

VIRGINIA THREATENED AND ENDANGERED SPECIES POLICY RECOMMENDATIONS IN FEDERAL CONSISTENCY REVIEW

**Prepared by
Environmental Law Institute
for the**

**Virginia Coastal Zone Management Program
#NA10NOS419
Grant Year 2010/Task 91**



Virginia Coastal Zone
MANAGEMENT PROGRAM



March 31, 2013

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This project was funded by the Virginia Coastal Zone Management Program at the Department of Environmental Quality through Grant #NA10NOS419, Grant Year 2010/Task 91, of the Department of Commerce, National Oceanic and Atmospheric Administration under the Coastal Zone Management Act of 1972, as amended. The views expressed herein are those of the authors and do not necessarily reflect the views of the U.S. Department of Commerce, NOAA, or any of its sub-agencies, nor of the Commonwealth of Virginia.

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ELI Project No. 1104-01. Senior Attorney James McElfish led this project.

Introduction

Virginia's Coastal Zone Management Program was approved by the National Oceanic and Atmospheric Administration (NOAA) in 1986. It included a number of enforceable policies to be used by Virginia in determining whether various federal actions are "consistent" with the Commonwealth's approved management plan. Virginia's 1986-approved CZM Program identified eight "core regulatory programs" used to organize the Commonwealth's enforceable policies. These eight were fisheries management, subaqueous lands management, wetlands management, dunes management, nonpoint source pollution control, point source pollution control, shoreline sanitation, and air pollution control. In 2000, Virginia added coastal lands management as a ninth core area of the approved program. The enforceable policies submitted by Virginia and approved by NOAA within these nine core areas do not expressly include Virginia's laws protecting state-listed threatened and endangered species of fish and wildlife, plants and insects (ELI, *Analysis of Virginia Threatened and Endangered Species Policy Incorporation into CZM Enforceable Policies* (2011)).

One of the core policies approved in 1986 was "to conserve and enhance finfish and shellfish resources, and to preserve and promote both commercial and recreational fisheries..." In this context, the 1986 final approved program submission relied on the then-Commission of Game and Inland Fisheries regulatory and management authority over "fish located within tidal brackish and freshwater creeks." In order to demonstrate enforceability of the policy, Virginia submitted provisions establishing the authority of the Commission (subsequently the Board, and Department of Game and Inland Fisheries) to regulate native fish and wildlife. These provisions were approved by NOAA as part of the Coastal Zone Management Program.

The statutory provisions included former Va. Code §29-125, in which the Commission was given broad powers:

Having a due regard for the distribution, abundance, economic value and breeding habits of wild birds, wild animals, and fish in inland waters, the Commission is hereby vested with the necessary power to determine when, to what extent, if at all, and by what means it is desirable to restrict, extend or prohibit in any degree the provisions of law obtaining in the State or any part thereof for the hunting, taking, capture, killing, possession, sale, purchase, shipment, transportation, carriage or export of *any wild bird, wild animal, or fish from inland waters* and may...propose regulations for such purpose.

Former section 29-11, also submitted in 1986, granted the Commission the

power and authority...to exercise such other powers and to do such other things as it may deem advisable for the *conservation, protection, replenishment, propagation of and increasing the supply* of game birds, game animals and *fish and other wildlife* of the State.

These broad provisions, adopted among Virginia's enforceable policies, were nonetheless marshaled in support of the "fisheries" enforceable policies goal.

The NOAA-approved Virginia CZM Program enforceable policies do not expressly address Virginia-listed threatened and endangered species. Thus, Virginia has not been able to disapprove or condition federal actions under the authority of federal consistency review of proposed federal actions that may affect the coastal zone. (See Virginia DEQ, *Federal Consistency Information Package*).

The original 1986 Executive Order approved as creating the Commonwealth's networked coastal resources program provided:

State agencies having responsibility for the Commonwealth's coastal resources shall promote the Program consistently with the following objectives...To maintain areas of wildlife habitat and to preserve endangered species of fish and wildlife. (Executive Order 13(86), *Establishment of Virginia Coastal Resources Management Program*.)

Subsequent iterations of this order continue to call for protection and restoration of threatened and endangered species. The current Executive Order provides:

State agencies having responsibility for the Commonwealth's coastal resources shall promote the Coastal Zone Management Program consistent with the following goals:
Goal 1: To protect and restore coastal resources, habitats, and species of the Commonwealth. These include, but are not limited to, wetlands, subaqueous lands and vegetation, beaches, sand dune systems, barrier islands, underwater or maritime cultural resources, riparian forested buffers, and *endangered or threatened species*.(Executive Order No. 18 (2010) *Continuation of the Virginia Coastal Zone Management Program*.)

In 2010, the Virginia CZM Program proposed that NOAA approve a Routine Program Change including its current state threatened and endangered species law for fish and wildlife among its enforceable policies. After objection from the Virginia Department of Transportation, the CZM Program withdrew this request.

This current review seeks to determine whether and to what extent state-listed threatened and endangered species are taken into account in federal consistency review by Virginia DEQ's Office of Environmental Impact Review, under the current system (where the state laws are not "enforceable policies"). It looks at some recent representative federal consistency reviews involving state-listed species. It also examines, in part, what effect the current review practices have on federal actions and applications for federal licenses or permits with respect to potentially affected state-listed species. It examines practice in other states. This review concludes with four recommendations.

Virginia's Threatened and Endangered Species Laws

Protection of endangered fish and wildlife, and of endangered plants and insects, are governed by two different Virginia laws, administered by separate departments of state government.

Fish & Wildlife Laws

Virginia's law protecting state-listed species of threatened and endangered fish and wildlife (found at former Va. Code §§ 29-233, 29-234 in 1986) is found at Va. Code §§ 29.1-563 to -570 (recodified in 1987 and subsequently amended). It is administered by Virginia's Department of Game and Inland Fisheries (DGIF). The state-listed threatened and endangered wildlife and fish species are identified at 4 VAC15-20-130.

