Office for Coastal Management Response to Comments Received on VA-2020-1
October 2, 2020

Comments Received

The Office for Coastal Management received five comments on the submission. Commenters include Chesapeake Bay Foundation (CBF), Mission H2O, Troutman/Sanders LLP on behalf of the Virginia Manufacturers Association (VMA), the Department of the Navy (Navy), and Southern Environmental Law Center (SELC). Although commenters raised questions regarding the submission, none of the commenters opposed the adoption of narrative enforceable policies.

The Virginia Coastal Management Program submitted a response to comments on September 9, 2020, that included technical corrections to citations, and one minor correction to the "Section VI: Nonindigenous Aquatic Nuisance, Predatory, or Undesirable Species" policy with the removal of the word "take" which does not appear in the underlying statute.

NOAA Responses

Comment: Several commenters questioned whether the submission could be properly characterized as a program change being that it is a narrative, more detailed description of the existing enforceable policies. (Mission H2O, VMA)

NOAA Response: Narrative policies derived from state statutes and regulations cannot be applied for CZMA review purposes unless NOAA has approved the incorporation of the narrative policies as enforceable policies in the state's NOAA-approved coastal management program. The purpose of the NOAA review and approval is to ensure that the narrative policies do not misstate the standards of the underlying statues and regulations upon which the policies are based and that the narrative policies contain standards of sufficient specificity.

Comment: Several commenters expressed concern that any approval of Virginia's enforceable policies should only apply prospectively and should not be used as a basis to revisit previous certifications for authorization reissuances or renewals (as used in 15 CFR § 930.51)). (Mission H2O, VMA)

NOAA Response: The approval of the proposed enforceable policies would not reopen previous concurrences issued by the state. Under the Federal Consistency regulations at 15 CFR § 930.51, a proposed renewal or major amendment of a federal authorization that has not been previously reviewed or has substantially different coastal effects than those previously reviewed by the state can be subject to CZMA review. These reviews would include consideration of new or revised policies changes since the original review for federal consistency. See 15 CFR § 930.51(b)(2). The new policies proposed in the state's submission cannot be applied in on-going CZMA reviews.

Comment: Several commenters noted that the citations for the enforceable mechanisms that the Commonwealth cites in support of its species related policies do not contain means of

enforcement under state law. (Mission H2O, VMA) The commenters questioned how compliance with the proposed endangered species-related policies would be demonstrated in a consistency certification given that Virginia does not have a consultation or incidental take permitting program for state listed species. (Mission H2O, VMA)

NOAA Response: In order for NOAA to approve a state policy for CZMA review purposes, a state must show that as a matter of state law, the standards of the policy can be enforced, i.e., under state law a person can be compelled to do or not do something. While a permit requirement demonstrates that a state has an enforceable mechanism to apply a standard as a matter of state law, it is not the only means to do so. So long as a state can show that it can bring an enforcement action to compel compliance or punish non-compliance with a standard, NOAA will find that the state has shown that there is an enforceable mechanism in support of the policy.

As noted in the Commonwealth's response to comments, Va. Code §§ 29.1-564 and -567 provide the enforceable mechanism for the Threatened and Endangered Species enforceable policy. Va. Code § 29.1-567 states that the penalty for violation of the threatened and endangered species regulations is a Class 1 misdemeanor. Va. Code § 29.1-567 was erroneously omitted from the narrative enforceable policies document and the State CZM Change Request Table in the legal authority and enforceable mechanism columns. Va. Code § 29.1-567 has been added to the revised documents submitted by the state. These additions clarify that the Commonwealth has a valid enforceable mechanism for applying these policies as a matter of state law, and are not substantive changes to the narrative enforceable policies.

Comment: Several commenters were concerned that the addition of the threatened and endangered species policy could potentially be used as a basis for imposing additional requirements that have not been the subject of state rulemaking under Virginia's Administrative Process Act (Va. Code § § 2.2-4000 et seq.) or an independent permitting program. A particular concern is that this addition could be viewed as an opportunity to impose compensatory mitigation requirements pursuant to recently enacted state budget language without clear standards and guidelines for determining appropriate mitigation. MissionH2O notes that it is not the purpose of the CZMA consistency certification process to independently impose new requirements, mitigation or otherwise, but instead to confirm compliance with other state permitting and land use requirements. (Mission H2O, VMA)

NOAA Response: NOAA agrees that the application of state enforceable policies for CZMA review purposes cannot expand standards beyond those set by state law.

