

**ANALYSIS OF VIRGINIA THREATENED AND
ENDANGERED SPECIES POLICY INCORPORATION
INTO CZM ENFORCEABLE POLICIES**

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Virginia Coastal Zone
MANAGEMENT PROGRAM



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Action under Consideration

Modify Virginia's approved Coastal Zone Management Program expressly to include enforceable policies that protect state-listed threatened and endangered species.

Basis for enforceable policy: Va. Code § 29.1-564, 29.1-566 29.1-568; Va. Code § 3.2-1002, 3.2-1003.

Overview

Coastal habitats are extremely important for threatened and endangered wildlife species, including birds, fish, and invertebrates, as well as for certain plants. The U.S. Fish & Wildlife has determined that 45 percent of the nation's threatened and endangered species are directly dependent on coastal habitats. (U.S. Fish & Wildlife Service, *Coastal Ecosystems Program*, 1995). Careful management of activities within the coastal zone is essential to ensure the health of the habitats on which threatened and endangered species depend, and to provide for conservation and recovery of the species.

In addition to the protections afforded to federally-listed threatened and endangered species under the federal government's Endangered Species Act, 16 U.S.C. §§1531-1544, nearly every state has its own laws protecting state-listed species. In fact, of all the states with NOAA-approved coastal zone management programs only Alabama has no state endangered species law.

Virginia's laws for the protection of *threatened and endangered fish and wildlife* (Va. Code §§ 29.1-563 to -570) and *threatened and endangered plants and insects* Va. Code §§3.2-1000 to -1011) were enacted in the 1970s. These laws apply within the coastal zone as well as in all other areas of the Commonwealth. Virginia has not previously requested the National Oceanic and Atmospheric Administration (NOAA) to review and concur in the incorporation of its two state threatened and endangered species laws as part of its enforceable policies for purposes of federal consistency under its approved coastal zone management program. (A 2010 submittal which included one section of the fish and wildlife threatened and endangered species law as part of a larger package of submissions was withdrawn at Virginia's request.)

Virginia is considering submitting its threatened and endangered species laws policies as an enforceable policy in order to ensure full coverage of these important resources in federal consistency review. This is important because of the intensive uses in the coastal zone, the larger number of species listed since the onset of the program, and the array of federal activities that may affect such species.

Coverage of Threatened and Endangered Species in Virginia’s Existing Coastal Zone Management Program

In the coastal zone context, Virginia has formally recognized the importance of threatened and endangered species and their habitats since the original 1986 Executive Order approved as creating the Commonwealth’s networked coastal resources program:

Executive Order 13(86) “Establishment of Virginia Coastal Resources Management Program” (June 23, 1986) –

“State agencies having responsibility for the Commonwealth’s coastal resources shall promote the Program consistently with the following objectives...10.To maintain areas of *wildlife habitat* and to *preserve endangered species of fish and wildlife.*”

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

Executive Order No. 18 (2010) “Continuation of the Virginia Coastal Zone Management Program” –

“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.*”

Since 2002, the more recent versions of the order (incorporated by routine program change into Virginia’s CZM Program) do not specifically limit the programmatic reference just to “fish and wildlife” endangered species; furthermore they explicitly use the term “threatened” as well as “endangered” species.

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. Virginia added coastal lands management as a ninth core area, incorporated by NOAA into the approved program in 2000.

Virginia’s two state endangered species laws were not listed in support of the enforceable policies identified within these nine program areas.

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 authority over “fish located within tidal

brackish and freshwater creeks.”(FEIS III-4) In order to demonstrate enforceability of the policy, provisions establishing the authority of the Commission regulate native fish and wildlife were submitted and approved as part of the Coastal Management Program. These included former Va. Code §29-125, in which the Commission was given broad powers to regulate for the protection of wildlife, not limited to fish:

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.

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.

In addition, the 1986 program’s description of the affected environment expressly included freshwater fishes and terrestrial wildlife. And the enforceable policies dealing with geographic areas of particular concern identified, among the “coastal natural resource areas of particular concern,” ten “wildlife management areas.” In sum, threatened and endangered species of fish and wildlife were referenced in the Executive order. They were not singled out in the core policies except as included in the protection of inland fish and certain habitats. But the Commission’s authority to regulate practices affecting nongame fish and wildlife was included in the broad statutory authority submitted.

Yet, while these fish and wildlife governance issues were included, the Commission commented on the draft EIS in 1985 that the program seemed to address wildlife only in the geographic areas of particular concern section – and in the context of the “wildlife management areas.” The Commission suggested:

A more realistic approach would be to treat the coastal zone as a unique ecosystem and manage it as [a] community, recognizing each integral part. It appears this has been done for the most part except for wildlife omission. The Commission’s jurisdiction here reaches beyond fishing, boating, and hunting regulations to the *endangered and threatened species and nongame protection*. ...The Commission’s responsibility for conservation of all wildlife should somehow be incorporated throughout the program. In conclusion, the priorities of conservation and preservation should be paramount for the Commonwealth’s extremely sensitive and productive coastal zone. (FEIS Part IX).

