TROUTMAN
SANDERS

HalfMoon Seminar on the Coastal Zone Management Act (CZMA)

July 17, 2008

PRESENTED BY

George A. Somerville
Troutman Sanders LLP
Troutman Sanders Building
1001 Haxall Point
Richmond, VA 23219
804.697.1291

www.troutmansanders.com

The Virginia Coastal Zone Management Program

The federal Coastal Zone Management Act (CZMA) was enacted in 1972 and has been amended several times. It is supported by Congressional findings, stated in § 302 of the CZMA, 16 U.S.C. § 1451, that, among other things,[1]

> (a) There is a national interest in the effective management, beneficial use, protection, and development of the coastal zone.
>
> ….
>
> (c) The increasing and competing demands upon the lands and waters of our coastal zone occasioned by population growth and economic development, including requirements for industry, commerce, residential development, recreation, extraction of mineral resources and fossil fuels, transportation and navigation, waste disposal, and harvesting of fish, shellfish, and other living marine resources, have resulted in the loss of living marine resources, wildlife, nutrient-rich areas, permanent and adverse changes to ecological systems, decreasing open space for public use, and shoreline erosion.
>
> (d) The habitat areas of the coastal zone, and the fish, shellfish, other living marine resources, and wildlife therein, are ecologically fragile and consequently extremely vulnerable to destruction by man's alterations.
>
> (e) Important ecological, cultural, historic, and esthetic values in the coastal zone which are essential to the well-being of all citizens are being irretrievably damaged or lost.
>
> (f) New and expanding demands for food, energy, minerals, defense needs, recreation, waste disposal, transportation, and industrial activities in the Great Lakes, territorial sea, exclusive economic zone, and Outer Continental Shelf are placing stress on these areas and are creating the need for resolution of serious

---

[1] These findings and policies are quoted at some length because they are important criteria in "appeals" of State consistency objection to the U.S. Secretary of Commerce, as discussed below.

conflicts among important and competing uses and values in coastal and ocean waters;

(g) Special natural and scenic characteristics are being damaged by ill-planned development that threatens these values.

(h) In light of competing demands and the urgent need to protect and to give high priority to natural systems in the coastal zone, present state and local institutional arrangements for planning and regulating land and water uses in such areas are inadequate.

(i) The key to more effective protection and use of the land and water resources of the coastal zone is to encourage the states to exercise their full authority over the lands and waters in the coastal zone by assisting the states, in cooperation with Federal and local governments and other vitally affected interests, in developing land and water use programs for the coastal zone, including unified policies, criteria, standards, methods, and processes for dealing with land and water use decisions of more than local significance.

….

(k) Land uses in the coastal zone, and the uses of adjacent lands which drain into the coastal zone, may significantly affect the quality of coastal waters and habitats, and efforts to control coastal water pollution from land use activities must be improved.

Section 303 of the Act, 16 U.S.C. § 1452, includes the following declarations of national policy (among others):

(1) to preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation's coastal zone for this and succeeding generations;

(2) to encourage and assist the states to exercise effectively their responsibilities in the coastal zone through the development and implementation of management programs to achieve wise use of the land and water resources of the coastal zone, giving full consideration to ecological, cultural, historic, and esthetic values as well as the needs for compatible economic development, which programs should at least provide for -

(A) the protection of natural resources, including wetlands, flood plains, estuaries, beaches, dunes, barrier islands, coral reefs, and fish and wildlife and their habitat, within the coastal zone,

(B) the management of coastal development to minimize the loss of life and property caused by improper development in flood-prone, storm surge, geological hazard, and erosion-prone areas and in areas likely to be affected by or vulnerable to sea level rise, land subsidence, and saltwater intrusion, and by the destruction of natural protective features such as beaches, dunes, wetlands, and barrier islands,

(C) the management of coastal development to improve, safeguard, and restore the quality of coastal waters, and to protect natural resources and existing uses of those waters,

(D) priority consideration being given to coastal-dependent uses and orderly processes for siting major facilities related to national defense, energy, fisheries development, recreation, ports and transportation, and the location, to the maximum extent practicable, of new commercial and industrial developments in or adjacent to areas where such development already exists,

(E) public access to the coasts for recreation purposes, [and]

(F) assistance in the redevelopment of deteriorating urban waterfronts and ports, and sensitive preservation and restoration of historic, cultural, and esthetic coastal features ….