The Commonwealth's response to comments also clarifies that the recently enacted budget language pertaining to compensatory mitigation was enacted following the completion of the drafting of these narrative policies and this submission was not intended to include any new standards enacted subsequent to the completion. The NOAA decision letter approving these policies contains a clarification noting the state's intention that the supporting citations for the narrative policies do not include requirements that were enacted subsequent to the completion of the drafting of these policies.

In addition, under the CZMA federal consistency authority, a state cannot require a federal agency or an applicant for a federal authorization to pay compensation to mitigate adverse impacts to determine consistency or on which to base an objection. A state and applicant might mutually agree to use compensation to mitigate coastal effects, but the compensation cannot be used as part of an enforceable policy. Therefore, as noted in the Office for Coastal Management's approval letter, the compensation requirements in narrative policy I. Tidal and Non-Tidal Wetlands, Tidal Wetlands, and Non-Tidal Surface Waters, Including Wetlands, are not approved as enforceable polices for CZMA purposes.

Comment: The Virginia Manufacturer's comments assert that the changes to the Wildlife policies pertaining to Threatened and Endangered Species are no different than the change Virginia proposed in 1988, which NOAA denied. (Citing Letter from J. Blizzard, NOAA, to K. Buttleman, VA Council on the Environment (Aug. 2, 1988)). In its decision, NOAA required Virginia to "clearly delineate the extent that the programs include enforceable VCRMP goals and policies as opposed to advisory policies, and the identification of the State authority used to implement such policies." (VMA)

NOAA Response: The Commonwealth's response to comments provided additional information on the 1988 NOAA denial of the state's program change request:

> In the referenced August 2, 1988 letter to Keith Buttleman, the routine program implementation (RPI) was denied due to the failure to include the texts of the proposed changes and the inadequate documentation of the public notice. The majority of these issues were resolved and the program change was approved by NOAA through a November 30, 1988 letter from Donald Critchfield to Keith Buttleman.

Comment: The Chesapeake Bay Foundation and Southern Environmental Law Center comments noted that the Virginia 2020 General Assembly session altered sections of the code upon which the proposed narrative policies are based with enacted bills that were to become legally effective while the proposed CZM changes would still be under review by the Office for Coastal Management. CBF recommends that in order to ensure regulatory clarity for federal agencies, and federal permit and license applicants, the proposed narrative policies should be updated to these new laws. (CBF, SELC)

NOAA Response: The Commonwealth notes in its response to comments that the drafting of the narrative policies was finalized in December 2019 prior to the enactment of bills by the 2020 Virginia General Assembly. The state response clarifies that the changes to the supporting authorities for these policies are not included in the proposed narrative policies. NOAA has included in its decision letter a clarification limiting the application of the narrative policies to the standards that are still supported by the latter enacted 2020 legislation. However, there appear to be only three instances where the 2020 legislation could affect the narrative policies.

(1) There is a budget initiative related to compensatory mitigation. This change could not be an enforceable policy. As noted in a response above, under the CZMA federal consistency authority, a state cannot require a federal agency or an applicant for a federal authorization to pay compensation to mitigate adverse impacts to determine consistency or on which to base an

objection. A state and applicant might mutually agree to use compensation to mitigate coastal effects, but the compensation cannot be used as part of an enforceable policy. Therefore, as noted in the Office for Coastal Management's approval letter, the compensation requirements in narrative policy I. Tidal and Non-Tidal Wetlands, Tidal Wetlands, and Non-Tidal Surface Waters, Including Wetlands, are not approved as enforceable polices for CZMA purposes.

(2) There is a prohibition on offshore oil and gas activities. It is a long-standing NOAA position that this could not be approved as an enforceable policy as it discriminates against one industry and is not consistent with national interest objectives in the CZMA.

