



COMMONWEALTH of VIRGINIA

Office of the Attorney General

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The Honorable Albert C. Pollard, Jr.
Member, House of Delegates
Post Office Box 508
Lively, Virginia 22507

Dear Delegate Pollard:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issue Presented

You inquire whether the Department of Conservation and Recreation has the authority to establish a “no swim” policy in waters that are adjacent to Virginia parks.

Response

It is my opinion that the Department may regulate swimming in public parks, natural preserves, and other areas over which the Department exercises supervisory authority, but lacks the authority to regulate swimming in other waters.

Background

You relate that the Department of Conservation and Recreation (“the Department”) has adopted a policy governing waters adjacent to certain Virginia parks. You state that the Department prohibits swimming in waters it does not own and allows only state park visitors to wade into public waters that are adjacent to certain Virginia parks.

Applicable Law and Discussion

The Department is a creature of statute, and its powers derive from statute.¹ The power of an agency of state government “is not strictly limited, however, to the narrow confines of the express language of the statute. “[E]very power expressly granted, or fairly implied from the language used, or which is necessary to enable [the Agency] to exercise the powers expressly granted, should and must be accorded.”²

The General Assembly has authorized the Department to take title to “state parks, state recreational areas, state trails, greenways, natural areas and natural area preserves.”³ Section 10.1-212

¹ *Muse v. Virginia Alcohol Bev. Control Bd.*, 9 Va. App. 74, 78, 384 S.E.2d 110, 112 (1989).

² *Id.* (quoting *Portsmouth v. Virginia Ry. & Power Co.*, 141 Va. 54, 61, 126 S.E. 362, 364 (1925)).

³ VA. CODE ANN. § 10.1-107 (Supp. 2010).

charges the Department with the responsibility of managing, developing and using “any lands purchased, leased or otherwise acquired” by the Department. The Department also has the responsibility of facilitating public use of parks and recreational areas.⁴

To carry out these responsibilities, the Department is empowered “to prescribe rules and regulations necessary or incidental to the performance of duties or execution of powers conferred by law,” to perform “acts necessary or convenient to carry out the duties conferred by law” and, finally, under the Administrative Process Act, to “promulgate regulations necessary to carry out the purposes and provisions of this subtitle.”⁵

Pursuant to this statutory authority, the Department has promulgated a regulation governing swimming in state parks.⁶ It provides that “[n]o person shall bathe, wade or swim in any waters *in any park* except at such times, and in such places as the department may designate as bathing areas, and unless so covered with a bathing suit as to prevent any indecent exposure of the person.”⁷ The Department also has published “management guidelines” for natural area preserves.⁸ Those guidelines provide that

[s]wimming is not an authorized activity on DCR-owned natural area preserves, due primarily to the issue of public safety. With no lifeguards or patrols in place on public beaches or waterways, responsible landowning public agencies cannot officially sanction swimming. Rather, in nearly all cases, they must prohibit or actively discourage it. On privately-owned natural area preserve, decisions to allow swimming or to prohibit it are the responsibility of the landowner.^{9]}

The Department has been provided broad authority to regulate the areas, including parks and natural area preserves, that fall within the purview of the Department. The Department can restrict who enters land managed by the Department and what they do once they are on the Department’s land. That Department’s authority includes the power to promulgate and enforce restrictions on swimming or wading on land for which the Department is responsible.¹⁰ There is no authority, however, that would permit the Department to regulate swimming in areas that are not managed by the Department. In the absence of such authority, the Department cannot regulate swimming in such areas.

⁴ Section 10.1-200 (2006).

⁵ Sections 10.1-104(4), (5) and (6) (Supp. 2010).

⁶ 4 VA. ADMIN. CODE § 5-30-170.

⁷ *Id.* (emphasis added).

⁸ Department of Conservation and Recreation, Natural Area Preserve Management Guidelines (Dec. 2000).

⁹ *Id.* at 4.

¹⁰ The land for which the Department is responsible may include land that is submerged in part. *See* VA. CODE ANN. § 28.2-1202(A) (2009) (“Subject to the provisions of § 28.2-1200, the limits or bounds of the tracts of land lying on the bays, rivers, creeks and shores within the jurisdiction of the Commonwealth, and the rights and privileges of the owners of such lands, shall extend to the mean low-water mark but no farther, except where a creek or river, or some part thereof, is comprised within the limits of a lawful survey.”). *See also* § 28.2-1200 (2009) (“All the beds of the bays, rivers, creeks and the shores of the sea within the jurisdiction of the Commonwealth, not conveyed by special grant or compact according to law, shall remain the property of the Commonwealth and may be used as a common by all the people of the Commonwealth for the purpose of fishing, fowling, hunting, and taking and catching oysters and other shellfish. ...”).

Whether it is wise or not for the Department to strictly regulate swimming does not render such regulations legally suspect. In considering the exercise of an agency's regulatory power, "the courts are not concerned with the wisdom or unwisdom of the act done. The only concern of the court is the reasonableness of the regulation promulgated. To hold otherwise would be to substitute judicial opinion for the legislative will."¹¹ When a policy or regulation does not infringe upon a suspect class or a fundamental right, the standard of review is highly deferential.¹² The courts must defer "if there is any reasonably conceivable set of facts that could provide a rational basis for the" measure under review.¹³ Under this standard, the Department rationally could conclude that the absence of lifeguards exposes the public to danger and would justify a prohibition on swimming that is limited to the land for which the Department is responsible. In other words, that policy may or may not be wise, but it does not lack a legal foundation.

Conclusion

Accordingly, it is my opinion that the Department may regulate swimming in public parks, natural preserves, and other areas over which the Department exercises supervisory authority, but lacks the authority to regulate swimming in other waters.

With warmest regards, I am

Very truly yours,

A handwritten signature in blue ink that reads "Ken C II". The signature is stylized, with the first name "Ken" and the last name "C" being prominent, followed by "II".

Kenneth T. Cuccinelli, II
Attorney General

¹¹ Flory v. Smith, 145 Va. 164, 168, 134 S.E. 360, 362 (1926).

¹² Advanced Towing Co. v. Fairfax Cty. Bd. of Supervisors, 280 Va. 187, 191, 694 S.E.2d 621, 623 (2010).

¹³ *Id.* at 192, 694 S.E.2d at 624.