The Act creates financial incentives for States to develop coastal management plans and submit them to the U.S. Department of Commerce for approval. *See* 16 U.S.C. § 1455.[2] Virginia has had an approved coastal program since 1986.[3] Its official program document has not been revised in more than twenty years and is badly out of date (*see* OCRM and Virginia Council on the Environment,

---

2 The National Oceanic and Atmospheric Administration (NOAA) is the branch of the Department of Commerce responsible for administration of the CZMA. Within NOAA, CZMA responsibility is further delegated, through the National Ocean Service (NOS), to the Office of Ocean and Coastal Resource Management (OCRM).

3 *See* 51 Fed. Reg. 35543 (Oct. 6, 1986) (program approval).

Final Environmental Impact Statement and the Virginia Coastal Resources Management Program (July 1985) (cited below as *VCP FEIS*), available on line at http://unicorn.csc.noaa.gov/docs/shoreline/83b2d5.pdf (visited June 11, 2008)); but additional state programs have been added to the coastal program from time to time, based on new state legislation, by a series of "routine program changes" (*see* 15 C.F.R. § 923.84; *see also*, *e.g.*, http://www.deq.virginia.gov/coastal/documents/pubnot919.pdf (visited June 13, 2008); http://www.deq.virginia.gov/coastal/documents/pubnotrpi1906.pdf (visited June 13, 2008)). Those changes are reflected on various other Virginia Department of Environmental Quality (DEQ) web sites cited in this chapter.[4]

Section 304(1) of the Act, 16 U.S.C. § 1453(1), defines "coastal zone," in part, as

> the coastal waters (including the lands therein and thereunder) and the adjacent shorelands (including the waters therein and thereunder), strongly influenced by each other and in proximity to the shorelines of the several coastal states, and includes islands, transitional and intertidal areas, salt marshes, wetlands, and beaches. The zone extends … seaward to the outer limit of State title and ownership under the Submerged Lands Act (43 U.S.C. 1301 et seq.) …. The zone extends inland from the shorelines only to the extent necessary to control shorelands, the uses of which have a direct and significant impact on the coastal waters, and to control those geographical areas which are likely to be affected by or vulnerable to sea level rise….

The Virginia Coastal Zone definition is set out below.

Section 307(c)(3)(A) of the CZMA, 16 U.S.C. § 1456(c)(3)(A), gives coastal States with federally-approved Coastal Zone Management Plans, including Virginia, the authority to review federal license or permit applications for consistency with those Plans. As discussed below, a State "consistency objection" functions as a veto of a federal license or permit application, subject to review by the U.S. Secretary of Commerce.

---

[4] The VCP Final EIS refers to the Virginia Council on the Environment, but the Council on the Environment no longer exists and Virginia's Coastal Program is now administered by the DEQ.

Section 307(c)(3)(A) provides:

> After final approval … of a state's management program, any applicant for a required Federal license or permit to conduct an activity, in or outside of the coastal zone, affecting any land or water use or natural resource of the coastal zone of that state shall provide in the application to the licensing or permitting agency a certification that the proposed activity complies with the enforceable policies of the state's approved program and that such activity will be conducted in a manner consistent with the program. At the same time, the applicant shall furnish to the state or its designated agency a copy of the certification, with all necessary information and data.….

NOAA's regulations use the shorthand terminology "any coastal use or resource" and "effect on any coastal use or resource," in place of the statutory terms "any land or water use or natural resource of the coastal zone" and "affecting any land or water use or natural resource of the coastal zone." *See* 15 C.F.R. § 930.11(b), (g) (definitions). "These terms are not intended to alter the statutory requirement …. [They] are merely a simpler description of the statutory requirement." 65 Fed. Reg. 77124, 77129 (Dec. 8, 2000).