(3) There is a change to Living Shorelines where applicants shall consider Living Shorelines where practicable. The Commonwealth has noted that the Living Shorelines policy included in the program change submission is not an enforceable policy and has removed it from the list of narrative enforceable policies. The Commonwealth could consider adding the 2020 legislative Living Shoreline change as an enforceable policy at a later time.

Comment: The Navy requests that NOAA clarify that applying the Commonwealth's ability to grant or deny any use of state-owned bottomlands through the Virginia Marine Resource Commission (VMRC) to federal agencies would not meet the CZMA's definition of "enforceable policy." (Navy)

NOAA Response: The Commonwealth notes that the policy is merely a restatement of the existing authority that it applies to state submerged lands. As noted in the state response to comments, the proposed narrative enforceable policy is not a new enforceable policy but rather a restatement of the existing policy into a narrative format. Under the public trust doctrine, the state interest in the submerged lands of the states is not merely regulatory. Those submerged lands that are owned by the state are under its control as a proprietor. The state has not asserted ownership or control over submerged lands that are under the control of the Federal Government.

Comment: The Navy seeks clarification on the application of the Wildlife and Inland Fisheries policies in concert with federal permitting authorities. Of primary concern is that the portions of this section prohibiting "take" of fish or wildlife, or actions that may "harass" or "harm" threatened or endangered species would appear to conflict with a "take" authorized in accordance with Federal law. The Navy requested NOAA to include amplifying guidance for this section that the application of the policies to federal agencies would only meet the definition of "enforceable policy" with respect to state listed species, but not federally listed species. (Navy)

NOAA Response: NOAA does not anticipate that the Threatened and Endangered Species enforceable policy will conflict with the National Marine Fisheries Service (NMFS) or U.S. Fish and Wildlife Service (the Services) management of endangered species under the Endangered Species Act (ESA) or Marine Mammal Protection Act (MMPA). Although the Threatened and Endangered Species policy refers to federal protected species, it does not incorporate those species within the scope of the policy. The reference to federally listed species is within the exceptions to the state policy. The application of the Threatened and Endangered Species enforceable policy in a CZMA federal consistency review involving federally listed species

would need to be cognizant of the exclusive authority of NMFS under the MMPA to regulate the take of species covered under the Act.

Comment: The Navy recommends that NOAA clarify whether subsection A of the proposed Section VI Nonindigenous Aquatic Nuisance, Predatory, or Undesirable Species would meet the definition of "enforceable policy" as applied to federal agencies given that federal invasive species programs already in effect. (Navy)

NOAA Response: A fundamental purpose of the CZMA is to ensure that federal actions that may have reasonably foreseeable effects on the coastal uses or resources of a state are consistent to the maximum extent practicable with the enforceable policies of federally approved state coastal zone management programs. Absent an express statement of preemption by Congress, the federal invasive species program does not preclude states from having their own invasive species programs and applying the enforceable policies of those programs through the CZMA review process.

Comment: The Navy recommends removing the word "take" from the first sentence of subsection B of the Nonindigenous Aquatic Nuisance, Predatory, or Undesirable Species as that term is not one of the prohibitions of the Nonindigenous Aquatic Nuisance Species Act (Va. Code Ann §29.1-574). (Navy)

NOAA Response: The Navy is correct. The word "take' does not appear in the underlying statute cited for the proposed narrative policy. The state has recognized and corrected this error in its revised submission. The removal of the word 'take" from the proposed narrative policy is not a substantive change as its removal would not expand, narrow or change the application of the policy.

Comment: The Southern Environmental Law Center notes that it is not clear why certain statutes and regulations in the "State CZM Change Request Table" that are listed as providing legal authority for a particular category are not also included in the corresponding list of enforceable policies. In addition, in some instances, regulations that are listed as enforceable policies are not included in the legal authority citations. (SELC)

NOAA Response: The Table of Changes submitted by the Commonwealth includes citations that are the legal basis for the standards within the narrative policies and are the enforceable mechanisms for the policies. The discrepancies in the citations for the policies and citations for enforceable mechanisms have been addressed by the Commonwealth with technical corrections to the citations. Some citations, such as findings and purpose statements, are included for context in the application of the policies.