The FEIS preparers responded that these concerns could be addressed “in large part” by Virginia’s new river basin planning process, and suggest that the Commission “take the initiative to see that consideration of specific wildlife values” would be incorporated into that process. (FEIS, Part VI, State and Local Agencies, p. 7). However, this was the last action related to inland fish and wildlife in the context of the CZM approval.

Changes in Virginia Law

In 1987, Title 29 was re-codified as Title 29.1. The Commission was renamed the Board of Game and Inland Fisheries (Board), and the Department of Game and Inland Fisheries (Department or DGIF) was created. The Commission’s authority under former §§ 29-125 to promulgate regulations pertaining to the taking, capture, killing, possession, sale, purchase and transportation of wildlife and inland water fish was transferred to the Board, and is found in Section 29.1-501 A.¹ The former §§ 29-233 and 29-234 dealing with state threatened and endangered species were consolidated into § 29.1-566 (part of the Commonwealth’s fish and wildlife threatened and endangered species law found at §§ 29.1-563 to -570). In 2011, the General Assembly further amended sections 29.1-563 and 29.1-568 to authorize the Board to adopt regulations that allow “incidental take” of a state-listed species under specified circumstances. The re-codified and updated provisions were not submitted to NOAA for incorporation into the CZM Program. Nor has the plant and insect threatened and endangered species law (§§3.2-1000 to -1011), enacted in 1979 and amended several times since then, been submitted to NOAA for incorporation into the CZM Program.

Current federal consistency review with respect to state-listed species

When a federal action affecting Virginia’s Coastal Zone requires a federal consistency determination, only the NOAA-approved enforceable policies can be used to approve or disapprove the activity and impose enforceable conditions. Virginia’s federal consistency review process includes seeking the views of the state agencies responsible for these enforceable policies. Their recommendations as to threatened and endangered species, if any, are currently included as advisory rather than as required elements of federal consistency in the determination.

¹ Va. Code § 29.1-501.A provides: “The Board may promulgate regulations pertaining to the hunting, taking, capture, killing, possession, sale, purchase and transportation of *any* wild bird, wild animal, or inland water fish.” This is substantially the same authority that was in §29-125, approved in 1986 as part of the original CMP. That section granted the Commission authority to promulgate regulations pertaining to or prohibiting in any degree the “hunting, taking, capture, killing, possession, sale, purchase, shipment, transportation, carriage or export of any wild bird, wild animal or fish from inland waters.

What does Virginia’s law currently provide concerning threatened and endangered species?

The Virginia Department of Game and Inland Fisheries and the Department of Agriculture and Consumer Services have separate legal authority over endangered and threatened species in Virginia. DGIF-listed threatened and endangered wildlife and fish species are identified at 4 VAC15-20-130. DACS-listed threatened and endangered plant and insect species are identified at 2 VAC 5-320-10.

The Division of Natural Heritage in the Department of Conservation and Recreation inventories the location and ecological status of rare plant and animal species and natural communities. DNH maintains data on ecologically significant sites and the locations of state and federally-listed threatened and endangered species. The data are used to evaluate potential impacts of projects and approvals. Virginia’s Natural Heritage Program has found that there are 44 state-listed species in Virginia’s Coastal Zone counties, of which 18 species are also federally-listed. (J. Christopher Ludwig, *State-Listed Species in Virginia's Coastal Zone*, Coastal Partners presentation, Richmond, Virginia, December 8, 2010). In the habitats of concern in Virginia’s coastal zone, these species occurrences are as follows:

- Beaches – 13 species
- Aquatic/Streams – 9 species
- Freshwater/Intertidal Wetlands – 2 species
- Isolated Ponds – 5 species
- Pine Savannas – 4 species
- Seeps/Bogs – 3 species
- Other or Multiple Habitats – 8 species

Virginia’s fish and wildlife threatened and endangered species law, first enacted in 1972, is found at Va. Code §§ 29.1-563 to -570. Key enforceable provisions include:

Va. Code § 29.1-566 provides that “the Board 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 § 29.1-564 prohibits the “taking, transportation, possession, sale, or offer for sale within the Commonwealth of any fish or wildlife appearing on” the federal list, except as provided in § 29.1-568.