> The phrase "any coastal use or resource" means any land or water use or natural resource of the coastal zone. Land and water uses, or coastal uses ... include, but are not limited to, public access, recreation, fishing, historic or cultural preservation, development, hazards management, marinas and floodplain management, scenic and aesthetic enjoyment, and resource creation or restoration projects. Natural resources include biological or physical resources that are found within a State's coastal zone on a regular or cyclical basis. Biological and physical resources include, but are not limited to air, tidal and nontidal wetlands, ocean waters, estuaries, rivers, streams, lakes, aquifers, submerged aquatic vegetation, land, plants, trees, minerals, fish, shellfish, invertebrates, amphibians, birds, mammals, reptiles, and coastal resources of national significance. Coastal uses and resources also includes uses and resources appropriately described in a management program.

15 C.F.R. § 930.11(b).

What then is the meaning of "affecting any land or water use or natural resource of the coastal zone"? Is there a threshold of significance, or does any effect,

no matter how minuscule, require a consistency certification? According to § 930.11(g),

> The term "effect on any coastal use or resource" means *any reasonably foreseeable effect* on any coastal use or resource resulting from a Federal agency activity or federal license or permit activity …. Effects are not just environmental effects, but include effects on coastal uses. Effects include both direct effects which result from the activity and occur at the same time and place as the activity, and indirect (cumulative and secondary) effects which result from the activity and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects are effects resulting from the incremental impact of the federal action when added to other past, present, and reasonably foreseeable actions, regardless of what person(s) undertake(s) such actions. [Emphasis added.]

The Federal Register notice that formally issued the current CZMA regulations added that the Conference Report on the 1990 Coastal Zone Act Reauthorization Amendments (H.R. Conf. Rep. No. 964, 101st Cong., 2d Sess.) "makes it clear that the test for triggering consistency is not whether the effect is significant or substantial, but whether it is reasonably foreseeable." 65 Fed. Reg. 77124, 77130 (Dec. 8, 2000).

A State has six months to respond to an applicant's consistency certification, by either "concurring" or "objecting." Section 307(c)(3)(A) provides that "[i]f the state or its designated agency fails to furnish the required notification within six months after receipt of its copy of the applicant's certification, the state's concurrence with the certification shall be conclusively presumed." If the State *objects* to the certification, the federal agency is disabled from approving the application unless the State's objection is set aside on "appeal" to the U.S. Secretary of Commerce.

The word "appeal" may be misleading. The Secretary does not review a State's consistency objection on the merits, to determine whether the State has accurately determined that the application is inconsistent with its Coastal Plan. The CZMA only authorizes the Secretary to override an objection on the ground that the activity is "consistent with the objectives of this chapter or is otherwise necessary in the interest of national security" (*id.*), *despite* the State's finding that the activity is inconsistent with its Coastal Plan. *See* 15 C.F.R. § 930.120 ("the Secretary may find that a federal license or permit activity … which a State agency has found to be inconsistent with the enforceable policies of the management program, may be

federally approved because the activity is consistent with the objectives or purposes of the Act, or is necessary in the interest of national security") (emphasis added). Any challenge to the State's finding of inconsistency therefore must be taken to the State courts. *Cf.*, *e.g.*, *Roosevelt Campobello International Park Comm'n v. U.S. EPA*, 684 F.2d 1041, 1056 (1st Cir. 1982) (challenges to States' decisions under § 401 of the Clean Water Act may only be brought in State courts); *American Rivers v. Federal Energy Regulatory Commission*, 129 F.3d 99, 110-11 (2d Cir. 1997) (federal agencies do not have authority to review and reject state-imposed conditions for inconsistency with CWA § 401; a federal agency may only issue a license or permit with state-imposed conditions or deny the license or permit application).