Virginia law defines "endangered species" as "any species which is in danger of extinction throughout all or a significant portion of its range," and "threatened species" as "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." Va. Code § 29.1-563. The law provides that the Board of Game and Inland Fisheries is authorized to adopt the federal endangered species list, as well as "modifications and amendments thereto by regulations; to declare by regulation, after consideration of recommendations from the Director of the Department of Conservation and Recreation and from other reliable data sources, that species not appearing on the federal lists are endangered or threatened species in Virginia; and to prohibit by regulation the taking, transportation, processing, sale, or offer for sale within the Commonwealth of any threatened or endangered species of fish or wildlife." Va. Code § 29.1-566. The "taking, transportation, possession, sale, or offer for sale within the Commonwealth of any fish or wildlife appearing on" the list, is prohibited. Va. Code § 29.1-564. Violations of the law, regulations, or a permit are punishable as a Class 1 misdemeanor; however, sale, purchase, or offer for sale or purchase of listed species within the Commonwealth, if the aggregate transactions total \$200 or more during any 90-day period, is a Class 6 felony. Va. Code §§ 29.1-567, 29.1-553

In 2011, the law was amended to authorize the Board to adopt regulations for taking, export, transportation or possession of listed species for "zoological, educational, or scientific purposes" and for propagation "in captivity for preservation purposes." It also allows the Board to adopt regulations that allow taking, possession, export, transportation, or release within or among "designated experimental populations" in the context of "an approved conservation plan for the species." The General Assembly also authorized the Board to adopt regulations that "allow incidental take [of a state-listed species] provided such regulations shall (i) describe the allowable circumstances; (ii) include provisions that ensure offsets through the implementation of conservation actions specified by the Department to enhance the long-term survival of the species or population; and (iii) require any actual taking to be at a minimum." Va. Code § 29.1-568. These provisions give DGIF more flexibility in addressing activities that may affect listed species, but that will be allowed in Virginia.

DGIF participates in review of actions and proposals that may affect resources within its jurisdiction. This includes submittals of information to DEQ for use in federal consistency determinations under the Coastal Zone Management Act.

Plants and Insects Laws

The Department of Agriculture and Consumer Services (DACS) and the Board of Agriculture and Consumer Services administer Virginia's Endangered Plant and Insect Species Act, first enacted in 1979 and amended in 2008. The Act is found at Va. Code § 3.2-1000 to -1011. DACS-listed threatened and endangered plant and insect species are identified at 2 VAC 5-320-10.

Virginia law authorizes the DACS to “establish programs as are deemed necessary for the management of threatened or endangered species.” It also authorizes the Commissioner to “issue a permit authorizing the removal, taking, or destruction of threatened or endangered species on the state list upon good cause shown and where necessary to alleviate damage to property, the impact on progressive development, or protect human health, provided that such action does not violate federal laws or regulations.” Enforcement provisions in this section include authorizing the Commissioner to “stop sale, seize, or return to point of origin at the owner's expense, any threatened or endangered species or part thereof if the Commissioner determines the owner has violated any of the provisions of this chapter or the regulations adopted hereunder. Any threatened or endangered species or part thereof seized may be disposed of at the discretion of the Commissioner.” Va. Code § 3.2-1001.

The Board “may adopt regulations including the listing of threatened or endangered species, their taking, quotas, seasons, buying, selling, possessing, monitoring of movement, investigating, protecting, or any other need in furtherance of the purposes of this chapter.” The Commissioner “may conduct investigations of species of plants and insects to develop information relating to the population, distribution, habitat needs, limiting factors, and other biological and ecological data in order to determine management measures necessary to assure their continued ability to sustain themselves successfully. As a result of this investigation and recommendations received regarding candidate species from the Director of the Department of Conservation and Recreation and from other reliable data, the Board shall approve proposed species to be added to or deleted from the list of threatened species or the list of endangered species, or to be transferred from one list to the other.” Va. Code § 3.2-1002.

Va. Code § 3.2-1003 makes it “unlawful for any person to dig, take, cut, process, or otherwise collect, remove, transport, possess, sell, offer for sale, or give away any species native to or occurring in the wild in the Commonwealth that are listed in this chapter or the regulations adopted hereunder as threatened or endangered, other than from such person's own land, except in accordance with the provisions of this chapter or the regulations adopted hereunder.” Va. Code § 3.2-1000 defines “take” in reference to plants and insects, as meaning “to collect, pick, cut, or dig up for the purpose of resale.” Va. Code §§ 3.2-1004, -1005, and -1006 provide for circumstances when the Commissioner may permit taking or harvest of threatened or endangered species, and for licenses to buy threatened species when authorized. Va. Code §3.2-1011 defines a violation of the law or regulations as a Class 1 misdemeanor.

Although DACS is responsible for threatened and endangered plants and insects, under an agreement the Virginia Department of Conservation and Resources (DCR), Division of Natural

Heritage (DNH), handles and coordinates comment and review of actions and proposals that may affect these resources, including submittals to DEQ for use in federal consistency determinations.

Virginia's Federal Consistency Process

The Office of Environmental Impact Review within Virginia's DEQ is responsible for implementing the CZM requirement for federal consistency. Federal activities which affect Virginia's coastal zone, its uses, or resources are to be consistent with the enforceable policies of the state's federally-approved coastal zone management program. Specifically, direct federal activities must be consistent with the state's enforceable policies "to the maximum extent practicable," and activities authorized by federal license or permit must be fully consistent with the state's enforceable policies.

The Office of Environmental Impact Review makes these decisions with the input and assistance of Virginia agencies with expertise concerning the policies. This office also performs other environmental review functions, related to federal environmental impact statements and state environmental impact statements.

Implementing the federal CZMA regulations, DEQ's review procedures provide that federal agencies engaged in direct activities and development projects must provide a determination (either a negative effects determination or a consistency determination) and any supporting information to the DEQ at least 90 days prior to final approval. The Commonwealth has 60 days (with an additional 15 days if needed) to review the consistency determination or negative determination and concur or object to the determination. If there are effects, the agency must conduct the activity "to the maximum extent practicable" consistent with the Virginia Coastal Management Program. Disputes can be mediated by the Secretary of Commerce, if requested.

