virginia Saltwater Recreational Development Fund. The specification of a Class 1 misdemeanor for violation of Commission regulations was omitted from this recodified section, as penalties are moved elsewhere in Title 28.2, including Section 28.2-225.

Section 28.2-202 (former Sections 28.1-9 and 28.1-16), affirms the Commission's power to investigate all matters affecting the seafood industry and to develop programs that enhance and improve commercial and sport fisheries. In addition, the Commissioner maintains the power to enforce marine fishery laws as provided in former Section 28.1-9. However, in the 1992 recodification, this authority was transferred to Title 28.2, Chapter 1- Section 28.2-104 which states that the "Commissioner shall [e]nforce the marine fishery and habitat laws and regulations." Accordingly, there is no change in the Commissioner's authority to enforce marine fishery laws. Rather, the authority has been transferred to new, separate chapters within Title 28.2.

Section 28.2-203 (former Section 28.1-23.1) vests the Commission with the duty to prepare fishery management plans. Substantively, Section 28.2-203 remains unchanged absent the omission of two explanatory opening paragraphs contained in former Section 28.1-23.1. However, these paragraphs are found under the policy section of the Fisheries Management Program in the CMP. Accordingly, this is considered a minor revision to the statute that does not affect the CMP. In 1995, Section 28.2-203.1 was enacted to establish the blue crab fishery management program. Because this amendment was prescribed in the existing CMP ("fisheries management plans for the oyster and blue crab will be developed in 1984-86)," this is considered a minor addition not exercising new authority or affecting additional areas and therefore not a substantial change.<sup>1</sup> Section 28.2-204 (former Section 28.1-23-2), authorizes the Commission to collect fishery statistics necessary to develop fishery management plans, rewording the authorization from "shall have the authority to collect" to "may collect" and renumbering the prior subsections.

Section 28.2-210 (former Section 28.1-25) states, with minor stylistic changes, the Commission's authority to adopt, in the case of an emergency, regulations for the immediate preservation of the seafood industry and marine life as in the original CMP.

In 1992, former Sections 28.1-47, 28.1-48, 28.1-59, and 28.1-64 were consolidated to form Section 28.2-225, minor updates to the program concerning the Commission's regulatory authority to establish penalties for statutory violations. These former Sections enumerated various types of prohibitions and corresponding penalties for fishing without a license. The newly consolidated Section 28.2-225 provides a single overarching prohibition on fishing without a license for greater ease and simplicity for a reader. Accordingly, this is considered a minor update and maintains consistency with former Title 28.1.

There have been minor updates to the program concerning the Commission's regulatory authority to issue fishing licenses. In 1992, Section 28.2-204.1 was enacted granting the Commission the authority to limit the number of gear licenses and permits based on factors relating to economic and social consequences, food production, dependence on fishery, efficiency of gear, impact on fisheries, and abundance of the resource. This change maintains consistency with former Title 28.1 which from its inception recognized

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<sup>1</sup> See Virginia Coastal Resources Management Program, Final Environmental Impact Statement p. III-3. 1985.

the Commission's authority to establish licenses and limit the number of such licenses and permits. In 1993, Section 28.2-226.1 was enacted requiring any person fishing for recreational purposes using commercial gear to obtain a non-transferable license. All license holders of this type are required to report catch data to the Commission for effective fisheries management. The definition of "recreational purposes" was included in the Section. Also in 1993, Section 28.2-226.2 was enacted. It authorizes the Commission to establish requirements, subject to size and fee limitations, for commercial gear licenses. These amendments maintain consistency with the authority vested in the Commission under the CMP to establish and enforce licenses relating to commercial and recreational fishing and thus amount to minor changes in the existing CMP.

Section 28.2-227 (former Section 28.1-47.1) was amended in 1993 to include a graduated fee scale for nonresident harvester's fishing licenses: the \$350 fee was replaced with the following graduated fee scale: "no less than \$350 and no more than \$1,150." The revised section omitted the fee restriction requiring nonresidents to pay no less than a Virginia resident, and designated fees collected to the Virginia Marine Products Fund. These changes maintain consistency with the Commission's authority under the existing CMP. The Fisheries Management Program under the CMP (as provided in former Section 28.1-47.1) previously established the Commission's authority to regulate nonresident harvester's fees.

Section 28.2-228 (former Section 28.1-119.1) covers licenses for direct purchases from catchers. It was modified in 1992 to add subsection numbers and eliminate an unnecessary cross-reference. In 1996, Section 28.2-228.1 was enacted to supplement this, giving the Commission the authority, by regulation, to establish licenses for the landing of seafood in Virginia. The regulations may limit the number of licenses that may be issued and may grant exceptions to registered commercial fishermen. These changes maintain consistency with the CMP which from its inception vested the Commission with the power to "make such regulations... it deems necessary to promote the seafood and marine resources of the state, including regulations as to the taking of seafood,"<sup>2</sup> and are therefore not a substantial change to the CMP.