The terms "consistent with the objectives of this chapter" and "necessary in the interest of national security" (the requirements for a Secretarial override) are defined in NOAA's regulations at 15 C.F.R. §§ 930.121 and 930.122. Briefly, a federally licensed or permitted activity is "consistent with the objectives or purposes of the Act" if (a) it "furthers the national interest as articulated in § 302 or § 303 of the Act, in a significant or substantial manner," (b) that national interest "outweighs the activity's adverse coastal effects, when those effects are considered separately or cumulatively," and (c) "[t]here is no reasonable alternative available which would permit the activity to be conducted in a manner consistent with the enforceable policies of the management program." § 930.121. The "national interest[s] … articulated in § 302 [and] § 303 of the Act" are summarized in the opening section of this chapter.

Application of some of those "national interest" factors is illustrated by a prominent Secretarial override of a North Carolina state consistency objection, in a case affecting eastern Virginia. In that case, the Secretary of Commerce found that the Lake Gaston pipeline project, which provides water from the Roanoke River to Virginia Beach and other localities in tidewater Virginia, "will foster *development of the coastal zone and coastal zone resources*, and thus furthers more than one of the objectives or purposes of the CZMA." *Decision and Findings in the Consistency Appeal of the Virginia Electric and Power Company from an Objection by the North Carolina Department of Environment, Health and Natural Resources* (May 19, 1994) (cited below as *Gaston Pipeline Consistency Decision*), at viii (emphasis added). *See also id.* at ix:

> The proposed project will contribute significantly to the national interest because it will allow the *beneficial use* of water resources of the coastal zone. Providing potable water for human consumption to a major metropolitan area constitutes a very high priority use among all beneficial uses of water. The record shows that the project will contribute significantly to the national interest

> because of the extent to which it will further and support *economic development in the coastal zone*, and the extent to which it will alleviate southeastern Virginia's projected water deficit. [Emphases added.]

A federally licensed or permitted activity "is 'necessary in the interest of national security' if a national defense or other national security interest would be significantly impaired were the activity not permitted to go forward as proposed." 15 C.F.R. § 930.122. As a practical matter, Secretaries of Commerce are not likely to override State consistency objections on national security grounds unless the Department of Defense or the Department of Homeland Security weighs in strongly in favor of the license or permit application. *See*, *e.g.*, *Gaston Pipeline Consistency Decision* at 53-54:

> Past decisions have established that "the regulatory criteria for an override based on Ground II establishes a difficult test."
>
> ….
>
> The Navy is the primary military service located in the Virginia Beach area. The Navy stated that the Department of Defense has a vital interest in efforts of the City to establish a water system that supplies installations and supports activities in the Hampton Roads area with a safe, adequate and dependable municipal water supply for three reasons: (l) operational readiness; (2) quality of life; and (3) support of local economy supplying military needs. In addition, the Navy stated that during the drought of 1980-81, when a 25 percent curtailment on water use was imposed, operations and readiness were impaired. Also, the Navy stated that readiness would be significantly impaired if uninterrupted usage of a safe, adequate and dependable water supply could not be assured.
>
> However, the Navy did not specifically state or find that a national security or defense interest would be "significantly impaired" if the Lake Gaston pipeline project did not go forward as proposed. General statements about the military's need for an adequate municipal water supply, and the likely adverse effects if such a supply is not available, do not meet the criteria for Ground II, which requires a finding specific to the particular project at issue in the appeal. The arguments presented in the various public comments were not of sufficient weight to overcome the failure of naval officials to link significant impairment of a national defense

> interest to the project's not going forward as proposed. [Footnotes omitted.]

Secretaries of Commerce have issued lengthy, detailed opinions in numerous CZMA appeals. Those decisions are available from the U.S. Department of Commerce's CZMA web site, at http://www.ogc.doc.gov/czma.htm (visited June 16, 2008).