Applicants for federal permits, licenses, or approvals must submit a "federal consistency certification" to DEQ, together with supporting data and information to allow the relevant state agencies to assess the project's effects. The DEQ has up to six months to review the submitted certification, but must respond within 90 days either concluding the review or providing an update on its status. It may concur with the certification or object; the federal agency cannot issue the permit, license, or approval if Virginia objects.

Similar review requirements apply for federal financial assistance projects (concurrently with coordinated intergovernmental review) or Outer Continental Shelf plan activities (federal consistency certification).

When the DEQ receives either a federal consistency determination or federal consistency certification for review, it publishes public notice and it requests responses from the responsible state and regional agencies and others to enable it to respond to the proposed action in order to determine consistency with the state's enforceable policies. These agencies always include DGIF, DCR, and usually DACS.

Content of Review by Virginia DEQ and State Agencies

The Office of Environmental Impact Review has published templates for the federal consistency determination and the federal consistency certification, for use by federal agencies and applicants. (Virginia DEQ, *Federal Consistency Information Package*.)

These templates specifically reference the Virginia Coastal Program's approved enforceable policies, require submittal of geographical location information for the activity or project affecting the coastal zone, and require the identification of information to support the consistency determination (in the case of a direct federal activity), and information addressing "aspects of the project that may cause direct or indirect environmental impacts" (in the case of a federal consistency certification for application for federal license or permit).

Because neither the template documents nor the information about federal consistency on the DEQ website makes any reference to Virginia-listed threatened or endangered species, a federal agency or applicant may choose not to submit any information about such species. Such information is not required, and indeed is not relevant to the federal consistency review. However, some agencies and applicants may submit such information because of other requirements for environmental impact assessment under the National Environmental Policy Act or because other requirements related to permits have caused them to collect such information.

When the DEQ receives either a federal consistency determination or federal consistency certification for review, it publishes public notice and it requests responses from the responsible state and regional agencies and others to enable it to respond to the proposed action in order to determine consistency with the state's enforceable policies. The agency responses are used to provide the content of the Virginia findings. (Virginia DEQ, *Federal Consistency Information Package*.)

The final DEQ review document always addresses the following three types of environmental requirements and environmental issues, expressed in separate sections of the document:

Enforceable Policies: The DEQ can apply federal consistency only with respect to Virginia's "enforceable policies" that have been approved as such by NOAA – not every Virginia law or regulation. The approved enforceable policies in Virginia are limited to provisions dealing with fisheries management, subaqueous lands, wetlands, dunes, nonpoint source pollution, point source pollution, shoreline sanitation, air pollution, and coastal lands management. The document must address these.

Advisory Policies: The DEQ also regularly provides federal agencies and applicants with information and recommendations concerning the effect of the Commonwealth's "advisory policies." These are part of the coastal program but are not deemed "enforceable policies" by NOAA. These include Virginia policies addressing coastal natural resource areas, coastal natural hazard areas, waterfront development areas, Virginia public beaches, the Virginia Outdoors Plan, parks, natural areas and wildlife management areas, waterfront recreational land acquisition, waterfront recreational facilities, and waterfront historic properties.

Additional Environmental Considerations: The DEQ provides federal agencies and applicants with other information and recommendations that may be relevant to the proposed action. The DEQ frequently provides information on state-listed species and other environmental considerations in the document transmitting its determination or concurrence with consistency, where state agencies have identified an issue or potential concern.

Thus, state-listed threatened or endangered species issues are addressed, if at all, only in the Advisory Policies or Additional Environmental Considerations sections of the DEQ federal consistency document. Usually state-listed species are addressed in the latter section.

The Advisory Policies include several that can be related, at least in part, to occurrences of state-listed threatened and endangered species of wildlife. In the context of the advisory policy to protect “coastal natural resource areas,” these areas are identified as including “aquatic spawning, nursery, and feeding ground” and “significant wildlife habitat areas.” (Virginia DEQ, *Federal Consistency Information Package*, at 8.) As will be seen below, at least some federal consistency reviews in Virginia have conveyed information and recommendations related to Virginia natural heritage resources, including recommendations related to state-listed species.

The Additional Environmental Considerations are not listed in a worksheet or information package. However, our review of recent DEQ federal consistency review documents shows that the following topics are often addressed:

- Solid and hazardous waste management
- Natural heritage resources (including state-listed species and their habitats)
- Wildlife resources and protected species (including state-listed wildlife species)
- Water supply
- Health impacts
- Transportation impacts
- Historical and archeological resources
- Forest resources

It is the practice of DEQ, relying on information from DGIF and DCR (acting on behalf of DACS), to provide information and recommendations to federal agencies and applicants on actions that should be taken to avoid, minimize, or mitigate harm to Virginia’s listed species in the context of the projects or actions undergoing federal consistency review.

DGIF’s comments are provided to DEQ by its Environmental Services Section. The DCR’s Division of Natural Heritage provides DEQ with comments relating to endangered plants and insects as well as relevant habitat information related to both fish & wildlife, and plants and insects.

Recent Experience with State-Listed Species Review by Virginia's Agencies

DEQ's Office of Environmental Impact Review searched its records for NEPA/CZMA federal consistency actions in calendar year 2012. Of the 155 concluded federal consistency reviews for direct federal actions and applications for federal licenses and permits (but excluding financial assistance reviews), in 103 instances the DEQ document making findings on federal consistency included nonbinding recommendations addressing some aspect of state-listed threatened or endangered species, based on information received from DGIF or DCR/DACS. The Office notes that state-listed species are addressed "in nearly all federal consistency reviews in the 'Additional Environmental Considerations' section of the response when identified." Thus, about 2/3 of the federal actors/applicants were provided with information to enable the federal actor or applicant to address or consider effects on state-listed species. (Communication from Office of Environmental Impact of Review).