Sections 28.1-21 and 28.1-70 were consolidated in 1992 to form Section 28.2-229, which consolidates the Commission's authority to issue fishing licenses. License validation dates were included to clarify the start and finish dates of annual licenses. Also, license holders were prohibited from receiving a refund on already purchased licenses when the season is closed for conservation purposes or due to natural conditions, or when a license has been suspended or revoked. These amendments maintain consistency with the existing CMP and clarify prior language pertaining to refunds and license validation dates.

In 1992, the Commission's authority to establish and enforce penalties for statutory violations was divided among several sections, but remains consistent with the original CMP. Section 28.2-230 addresses penalties for violating Commission regulations relating

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<sup>2</sup> See Virginia Coastal Resources Management Program, Final Environmental Impact Statement p. III-2. 1985.

to fishing licenses. In 1992, Section 28.2-230 replaced language of former Section 28.1-64 and used the term Class 1 misdemeanor, rather than “misdemeanor” as the penalty for making a materially false statement when applying for a license or altering or changing such license, in order to reflect Virginia’s penalty classification scheme.

Section 28.2-232 (former Section 28.1-36) was amended in 1989 to clarify the timing of a license revocation hearing. While former Section 28.1-36 previously required a hearing, the amendments in Section 28.2-232 clarify that such hearing must be held *before* the Commission decides to prevent the issuance, reissuance or renewal or any license. Therefore, the amendments elucidate the terms and duration of revocation and do not amount to a substantial change.

Section 28.2-241 was enacted in 1992 to ensure that commercial fishermen registered with the Commission. The General Assembly included a definition of “commercial fisherman,” a penalty for provision violators, registration fees, expiration dates, and exemptions within the Section. In 1992, Section 28.2-243 was enacted requiring the Commission to promulgate regulations governing the registration of commercial fishermen. Because the Commission possesses regulatory authority under the approved CMP to promulgate regulations concerning commercial fishing (under former Sections 28.1-23 and 28.1-23.1), this amendment maintains consistency with the uses subject to management and authority vested in the Commission under the CMP and is not a substantial change.

### ***Chronology of Changes***

1989 Changes: The legislature clarified the duration and terms of license revocations and the timing of licensing hearings.

1991 Changes: The legislature earmarked a portion of all license fees for the Virginia Marine Products Fund and Marine Fishing Improvement Fund.

1992 Changes: Title 28.1 was recodified to Va. Code 28.2-100 *et seq.* The 1992 recodification reorganized the previous sections and consolidated others. At the same time, the legislature enacted Sections 28.2-203.1, 28.2-204.1, 28.2-241, and 28.2-243. Legislation clarified fishing prohibitions, licenses, and expiration dates. The legislature reorganized the penalty provisions and changed the penalty for making false statements or altering a license from a simple misdemeanor to a Class 1 misdemeanor.

1993: The legislature modified the license fee scheme from a fixed fee to a graduated fee scheme. The legislature enacted Sections 28.2-226.1 and 28.2-226.2 to require recreational fishermen to obtain a commercial gear license in specific instances and report catch data to the Commission.

1994: The legislature omitted a fee provision that nonresidents pay no less than residents of Virginia.

1995 Changes: The legislature enacted Section 28.2-203.1 to establish the blue crab fishery management program and to submit annual progress reports to the Governor. The legislature also enacted Section 28.2-204 granting authority to the Commission to issue gear licenses and promulgate regulations pursuant to the provisions of the section. The legislature moved penalties to elsewhere in Title 28.2, including 28.2-225.

1996 Changes: The legislature enacted Section 28.2-228.1 confirming the Commission's authority to promulgate regulations to establish licenses for the landing of seafood.

1998 Changes: The legislature authorized the Commission to issue gear licenses or permits to any person residing on an island at least three miles from the mainland for at least five years.

2004 Changes: The legislature made a number of changes relating to fishing license fees. The legislature added a cap for permit fee increases at three year intervals. All money collected from the fee increase will be distributed to the Marine Fishing Improvement Fund and the Virginia Saltwater Recreational Fishing Development Fund.

2006 Changes: The legislature assented to the Federal Aid in Sport Fish Restoration Act and provided the Commission the authority to establish fish restoration and management projects under the Act.

## **Conclusion**

The proposed changes do not substantially affect the uses subject to management under the CMP, special management areas, boundaries, authorities and organization, or coordination, public involvement and national interest. Virginia requests concurrence in this Routine Program Change.