Section 307 does not expressly authorize a State to add conditions to its concurrence with a consistency certification, but that authority is provided by regulation. See 15 C.F.R. § 930.4 (Conditional concurrences). The applicant must amend its federal application to incorporate the State conditions, and the federal licensing agency must approve the application as amended with those conditions.[5] The Federal Register notice which promulgated that regulation nevertheless provides pretty strong signals that some NOAA personnel, at least, are not thrilled with the concept. *See* 65 Fed. Reg. 77123, 77127-28 (Dec. 8, 2000): "Conditions of concurrence should not replace State objections and the identification of alternatives for activities that the State agency finds are inconsistent with its management program…. [C]onditional concurrences could seriously weaken the State authority granted by the CZMA consistency requirement …." *See also* 65 Fed. Reg. 20270, 20272 (April 14, 2000) (proposed rule). Virginia has exercised that authority, however, on several occasions. (The City of Newport News' King William Reservoir project (Corps of Engineers Clean Water Act § 404 discharge permit application) and Dominion Virginia Power's North Anna II nuclear generating plant (Nuclear Regulatory Commission early site permit application) are prominent examples.)

---

[5] 65 Fed. Reg. 77124 (Dec. 8, 2000), explains that those requirements are included because a State cannot, through the CZMA, enforce its conditions after it has concurred; because the CZMA does not require a Federal agency to adopt a State's conditions of concurrence; and because federal agencies are not required to enforce state conditions. If an applicant modifies its federal permit application pursuant to state conditions and the federal agency approves the amended application, however, "the Federal agency would be more likely to enforce the State's conditions (since the State conditions would be part of the federal permit)." *Id*. at 77128. (The CZMA does not give States *any* enforcement powers – the *only* power it gives them is the power to "veto" federal permits for inconsistency with enforceable policies of State coastal programs – but it also does not in any way affect States' enforcement powers under their own laws. *See* 15 C.F.R. § 930.5 (State enforcement action): "The regulations in this part are not intended in any way to alter or limit other legal remedies, including judicial review or State enforcement, otherwise available.")

Whether the CZMA authorizes a State to review a project located in another State for consistency with its Coastal Plan, and to veto a federal permit for such a project if it finds an inconsistency with its plan, has been a controversial issue in several cases.[6] It appears now to have been settled, in favor of allowing such interstate consistency reviews, by NOAA's CZMA regulations. *See* 15 C.F.R. §§ 930.150 - 930.157. "A federal activity may affect coastal uses or resources of a State other than the State in which the activity will occur. Effective coastal management is fostered by ensuring that activities having such reasonably foreseeable interstate coastal effects are conducted consistent with the enforceable policies of the management program of each affected State." *Id*., § 930.150(a).

What happens if an applicant provides the State agency a copy of its certification but without "all necessary information and data"? *See* 15 C.F.R. § 930.63(c):

> A State agency *objection* may be based upon a determination that the applicant has failed, *following a written State agency request*, to supply the information required pursuant to § 930.58 or other information necessary for the State agency to determine consistency. If the State agency objects on the grounds of insufficient information, the objection shall describe the nature of the information requested and the necessity of having such information to determine the consistency of the activity with the management program. [Emphases added.]

The regulations also provide an option short of a formal objection, however:

> State agencies and applicants … may mutually agree in writing to stay the six-month consistency review period. Such an agreement

---

[6] *See generally City of Virginia Beach v. Brown*, 858 F. Supp. 585 (E.D. Va. 1994) (dismissing as moot Virginia Beach's challenge to the State of North Carolina's jurisdiction to review the Lake Gaston water supply project – which is located entirely in Virginia but withdraws water from a river that flows into North Carolina – for consistency with the North Carolina state coastal plan, after the Secretary of Commerce sustained Virginia Beach's appeal from North Carolina's consistency objection; the opinion provides a brief recitation of the tangled history of the U.S. Commerce and Justice Departments' positions on issue of interstate consistency review in that one case). The regulations cited in the text were promulgated after the conclusion of the Lake Gaston case. *See* 65 Fed. Reg. 77124 (Dec. 8, 2000).

> shall … state a specific date on when the stay will end. The State agency shall provide a copy of the written agreement to the Federal agency and the Federal agency shall not presume State agency concurrence with an applicant's consistency certification when such a written agreement to stay the six-month consistency review period is in effect.

15 C.F.R. § 930.60(b).

Several other provisions of the federal CZMA are discussed below, in conjunction with related provisions of the Virginia Coastal Plan.