The Environmental Law Institute examined summaries of the projects seeking federal consistency review from the first quarter of 2012 to the first quarter of 2013. These included projects such as beach nourishment, wildlife habitat and facilities management, section 404/10 dredge and fill permits, building construction, events, shoreline stabilization, fishery management plans, pipeline and transmission rights of way and construction, railway stream crossings, highway construction, and others. The period included federal consistency review of the U.S. Army Corps of Engineers "nationwide" permits for section 404/10 permits for dredge and fill activities in the waters of the United States, which will cover numerous activities for the next five years. The nonbinding "Additional Environmental Considerations" sections of these consistency review documents contain various recommendations, including recommendation from DCR and DGIF. As noted above, about 2/3 of the DEQ actions contain some information on state-listed species and habitats.

Selected examples are discussed below. These illustrate how the Virginia-listed species information is conveyed by DEQ to federal agencies and applicants in the federal consistency review process. In some cases these examples show whether the recommendations on state-listed species affect or are likely to affect federal or applicant actions.

1) DEQ 12-047F. Federal Consistency Determination for the Reissuance of Nationwide Permits and Virginia Regional Conditions, U.S. Army Corps of Engineers

This federal consistency determination covers numerous activities in Virginia. In many respects it is one of the more significant federal consistency determinations, because it provides the only instance for federal consistency review for thousands of actions that will occur over the 2012-2017 period. While individual permit applications for Corps of Engineers permits affecting the coastal zone must each undergo consistency review, persons eligible for coverage under most Nationwide Permits (NWP) will not undergo such review, because the federal action already occurred (viz. issuance of the NWP) in 2012).

In its review of the submitted federal consistency determination for the Corps of Engineers Nationwide Permits in 2012, DEQ sought the comments of Virginia Departments and agencies. It received comments from DCR, DACS, and DGIF relevant to state-listed threatened and endangered species.

Most noteworthy among these, is that in its concurrence document, the DEQ transmitted DCR's recommendation that the Corps adopt changes to generally applicable Regional Condition 4, "Conditions for Federally-Listed Species and Designated Critical Habitat," and Regional Condition 5, concerning preconstruction notification (PCN) for waters with federally-listed species. DEQ included in the "Additional Environmental Considerations" portion of the document a DCR recommendation that threatened and endangered "species with state-listed status, but no federal-listed status, be included as part of the pre-construction notification for NWP provided 401 Water Quality Certification." This would expand the Corps' regional condition to ensure that Virginia would receive notice and that a project eligible for a NWP could not proceed without advance notice if a state-listed species might be affected. DCR further recommended that if a state-listed species is documented and determined to be adversely affected, the activity should "not be authorized under a NWP and the permittee be required to obtain an individual permit." (DEQ, Federal Consistency Determination for the Reissuance of Nationwide Permits and Federal Regional Conditions, U.S. Army Corps of Engineers, DEQ 12-047F, April 19, 2012, at 14-15.)

However, despite these recommendations (which are advisory only, because not implementing an approved enforceable policy), the Corps did not revise these conditions, which continue to provide only for federally-listed species. For example, general Regional Condition 4 continues to apply only to federally-listed species and to federal agency interaction:

4. Conditions for Federally Listed Species and Designated Critical Habitat. Notification for ALL NWPs will be required for any project that may affect a federally listed threatened or endangered species or designated critical habitat. The U.S. Fish and Wildlife Service (Service) has developed an online system that allows users to find information about sensitive resources that may occur within the vicinity of a proposed project. This system is named "Information, Planning and Conservation System," (IPaC), and is located at: <http://ecos.fws.gov/ipac/>. This system provides information regarding federally listed and proposed candidate, threatened, and endangered species, designated critical habitats, and Service refuges that may occur in the identified areas, or may be affected by the proposed activities. The applicant may use this system to determine if any federally listed species or designated critical habitat may be affected by their proposed project, ensuring compliance with the Endangered Species Act.

http://www.nao.usace.army.mil/Portals/31/docs/regulatory/nationwidepermits/NAO_2012_NWP_REGIONAL_CONDITIONS.pdf. Regional Condition 5 also continues to apply only to federally-listed species, rather than also including state-listed species. *Id.*

In the same federal consistency review document, VDACS noted its jurisdiction over listed plants and insects, but offered no comments (DEQ, Federal Consistency Determination for the Reissuance of Nationwide Permits and Federal Regional Conditions, U.S. Army Corps of Engineers, DEQ 12-047F, April 19, 2012, at 15-16).

The DEQ federal consistency review document also included input from DGIF, related to both fisheries and to listed species. DGIF indicated that it could not determine whether the NWP's are consistent with the fisheries management enforceable policies, because of the importance of geographic locations ("project location and scope where conditions may not adequately protect the fisheries resources known"), but agreed to conditional consistency based on the Corps working with it "to address our concerns for impacts upon aquatic resources."

The DEQ recommended, therefore, in its findings that the Corps "continue with the Department of Game and Inland Fisheries on the development of an agreement providing for the agency's review and comment on NWP's to ensure impacts to aquatic resources are addressed and to ensure consistency with the fisheries management enforceable policy of the VCP," making this recommendation part of a "conditional concurrence." However, this conditional concurrence was linked only to the enforceable policy for fisheries; it could not be linked to state-listed threatened or endangered species – although the DEQ did note DGIF's jurisdiction over both "fisheries resources and listed species." (DEQ, Federal Consistency Determination for the Reissuance of Nationwide Permits and Federal Regional Conditions, U.S. Army Corps of Engineers, DEQ 12-047F, April 19, 2012, at 4.)