Va. Code § 29.1-568 authorizes 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.” In 2011, Virginia’s General Assembly authorized 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.” This last provision confers more authority to condition actions that might adversely affect state-listed species, thus both providing greater flexibility than the flat prohibition under § 29.1-566. This will likely encourage the DGIF to develop and prescribe enforceable conditions for state listed species as the U.S. Fish & Wildlife Service does for federally-listed species under federal incidental take permits. However, the DGIF does not envision creating a new permit program.

Va. Code § 29.1-563 provides the definitions, including defining “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.” “Fish or wildlife” is defined as “any member of the animal kingdom, vertebrate or invertebrate, except for the class Insecta, and includes any part, products, egg, or the dead body or parts thereof.”

Va. Code § 29.1-567 provides for penalties and enforcement. Violations of the law, the implementing 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 § 29.1-553.**

Virginia’s Endangered Plant and Insect Species Act, first enacted in 1979 and most recently amended in 2008, is found at Va. Code § 3.2-1000 to -1011. It is administered by the Department of Agriculture and Consumer Services (DACS) and the Board of Agriculture and Consumer Services.

§ 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.”

§ 3.2-1001 authorizes the Commissioner of 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.” And to enter property on administrative inspection warrant for the proper management of any threatened or endangered species.

§ 3.2-1002 provides that “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.”

§ 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.”

§§ 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.

§3.2-1011 defines a violation of the law or regulations as a Class 1 misdemeanor.

The provisions of these two laws currently apply throughout Virginia’s coastal zone as elsewhere in the Commonwealth, but are not part of the “enforceable policies” that can be used for federal consistency. Thus, while state agencies and private actors must comply with these provisions and are subject to enforcement by the Commonwealth, federal permits within the coastal zone cannot be conditioned upon or denied federal consistency based on state-listed species. Similarly, federal actions land management decisions in the coastal zone are also not subject to conditions or disapproval based on these policies.

What are the implications of incorporating these laws into Virginia’s enforceable policies?

Most states with approved coastal zone management programs have include state-listed threatened and endangered species protections within their enforceable policies.²

- The inclusion of these policies enables the state to ensure that federal actors and land managers take into account the protection of these species to the extent covered by the state law.
- It also provides an opportunity to review federal permit actions for compliance with laws protecting state-listed species.

It is important to note that the inclusion of modified or additional enforceable policies does not expand the universe of activities subject to federal consistency determinations. Thus, the mere fact that an activity within the coastal zone may affect a state-listed species does not convert a non-federal action into a federal action, and does not itself trigger federal consistency. Addition of Virginia’s threatened and endangered species laws would mean that when federal consistency review is triggered, the requirements of these laws will be applied to the federal action.

What concerns have been articulated?

The Virginia Department of Transportation (VDOT) in 2010 expressed concerns with the Virginia CZM Program’s submission of § 29.1-566 as well as other wildlife-related provisions; and the submission was voluntarily withdrawn for further review.

VDOT’s concerns were expressed in two general areas: first that inclusion of sections dealing with wildlife went beyond the original program’s enforceable policies that were focused on inland fish and fish in brackish waters;³ and second, that Virginia’s state list for threatened and endangered species of fish and wildlife, while including amphibians, reptiles, birds, mammals, and mollusks in the coastal zone, includes only one fish in the coastal zone, and that not in a drainage that “contributes to Virginia’s Coastal Zone.”⁴ VDOT maintained that addition of these provisions to the approved CZM Program would constitute an amendment to the program, would protect non-fish species in the coastal

² For example, Maryland has listed its state endangered species laws as an enforceable policy. In its most current re-statement (approved by NOAA as a routine program change in March 2011) Maryland’s enforceable policies provide: “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 et seq., 4-10A-01 et seq.). “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).

³ As noted above, the 1986 program did include authority of the Commission to promulgate regulations addressing the “taking, capture, killing, possession, sale, purchase and transportation of any wild bird, wild animal or fish from inland waters.” 29-125 (approved as part of the CZM Program in 1986).

⁴ Letter from Richard C. Woody, II (VDOT) to John King (NOAA), Feb. 12, 2010.

zone, and would establish a “regulatory approach in place of an established cooperative process.”⁵

The cooperative process used by VDOT is substantially expressed in its “Fish, Plant and Wildlife Resources Review Standard Operating Procedures” used by VDOT to address requirements of the federal Endangered Species Act and the two Virginia acts. These procedures apply, among other things, to all “activities requiring a federal action other than funding” as well as to many activities requiring state permits and activities within areas “known to support threatened or endangered species” (FP&W SOP, §3). The SOP authorizes VDOT District staff to determine species occurrences and confirm that activities comply with all federal and state requirements, including review for potential effect on resources. The initial review may lead either to abbreviated review or full review, documentation, and external consultation where required by law.