The Virginia Coastal Zone Management Program (VCP) was established in 1986, by an Executive Order of Governor Baliles which has been renewed by each successive Governor since that time.

A map of the Virginia Coastal Zone is attached at the end of this chapter. Virginia's Coastal Zone includes 29 counties, 17 cities and 42 incorporated towns, 5,000 miles of shoreline, and extends seaward to the three mile Territorial Sea boundary. It includes Virginia's Atlantic Ocean coastline and all of Virginia's Atlantic coast watershed; parts of the Chesapeake Bay and Albemarle-Pamlico Sound watersheds; and the Potomac, Rappahannock, York and James Rivers and their tributaries, up to as much as 100 miles inland. Any federally licensed or permitted activity, *whether it occurs* "*in or outside of the coastal zone*," must be accompanied by a consistency certification if it will "*affec[t] any land or water use or natural resource* of" Virginia's Coastal Zone. CZMA § 307(c)(3)(A), 16 U.S.C. § 1456(c)(3)(A).

A CZMA consistency certification must state "that the proposed activity complies with the enforceable policies of the state's approved program and that such activity will be conducted in a manner consistent with the program," CZMA § 307(c)(3)(A); and State objections may only be based on "enforceable policies" of the State program. 15 C.F.R. § 930.11(h).[7] The "enforceable policies" provision is a

---

[7] *See also* 15 C.F.R. § 930.58(a)(3): "Applicants shall demonstrate that the activity *will be consistent with the enforceable policies* of the management program. Applicants shall demonstrate *adequate consideration of policies which are in the nature of recommendations*. Applicants need not make findings with respect to coastal effects for which the management program does not contain enforceable or recommended policies." (Emphases added.)

key limitation on the reach of the certification requirement. That term is defined in the CZMA as follows:

> The term "enforceable policy" means *State policies which are legally binding* through constitutional provisions, laws, regulations, land use plans, ordinances, or judicial or administrative decisions, by which a State *exerts control* over private and public land and water uses and natural resources in the coastal zone.

16 U.S.C. § 1453(6a) (emphases added). The NOAA regulations add that such policies "must be sufficiently comprehensive and specific to regulate land and water uses, control development, and resolve conflicts among competing uses in order to assure wise use of the coastal zone." 15 C.F.R. § 923.40(a).

Those provisions indicate clearly that the CZMA does not add anything substantively to the powers that States already have under their own laws, except to attach the additional consequence of a federal permit veto to an applicant's failure to satisfy the requirements of such laws. The VCP thus "proposes no new state programs, organizations, regulations, or laws. It is based on an approach termed 'networking' which is a framework and process for linking *existing* Commonwealth programs, agencies, and laws into a system that will meet Federal requirements for an effective Commonwealth Coastal Resources Management Program." *VCP FEIS*, Part I: Overview (emphasis added).

Applicants for federal licenses or permits subject to CZM review therefore are required only to certify compliance with "enforceable policies" that are legally binding under state law, without regard to the CZMA. DEQ's policy and practice is that for a proposed project to be consistent with the VCP, the applicant must obtain and comply with all applicable permits and approvals. The DEQ's CZM Program Staff has primary responsibility for administration of the consistency review requirements of the CZMA and the VCP, but in those respects it acts largely in a clearinghouse capacity. In other words, it compiles and coordinates the responses of other agencies who are responsible for implementation of the enforceable policies of the coastal program – including other components of DEQ itself – to federal license and permit applicants' consistency certifications. Notwithstanding this apparent directness and simplicity, however, obtaining DEQ's concurrence in a consistency certification can be a difficult and time-consuming journey through the bureaucratic maze, at least in controversial cases.