Since the conditional concurrence, the development of an agreement between DGIF and the Norfolk District of the Corps on NWP's addressing these issues has not occurred. The U.S. Fish & Wildlife Service proceeded with implementation of the iPAC system, as noted in the Regional Conditions cited above; this system is used to identify possible impacts on federally-listed species, so there is not seamless coverage identifying or requiring identification of potential impacts to state-listed species. DGIF staff advises us that DGIF had anticipated coordination among DCR-DNH, DGIF, USFWS and Corps consideration, with such review to include state-listed species.

The Corps' decision not to adopt Virginia's non-binding recommendations on state-listed species does not mean that state-listed species will never be addressed by dredge and fill applicants who use nationwide permits in Virginia, but it does mean that the trigger for such involvement will not be the regional conditions to the NWP's. These conditions continue to address only federally-listed species, having passed through federal consistency review without adding the recommended coverage. Instead, such concerns will need to be identified independently; this might occur via joint permitting applications involving Virginia agencies (VMRC or DEQ) as well as the use of a Corps NWP; or by the U.S. Fish & Wildlife Service identifying the issue; or by a project coming to the direct attention of DGIF or DCR's Natural Heritage Program. The consistency determination for the Corps NWP's for the next five years essentially has added no protective effects for Virginia-listed species.

2) DEQ-11-173F, Federal Consistency Certification for the Aircraft Hangar, Helicopter Parking Pad, and Helicopter Fueling Pad, Tappahannock-Essex County Airport.

This federal consistency review was conducted for an airport improvement project. The DEQ concurred in the certification submitted by the airport authority.

In the nonbinding “Additional Environmental Considerations” section of the DEQ determination, the DEQ conveyed DCR’s comment that it did not anticipate adverse impacts on natural heritage resources, and noted on behalf of DACS that “no listed threatened or endangered plant and insect species are documented to occur in the vicinity of the project area.” (DEQ, Federal Consistency Certification for the Aircraft Hangar, Helicopter Parking Pad, and Helicopter Fueling Pad, Tappahannock-Essex County Airport, DEQ-11-173F, January 10, 2012, at 11-12).

The DEQ document further advised, in the “Additional Environmental Considerations” section, that DGIF had documented the state-listed bald eagle in the project area, but that the specific airport improvement is outside the management zone for the eagle nest currently observed by DGIF, although new nests could be affected if in or near the project area. The finding recommends that the airport authority check to determine whether any new nests have been documented within 0.25 miles of the project area and to contact DGIF if such is the case. (Id., at 12-13). The DGIF also offered general recommendations to protect wildlife, including minimizing habitat disturbance, maintaining stream and wetland buffers, and complying with erosion, sediment, and stormwater controls.

The project has not yet been constructed. The Airport Authority has submitted a “categorical exclusion” to the Federal Aviation Administration in connection with the project under the National Environmental Policy Act. <http://www.tappahannockessexairport.com/archive.htm>. A categorical exclusion is not available if there are federally-listed endangered species affected by the project; but as the bald eagle is now state-listed (and protected federally only by the bald and golden eagle protection act rather than the endangered species act), the categorical exclusion will not indicate whether the authority took the DGIF recommendation into account – although it would be prudent to do so.

3) DEQ-11-130F, Draft Environmental Assessment and Federal Consistency Determination for the Commercial Wind Lease Issuance and Site Characterization Activities on the Outer Continental Shelf.

This review was of a Draft Environmental Assessment and Federal Consistency Determination prepared by the U.S. Department of Interior for a program providing for offshore wind energy leasing activities in federal waters off the coast of Virginia.

In a section of the review document entitled “Environmental Impacts and Mitigation” (presumably responding to the Draft EA) the DEQ discussed natural heritage resources and identified the possible occurrence of two federally-listed and state-listed bird species in the area, as well as sea turtles and marine mammals. DCR-DNH recommended coordination with DGIF,

the US Fish and Wildlife Service and the National Marine Fisheries Service “to ensure compliance with the protected species legislation.” It also recommended use of meteorological buoys rather than meteorological towers, and the development of a spill prevention plan. (DEQ, Draft Environmental Assessment and Federal Consistency Determination for the Commercial Wind Lease Issuance and Site Characterization Activities on the Outer Continental Shelf, DEQ-11-130F, August 10, 2011, at 8).

In the same section, DGIF made recommendations on biological monitoring, lighting specifications, acoustic monitoring, post-construction monitoring and mitigation, and decommissioning procedures to protect wildlife resources including, if applicable, state-listed species; no particular species were referenced. (Id., at 9-10).

The DEQ concurred with the federal consistency determination (Id., at 11). The comments were not conditions of concurrence.

4) DEQ-10-167F, Federal Consistency Certification for a Combined Construction and Operation License and USACE Permit for the North Anna Power Station Unit 3.

This federal consistency review was conducted for the projected third nuclear unit at the North Anna Power Station, operated by Dominion Virginia Power. DGIF submitted various requirements related to its fisheries enforceable policy; these became part of the DEQ-approved certification concurrence. The DEQ issued a federal consistency conditional concurrence as to the project, with most of the conditions addressing compliance with various named state permits.

Interestingly, the statement of “Advisory Policies” in the concurrence refers to protection of Virginia-listed and federally-listed plant species in “coastal natural resource areas” affected by the project. These are, specifically, areas to be affected by a transmission line and a large component transport route (for construction). This section also identifies the presence of state-listed plants and bald eagles at a related site.

The only recommendations related to these issues under “Advisory Policies” provide that the applicant “is encouraged” to coordinate with the U.S. Fish & Wildlife Service to protect a federally listed plant, to coordinate with DGIF on the state-listed bald eagle, and to implement and strictly adhere to sediment and erosion control and stormwater laws to “minimize adverse impacts to the aquatic ecosystem.” (DEQ, Federal Consistency Certification for a Combined Construction and Operation License and U.S. Army Corp of Engineers Permit for the North Anna Power Station Unit 4, Dominion Virginia Power, DEQ-10-167F, May 16, 2011, at 18-21). The same “Advisory Policy” section notes that DGIF “does not anticipate any adverse impacts to wildlife resources of listed species” but does provide 10 recommendations to avoid and minimize disturbances, adjust the timing of activities to protect songbirds, maintain stream buffers, and avoid erosion, among others. (Id., at 22).

