

# Virginia Coastal Zone Management: Narrative Enforceable Policies

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WILLIAM & MARY  
LAW SCHOOL

VIRGINIA COASTAL POLICY CENTER



# Coastal Zone Management Program Grant

- Final Goal: draft, develop, and gain NOAA approval for narrative policy statements that reflect the entirety of Virginia's networked CZMP "enforceable policies"
- Grant: VCPC will draft and develop narrative policy statements of DGIF's "enforceable policies" relevant to the CZMP (Title 29.1)
  - DEQ will submit narrative policy statements to NOAA
- Associated Grant Goals
  - Establish procedure for DEQ & other networked agencies
  - Lay groundwork for future narrative drafts



# History of Virginia's "Enforceable Policies"

- Virginia DEQ first submitted the state's "enforceable policies" to NOAA in 1986. These policies are comprised of statutes and regulations from various state agencies that cover 9 subject matters.
- In 2010, DEQ submitted an update ("RPC") to DGIF's enforceable policies, which had not been updated significantly since 1986.
  - NOAA noted that a number of updated and new sections did not meet the criteria for "enforceable policies".
  - Internal concerns about procedural effects
- Instead of submitting a RPC , DEQ has decided (with NOAA's recommendation) to submit "narrative policies"



# Narrative Enforceable Policies

- Restatement of an “enforceable policy” in more plain and clear terms
  - Usually simple, short narrative statements are sufficient to trigger CZM federal consistency review
- Advantages of Narrative Enforceable Policies
  - Clarity
  - Accessibility by the CZM-regulated community
  - Procedural simplicity
  - Flexibility (as long as narrative statement accurately reflects underlying law)
    - May add and remove policies when updating





# “Enforceable Policy”

- Term of Art within the CZMA
  - Only applies to the CZMA federal consistency review process; does not affect an agency’s independent ability to enforce its laws & policies
- Three Main Criteria:
  - Must have a clear **standard** by which an activity can be determined to be consistent
    - Focus on objective requirements that affect the substance of the federal activity
  - Must be an **enforceable mechanism** based on state law to apply the standard
    - I.e. means to compel the regulated person/entity to do or not do something
  - The policy must be **approved by NOAA** as an “enforceable policy”
- Approval by NOAA
  - The policy must conceivably apply to a likely federal activity

# “Enforceable Policy”

## 29.1-532: Dams & Fishways

“Any person owning or having control of any dam or other obstruction in the streams of the Commonwealth which may interfere with the free passage of anadromous and other migratory fish, shall provide every such dam or other obstruction with a suitable fishway unless the Board considers it unnecessary.”

- Substantive Standard?
  - **Yes** – “free passage of anadromous & other fish” is clear
- Enforceable Mechanism?
  - **Yes** – here it is found within the statute
- Approval by NOAA?
  - **Yes** – likely to apply to federal activity



# “Enforceable Policy”

## 29.1-103(12): Powers and Duties of the Board

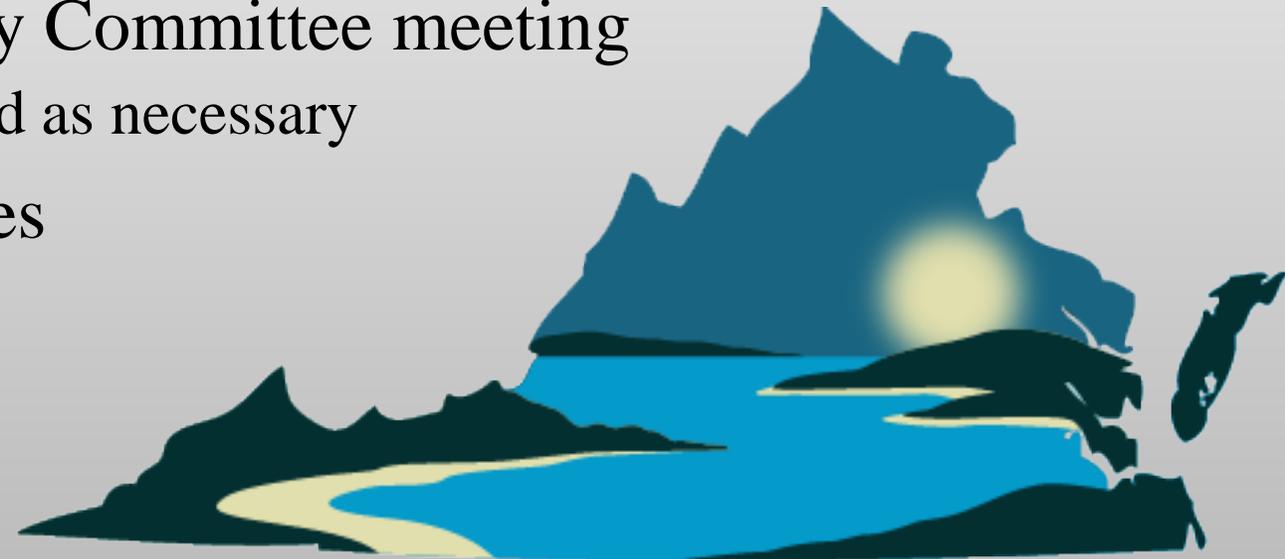
“The Board is responsible for carrying out the purposes and provisions of this title and is authorized to: Adopt resolutions or regulations conferring upon the Director all such powers, authorities and duties as the Board possesses and deems necessary or proper to carry out the purposes of this title.”

- Substantive Standard?
  - **No** – must look to the actual resolutions/regs for a standard
- Enforceable Mechanism?
  - **No** – look at the resolutions/regs
- Approval by NOAA?
  - **No**



# Grant Schedule

- October: Identify policies that may be re-written for clarity. Form advisory committee for DGIF policies.
  - Advisory Committee representatives: Relevant Agency, DEQ, OEIR, VA Att'y Gen, NOAA, Navy/Army, Planning District Comm'n
- November 2: Kickoff Advisory Committee meeting
- November 30: Follow-up Advisory Committee meeting
  - Subsequent meetings to be scheduled as necessary
- March: Final draft of DGIF policies



# Kick-off Meeting

- Attendees: DGIF, DEQ, NOAA, OAG, HRPDC, VDOT
- Focused on identifying DGIF “enforceable policies”, but also discussed other CZM federal consistency review issues
- Results
  - DGIF is examining whether they would like to add wildlife provisions
  - DGIF is identifying “high priority” statutes and regulations
  - VDOT & DGIF are discussing possible narrative Threatened & Endangered Species policies



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