The enforceable policies of the VCP consist of nine core programs:

(1) *Subaqueous Land Management*, administered by the Virginia Marine Resources Commission (VMRC) pursuant to Va. Code §§ 28.2-1200 through 28.2-1213;

(2) *Wetlands Management*, administered in part by the VMRC pursuant to Va. Code §§ 28.2-1300 through 28.2-1320 (tidal wetlands), and in part by the State Water Control Board (SWCB) and the DEQ pursuant to Va. Code §§ 62.1-44.15:20 through -44.15:23 (the Virginia Water Protection Permit program), which is discussed in a previous chapter of this manual;

(3) *Dunes Management*, administered by the VMRC pursuant to the Coastal Primary Sand Dune Protection Act, Va. Code §§ 28.2-1400 through 28.2-1420;

(4) *Fisheries Management*, administered by the VMRC pursuant to Va. Code §§ 28.2-200 through 28.2-713, the Department of Game and Inland Fisheries (DGIF) pursuant to Va. Code §§ 29.1-100 through 29.1-570, and the SWCB, VMRC, Virginia Institute of Marine Science, DGIF and the Department of Agriculture and Consumer Services pursuant to Va. Code §§ 3.1-249.59 through 3.1-249.62 (Tributyltin regulation);

(5) *Non-Point Source Water Pollution Control*, administered by the Department of Conservation and Recreation pursuant to Va. Code §§ 10.1-560, *et seq.*;

(6) *Point Source Water Pollution Control*, administered by the State Water Control Board pursuant to Va. Code § 62.1-44.15;

(7) *Shoreline Sanitation Control*, administered by the Department of Health pursuant to Va. Code §§ 32.1-163 through 32.1-165;

(8) *Air Pollution Control*, administered by the State Air Pollution Control Board pursuant to Va. Code § 10-1.1300; and

(9) *Coastal Lands Management*, a state-local cooperative program administered by the Division of Chesapeake Bay Local Assistance (in the Department of Conservation and Recreation) and local governments in eastern Virginia, pursuant to the Chesapeake Bay Preservation Act, Va. Code §§ 10.1-2100 through 10.1-2114, and Chesapeake Bay Preservation Area Designation and Management Regulations, 9 VAC 10-20-10 *et seq*.

The VCP also articulates "advisory policies (recommendations)," which "were established to serve as a discretionary guide during project planning." DEQ, "Federal Consistency Information Package,"

http://www.deq.virginia.gov/eir/pdf/fcman04.pdf (visited June 13, 2008) at 2. Advisory policies are not enforceable and may not be cited as grounds for a consistency objection, but federal agencies (and therefore federal license or permit applicants) nevertheless "should consider" and address them in consistency certifications. *Id.* at 5. The advisory policies of the VCP are discussed below, after completion of the discussion of mandatory (enforceable) policies.

The Act states without reservation that federal license and permit applicants must certify the consistency of any "activity, in or outside of the coastal zone, affecting any land or water use or natural resource of the coastal zone …." NOAA's regulations effectively modify that directive, however, by providing different sets of procedures for "listed" and "unlisted" activities. In brief, applicants are always required to submit certifications for listed activities (categories of "federal license or permit activities" named in the State Coastal Plan); but State coastal agencies must request OCRM's authorization to review unlisted activities, and they have only 30 days from notice of an application to make such a request. (Unlisted activities include activities "listed" by category but located outside the coastal zone, unless the State coastal management program "generally describe[s] the geographic location of such activities.") Section 930.53(a) of the NOAA regulations states the requirements for listed activities:

> State agencies shall develop a list of federal license or permit activities which affect any coastal use or resource, including reasonably foreseeable effects, and which the State agency wishes to review for consistency with the management program. The list shall be included as part of the management program, and the federal license or permit activities shall be described in terms of the specific licenses or permits involved (e.g., Corps of Engineers 404 permits, Coast Guard bridge permits). In the event the State agency chooses to review federal license or permit activities, with reasonably foreseeable coastal effects, outside of the coastal zone, it must generally describe the geographic location of such activities.