In the “Additional Environmental Considerations” section, where one would normally anticipate finding the references to Virginia listed species issues, if any, there is no additional discussion.

Observations on State Review of Threatened and Endangered Species and Federal Consistency in Virginia

These examples give some idea of the range of activities, and potential responses related to state-listed species found in federal consistency review in Virginia.

1. In each instance, any threatened and endangered species recommendation is not a condition of Virginia's concurrence or approval for federal consistency.
2. In some cases, the need to obtain some other state permit or approval will provide the opportunity to apply the state threatened and endangered species laws to a project.
3. The Virginia state agencies responsible for species protection rely primarily on the project location information (which is required) and the project description to determine whether there are species of concern and what the impacts may be. Using the data that they maintain, they then develop their recommendations. The fact that the DEQ templates for federal consistency determinations and certifications do not now require the federal agency or applicant for federal approval to submit data on state-listed species is not viewed by the state agencies as an impediment, because the data are searched based on locations.
4. DGIF staff note that it would be useful if agencies and applicants undergoing federal consistency considered and addressed "other wildlife" issues. There is no express enforceable policy addressing wildlife (although the Virginia statutes approved by NOAA in support of the fisheries management enforceable policy have from the beginning included authority over wildlife resources as well as fish). Wildlife concerns are often among the "additional environmental concerns" addressed in Virginia's review, but identifying wildlife concerns (other than for the geographically located listed threatened and endangered species) may be more difficult and the advice more general in the absence of project-specific wildlife data.
5. Given the status of state-listed species as an "additional environmental concern," and the sometime relevance of such species as an "advisory policy" subject in coastal natural resource areas, comments to DEQ in support of federal consistency review are not necessarily coordinated between DCR and DGIF. Thus, DCR-DNH may submit comments and recommendations to DEQ that relate to state-listed fish and wildlife species under DGIF jurisdiction. The comments and recommendations may not necessarily be the same as the DGIF comments, and each may address different species based on the data it has and its best judgment as the needs of the species. This has not proven to be a problem in practice, and DEQ does coordinate the final document.
6. There is no way to track whether federal agencies or applicants have implemented the recommendations made in "Additional Environmental Considerations." There is no reporting requirement, and the recommendations are informational in the context of the federal consistency process.

Other State Experiences

The ability to apply state-listed threatened and endangered species concerns to federal consistency depends almost entirely on what the state has put into its program for NOAA review and approval as “enforceable policies.” Most coastal states have some reference to state-listed threatened and endangered species in their enforceable policies. As ELI noted in a previous report to Virginia, only Alabama among the coastal states has no state endangered species law. Most states have incorporated at least some aspect of their state endangered species law into their enforceable policies, even if (as is sometimes the case) it is limited to particular habitats or natural areas.

Maryland submitted a Routine Program Change to NOAA in November 2010 that was approved in March 2011. Maryland describes the updated and clarified enforceable policies contained in the RPC as “the result of a comprehensive review and update of the policies of the State of Maryland Coastal Management Program Document and past program changes.”

http://dnr.maryland.gov/ccp/pdfs/mdrpc_overview.pdf. This was not so much a set of new laws but rather a restatement of prior laws in a more accessible form. Maryland’s enforceable policies now provide, among other provisions:

B. 6 Living Aquatic Resources: 1. Unless authorized by an Incidental Take Permit, no one may take a State listed endangered or threatened species of fish or wildlife (citing Md. Code Ann., Nat. Res. §§ 4-2A-01 to -09; Md. Code Ann., Nat. Res. §§ 10-2A-01 to -09).

C.3. Tidal Shore Erosion Control: 7. Shore erosion control projects shall not occur when....threatened or endangered species, [or] species in need of conservation...may be adversely affected by the project (citing COMAR 26.24.04.01). (Maryland’s Enforceable Coastal Policies, available at <http://dnr.maryland.gov/ccp/pdfs/mecp.pdf>)

Delaware’s fairly weak state endangered species law prohibits only possession, transportation, sale and trafficking in listed species, but not taking, killing, or habitat destruction (7 Del. Code § 601). However, Delaware’s approved coastal zone management program specifically identifies “enforceable policies” that protect habitats that are important for these species. Enforceable policies include:

No activity shall have an adverse environmental effect on living resources and shall include consideration of the effect of site preparation and the proposed activity on the following wetland values: (b) Habitat value...(4) Habitat for rare or endangered plants. (5) Presence of plants or animals known to be rare generally, or unique to the particular location. (Del. CZM Enf. Policies 5.11.1.1).

Rare and endangered species are in need of active, protective management to preserve and enhance such species. The diversity and abundance of the native flora and fauna or Delaware, particularly those deemed rare or endangered, shall be preserved and enhanced through the protection of the habitat, natural areas, and areas of unusual scientific significance or having unusual importance to their survival. (Del. CZM Enf. Policies 5.11.3.2).

Construction of marinas shall not be permitted at sites that are recognized by the DNREC as critical habitats...[which include] unique aquatic or terrestrial ecosystems that support rare endangered or threatened plants and animals...defined by *both state and/or federal listings*.”(Del. CZM Enf. Policies 5.3.2.9).

Thus Delaware has used an array of different laws and policies, including a fairly weak state endangered species law, to sustain a broader set of criteria for federal consistency review tied to habitat.