Under current law and practice VDOT also must take into account requirements under Virginia’s Water Protection Permit Program for evaluation of threatened and endangered species in the context of projects affecting wetlands (Va. Code § 62.1-44.15:5). Thus, apart from any action under the CZM program, VDOT itself already evaluates and addresses state-listed threatened and endangered species.

VDOT has few actions that are subject each year to federal consistency. These occur primarily when an activity requires a Coast Guard permit. Such interactions may also occur for some federal §10/404 wetlands and waters permits issued by the U.S. Army Corps of Engineers; but most such VDOT activities are covered by nationwide permits and/or statewide programmatic general permits (*e.g.*, VWP General Permit WP3 for Linear Transportation Projects). Federal consistency review would only be triggered if an individual federal permit is needed, or in those instances (at 5 year intervals) when the nationwide permit is itself undergoing federal consistency review.⁶

Currently, in those infrequent instances where federal consistency review of a VDOT action occurs, the recommendations of DGIF and DACS, if any, are provided but not made a condition of federal consistency. VDOT has expressed concern that including Virginia’s threatened and endangered species laws in the enforceable policies of the CZMP could lead to the CZMP imposing different conditions or recommendations from those offered by DGIF or DACS in the context of current procedures. However, the Virginia DEQ’s Office of Environmental Impact Review which administers federal consistency does not separately identify or create new conditions, but coordinates the findings and recommendations provided by the expert agencies that administer the programs.

⁵ Id.

⁶ For example, Ellie Irons, Virginia Department of Environmental Quality, to Colonel Dionysios Anninos, District Engineer/Commanding Officer, U.S. Army Corps of Engineers, Norfolk District, *Federal Consistency Determination (and Federal Register Notice) for Re-issuance and Modification of Nationwide Permits DEQ-07-047F* (May 7, 2007) (concurring in consistency of current nationwide permits).

For its part, DGIF notes that it would use the same process to identify concerns or issues with listed species that it currently uses. DGIF does not anticipate that the incorporation of the threatened and endangered species provisions into the CZM Enforceable Policies would result in any additional workload.

Incorporation of Virginia's threatened and endangered species laws into the enforceable policies of the CZMP would make the conditions applicable to federal permit actions. It would also make them part of a federal consistency determination for actions like activities on federal installations, offshore wind facilities and support facilities, and other federal activities.

What is the form of the change?

The filing with NOAA could be submitted as a routine program change. Under 15 C.F.R. §923.80(d), amendments are defined as substantial changes in one or more of the five listed coastal zone management program areas: uses subject to management; special management areas; boundaries; authorities and organization; and coordination, public involvement and the national interest. NOAA's Office of Ocean and Coastal Resource Management'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 CZMP manages coastal uses or resources.

Virginia's state threatened and endangered species laws do not redefine the boundaries of the coastal zone; these policies will be applied where the federal activity affects the coastal zone as already defined. The submittal is not intended to add new uses subject to management. The list of uses is not being amended. Nor does it define special management areas. The submittal does not change coordination or public involvement procedures for the coastal zone; as in the past, any actions subject to federal consistency will be vetted with the state agencies responsible for state-listed species protections and those agencies will provide their recommendations and findings to the Virginia DEQ's Office of Environmental Impact Review for transmittal to the applicant or federal agency. The remaining issue is whether the submittal substantially changes the authorities under which the CZMP is managed.

The original enforceable policies included not only conserving and enhancing finfish and shellfish resources, but also to draw upon "all available capabilities in carrying out research, administration, management and enforcement;" to consider effects on other "reasonable and permissible uses" of state waters and state-owned bottomlands and wetlands; preserving wetlands and preventing their despoliation; preserving and protecting coastal dunes; controlling sediment and erosion to "conserve and to protect the land, water, air and other natural resources of the Commonwealth" including fish and aquatic life; to protect the waters of the state from alteration that would make them detrimental to "animal or aquatic life"; and to maintain air quality "to the greatest degree practicable [to] prevent injury to plant and animal life." (FEIS Chapter III). While the

most direct enforceable policy statement addressed fish and shellfish, the statutes submitted in support included the predecessor of § 29.1-501, which confers authority to protect nongame species of fish and wildlife.

While state-listed threatened and endangered plant and insect species were not addressed in the original program submittal, they are important components of significant areas in the coastal zone. The original program description also notes that enforceable policies are not only described in Chapter III but also in Chapter V - Geographic Areas of Particular Concern (FEIS, X-1) The GAPCs include wetlands, spawning and nursery and feeding areas, coastal primary sand dunes, barrier islands, significant wildlife management areas, significant public recreation areas, sand and gravel resource areas, underwater historic sites, highly erodible areas, coastal high hazard areas, and water front development areas. Many of these include references to wildlife conservation, recreation, vegetation, and biological productivity.

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