Section 930.54 generally governs unlisted activities:

> (a)(1) With the assistance of Federal agencies, State agencies should monitor unlisted federal license or permit activities (*e.g.*, by use of intergovernmental review process established pursuant to E.O. 12372, review of NEPA documents, FEDERAL REGISTER notices). *State agencies shall notify Federal agencies, applicants, and the Director* of unlisted activities

> affecting any coastal use or resource which require State agency review *within 30 days from notice of the license or permit application*, that has been submitted to the approving Federal agency, *otherwise the State agency waives its right to review the unlisted activity*. The waiver does not apply in cases where the State agency does not receive notice of the federal license or permit application.
>
> (2) Federal agencies or applicants should provide written notice of the submission of applications for federal licenses or permits for unlisted activities to the State agency. *Notice to the State agency may be constructive* if notice is published in an official federal public notification document or through an official State clearinghouse (*i.e.*, the FEDERAL REGISTER, draft or final NEPA EISs that are submitted to the State agency, or a State's intergovernmental review process). The notice, whether actual or constructive, shall contain *sufficient information for the State agency to learn of the activity, determine the activity's geographic location, and determine whether coastal effects are reasonably foreseeable*. [Emphases added.]

As provided by § 930.53(a)(2), § 930.54 also governs "listed activities occurring outside of the coastal zone for which a State has not generally described the geographical location of review."

The VCP lists licenses and permits subject to consistency review at pages X-9 and X-10.[8] Examples of such "listed activities" include Corps of Engineers permits under § 404 of the Clean Water Act (33 U.S.C. § 1344) and §§ 9 and 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. §§ 401, 403); FERC licenses for non-federal hydroelectric projects; Coast Guard permits for construction or modification of bridge structures across navigable waters; Federal Aviation Administration permits and licenses for the construction, operation, or alteration of airports; and

---

[8] *See also* http://www.deq.virginia.gov/eir/federal.html#activities (visited June 11, 2008). The enumeration of "Listed Federal Permit, License, Approval Activities" provided at the web site differs verbally but not substantively from the list in the VCP – even to the extent that both continue to list Interstate Commerce Commission approvals of the abandonment of rail lines, despite the fact that the ICC was abolished in 1995 and its functions either cancelled or transferred to the Surface Transportation Board. (*See* ICC Termination Act of 1995, 109 Stat. 803; 49 U.S.C. § 702.)

Nuclear Regulatory Commission permits and licenses required for the construction and operation of nuclear power plants. Applicants for such federal licenses and permits therefore must comply with the consistency certification requirements described above.

The advisory policies of the VCP (see above) apply in "Geographic Areas of Particular Concern" (GAPCs). The GAPCs identified in the VCP Final EIS include Wetlands; Spawning, Nursery, and Feeding Grounds; Coastal Primary Sand Dunes; Barrier Islands; Significant Wildlife Habitat Areas; Public Recreation Areas (public beaches and State Parks); Sand and Gravel Resources; Underwater Historic Resources; Coastal Natural Hazard Areas (Highly Erodible and High Hazard Areas; High Hazard Areas are those subject to coastal flooding); and Waterfront Development Areas (Commercial Ports, Commercial Fishing Piers and Community Waterfronts).

The advisory policies are stated in the VCP as priorities of use. The highest priority use in most instances, not surprisingly, is preservation (defined as "[t]he maintenance, in unaltered form, of any resource in its natural state, except when structural methods are deemed necessary to protect that resource from natural destruction"), followed by conservation ("[t]he limited (balanced with protection and/or replenishment) use of a resource, its products or associated indigenous life, provided the resource itself is not irreversibly damaged"). *VCP FEIS* at V-4. Other, generally lower priorities include commercial and recreational fishing, recreational hunting and fowling, agricultural (grazing), and development. Development is the lowest priority use of most areas, and the state discourages such action. The order of priority of use does vary to some extent from one GAPC to another, however. The highest priority of use of State Parks, for example, is recreation, followed in order by education, conservation and preservation. *Id.* at V-14 - 15. The highest priority of uses of Waterfront Development Areas of Particular Concern (Waterfront Development APCs) are development and/or redevelopment uses, specifically (1) Water access dependent activities (which have "by far the highest priority") and (2) "Activities significantly enhanced by a waterfront location and complementary to other existing and/or planned activities in a given waterfront area." *Id.* at V-24.