North Carolina explicitly protects state-listed species in its enforceable policies applicable in “areas of environmental concern”:

15A NCAC 07H .0505 COASTAL AREAS THAT SUSTAIN REMNANT SPECIES

- (a) Description. Coastal areas that sustain remnant species are those areas that support native plants or animals determined to be rare or endangered (synonymous with threatened and endangered), within the coastal area. Such places provide habitats necessary for the survival of existing populations or communities of rare or endangered species within the coastal area. Determination will be made by the Commission based upon the *listing adopted by the North Carolina Wildlife Resources Commission* or the federal government listing; upon written reports or testimony of experts indicating that a species is rare or endangered within the coastal area; and upon consideration of written testimony of local government officials, interest groups, and private land owners.
- (b) Significance. The continued survival of certain habitats that support native plants and animals in the coastal area is vital for the preservation of our natural heritage and for the protection of natural diversity which is related to biological stability. These habitats and the species they support provide a valuable educational and scientific resource that cannot be duplicated.
- (c) Management Objective. To protect unique habitat conditions that are necessary to the continued survival of threatened and endangered native plants and animals and to minimize land use impacts that might jeopardize these conditions.

North Carolina’s sample consistency certification document shows how this issue can be addressed by an applicant. <http://www.nccoastalmanagement.net/Permits/Belhaven%20Submission.pdf>

California enacted its enforceable policies directly in its state Coastal Act. This enables it to integrate compliance with other state laws, include those protecting its state-listed species, without having to adopt those laws individually as enforceable policies themselves. The California Coastal Commission’s sample documents include a certification based on, in part, a biological assessment reflecting consultation with the state Fish & Game agency as well as the USFWS. The relevant policies include:

Marine resources shall be maintained, enhanced, and where feasible, restored. Special protection shall be given to areas and species of special biological or economic significance. Uses of the marine environment shall be carried out in a manner that will sustain the biological productivity of coastal waters and that will maintain healthy

populations of all species of marine organisms adequate for long-term commercial, recreational, scientific, and educational purposes. Cal. Pub. Res. Section 30230

The biological productivity and the quality of coastal waters, streams, wetlands, estuaries, and lakes appropriate to maintain optimum populations of marine organisms and for the protection of human health shall be maintained and, where feasible, restored through, among other means, minimizing adverse effects of waste water discharges and entrainment, controlling runoff, preventing depletion of ground water supplies and substantial interference with surface water flow, encouraging waste water reclamation, maintaining natural vegetation buffer areas that protect riparian habitats, and minimizing alteration of natural streams. Cal. Pub. Res. Section 30231

(a) Environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, and only uses dependent on those resources shall be allowed within those areas. (b) Development in areas adjacent to environmentally sensitive habitat areas and parks and recreation areas shall be sited and designed to prevent impacts which would significantly degrade those areas, and shall be compatible with the continuance of those habitat and recreation areas. Cal. Pub. Res. Section 30240

New York's enforceable policies related to fish and wildlife do not specifically reference protection of state-listed threatened or endangered species. Thus it presents a superficially similar case to Virginia. However, because its policies do provide explicitly for protection of significant habitats, and it uses "support populations of rare and endangered species" as one criterion to define such habitats, it has some opportunity to apply these standards in federal consistency (Policy 7: Significant coastal fish and wildlife habitats will be protected, preserved, and where practical, restored so as to maintain their viability as habitats.) <http://www.dos.ny.gov/communitieswaterfronts/pdfs/CoastalPolicies.pdf>

An example of the contrast between Maryland and Virginia's treatment of state-listed species in federal consistency review is provided by a recent federal consistency determination for a direct federal activity affecting the coastal zone of both states.

In August 2012, the Navy submitted its Draft Environmental Impact Statement and Federal consistency determinations for proposed research, development, test, and evaluation activities of the Naval Surface Warfare Center, Dahlgren Division (NSWCDD) at Naval Support Facility Dahlgren, Virginia. The submittal was for both states.

In its federal consistency determination for Virginia, it submitted no information on impacts to state-listed species, and no findings were required. In its federal consistency determination for Maryland it submitted the following:

Living Aquatic Resources

Policy B.6.1 – *This policy prohibits taking a State-listed endangered or threatened species of fish or wildlife unless authorized by an Incidental Take Permit.*

One State-listed endangered fish species, the shortnose sturgeon (*Acipenser brevirostrum*), and two federally proposed endangered species, the shortnose sturgeon and Atlantic sturgeon (*A. oxyrinchus*), are found in the PRTR portion of the Potomac River. Three State-listed endangered or threatened species of sea

turtles are known to occur in the lower Potomac River based on reported stranding incidents: loggerhead (*Caretta caretta*), Kemp's ridley (*Lepidochelys kempii*), and, to a lesser extent, the green turtle (*Chelonia mydas*). As detailed in Chapter 4, Section 4.14 and Appendix G of the DEIS, the NSWCDD RDT&E activities conducted on the PRTR under the Proposed Action are predicted to have discountable effects on shortnose and Atlantic sturgeon and, because there would be minimal spatial overlap between RDT&E activities conducted on the PRTR and sea turtles using the lower Potomac River, the Proposed Action would have no effect on sea turtles in the Potomac River.

Five State-listed endangered or threatened species of birds are found, or potentially found, on or in the vicinity of NSF Dahlgren or within the PRTR: loggerhead shrike (*Lanius ludovicianus*), black rail (*Laterallus jamaicensis*), upland sandpiper (*Bartramia longicauda*), least tern (*Sterna antillarum*), and sedge wren (*Cistothorus platensis*). The often patchy distribution of birds, NSWCDD's clearing the range of waterfowl on the water surface before events begin, and the resulting low probability that birds would occur at the exact target location at the time a projectile would detonate diminishes the likelihood of direct impacts. Although individuals could be hit by projectiles, the total number of birds affected would be too small to cause population-level impacts. A range-specific screening-level ecological risk assessment was performed, as described in Sections 4.11, 4.12, and 4.13 of the DEIS, to determine if concentrations of metals and explosives in water and sediments from ordnance fired into the PRTR are present at concentrations that could cause adverse effects on avian and mammalian wildlife. One representative receptor modeled was the great blue heron. The results of the ecological risk assessment indicate that none of the constituents entering into the Potomac River by munitions activities are released at concentrations high enough to cause adverse effects in the great blue heron, which was selected to represent Potomac River birds.

Impacts to birds during operation of EM energy emitters would be negligible for two reasons. First, range areas used for EM energy activities are checked for the presence of birds before testing begins; and if they are present, they are either scared away or tests are paused until they leave. Second, even if birds are present in the area, the high electric or magnetic field levels experienced within test areas quickly dissipate and return to background levels outside the test areas. Birds flying above EM energy test facilities are unlikely to be exposed to high electric or magnetic fields, as exposure levels rapidly dissipate with distance.

The impact to birds from HE laser activities would be negligible to minor because, before an event begins, NSWCDD personnel would clear the test areas of visible wildlife and the event would be stopped if people or wildlife approach the laser corridor during the event. The probability of adversely affecting a bird that may fly into or along the laser beam during an event would be very low due to the short duration of the laser emissions and the small area that would be used for testing. The odds of a bird's flying into the beam during emission would be very low, particularly as most birds spend the majority of their time in activities other than flying – e.g., resting or feeding.

Draft Environmental Impact Statement, NSWCDD Outdoor RDT&E Activities, Appendix H "Federal Consistency," at pages H-23 and H-24 (June 2012), available at <http://www.navsea.navy.mil/nswc/dahlgren/EIS/EIS-to-Date/AppendixH.pdf>.

This coverage of threatened and endangered species issues was necessary in order for Maryland to undertake its federal consistency review. The Navy's federal consistency determination contained certain commitments as to its anticipated practices (e.g., range clearing, cessation of laser tests under certain conditions). Maryland's review also included consideration of threatened and endangered species issues. State agency comments included reference to impacts on the Atlantic sturgeon and to effects on a waterfowl concentration area, but noted that Maryland does not track bald eagle nesting locations. Comments on MD20120828-0630 - the Naval Surface Warfare Center, Dahlgren Division Outdoor Research, Development and Test and Evaluation Activities, Draft Environmental Impact Statement. While transmitting these comments on the

DEIS, Maryland did not make a specific consistency finding, and thus was deemed to concur with the Navy's federal consistency determination. (Pers. Communication, MDE).

Virginia completed its review of the Federal Consistency Determination and Draft EIS on October 18, 2012. In the section of the document dealing with the DEIS (viz. "Environmental Impacts and Mitigation"), the DEQ identified concerns with state-listed bald eagles, and recommended that the Navy coordinate with DGIF "to ensure compliance with the Virginia Endangered Species Act." It noted no likely impacts on state-listed plants and insects. (DEQ, Draft Environmental Impact Statement and Federal Consistency Determination, Outdoor Research, Development, Test, and Evaluation Activities as Naval Surface Warfare Center, Dahlgren, DEQ-12-152F, October 18, 2012, at 8-10). However, in the section addressing the submitted federal consistency determination for Virginia, the DEQ concurred with consistency without further discussion, noting that other state approvals and permits "are not included in this concurrence" (Id., at 14). In a free-standing section entitled "Regulatory and Coordination Needs" the Virginia DEQ recommended that the Navy consult with DGIF concerning activities that may affect the bald eagle and anadromous fish; it also listed Virginia's state endangered species laws, and advised that the Navy "may contact" DCR-DNH for updated natural heritage resources information (Id., at 15-16). In sum, Virginia was able to provide advice or recommendations on state-listed species, but not based on "enforceable policies." The advice is not a condition of the concurrence.

In contrast with Virginia, Maryland's enforceable policies drove the submission of descriptions and commitments by the Navy. The Navy had to affirmatively address threatened and endangered species in its federal consistency determination. It also shows that despite the absence of an enforceable policy for state-listed species in Virginia and the presence of one in Maryland, both states provided the Navy with information relevant to the interactions of its projects with state-listed threatened and endangered species. Whether the absence of commitments by the Navy in the Virginia federal consistency determination will make any difference to the protection of state-listed species cannot be determined.

With respect to federally-listed species, the Navy prepared a Biological Assessment and determined that the proposed project is not likely to adversely affect any species listed as threatened or endangered under the jurisdiction of the National Marine Fisheries Service. NMFS concurred with this determination in early 2012. The NMFS concurrence is available at http://www.navysea.navy.mil/nswc/dahlgren/EIS/Related_Publications/NMFS_Ltr_Sec_7_consult_for_NSWCDD_Potmac_River.pdf. The existence of the Biological Assessment and consideration of effects on federally-listed species, along with the array of wildlife and habitat issues considered in the Draft EIS may mean that differences in federal consistency requirements as to state-listed species are less important than in a project where the only threatened or endangered species are state-listed, and where federal consistency is the only state jurisdictional "hook" for review and conditions.

Conclusions

- Virginia would be best served by incorporating its relatively robust state threatened and endangered species laws into its enforceable policies.
- Without doing this, the current system could be improved by Virginia DEQ's Office of Environmental Impact Review adding new material to its advice to federal agencies and applicants in its federal consistency procedures, forms, and website (Federal Consistency Information Package). It could explain that Virginia DEQ will be examining the submitted project not only with respect to (1) Applicable Enforceable Policies of the VCP and (2) Advisory Policies of the VCP (as it currently does), but also that it will be interested in (3) Additional Environmental Considerations. Doing so may encourage applicants and agencies to address these additional areas in project design or mitigation. In addition, this addition will have the advantage of increasing transparency of the process, particularly if the DEQ identifies in its information package the topics it typically (or often) may include in the Additional Environmental Considerations segment.
- Where DCR or DGIF identifies a concern with a state-listed threatened or endangered species in the course of federal consistency review – and particularly where it they make a recommendation -- it would be helpful to create a system that reminds them to follow up on the ensuing project activity at a future date. This is particularly important where the action is *not* one that is likely to trigger further state permitting or consultation. This may already be the practice, informally; if not, a simple tracker or reminder system would have value.
- Continued follow-up by DGIF with the Corps of Engineers and the US Fish & Wildlife Service with respect to NWPs is warranted. A system of coordination is needed to ensure appropriate consultation on activities that may affect state-listed species, as the recommended changes to the NWP regional conditions were not made.