

Laws of Virginia
Relating to the
Marine Resources of the
Commonwealth of Virginia

Chapter 13. Wetlands.

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Article 1. General Provisions.

§ 28.2-1300. Definitions.

As used in this chapter, unless the context requires a different meaning:

“Back Bay and its tributaries” means the following, as shown on the United States Geological Survey Quadrangle Sheets for Virginia Beach, North Bay, and Knotts Island: Back Bay north of the Virginia-North Carolina state line; Capsies Creek north of the Virginia-North Carolina state line; Deal Creek; Devil Creek; Nawney Creek; Redhead Bay, Sand Bay, Shipps Bay, North Bay, and the waters connecting them; Beggars Bridge Creek; Muddy Creek; Ashville Bridge Creek; Hells Point Creek; Black Gut; and all coves, ponds and natural waterways adjacent to or connecting with the above-named bodies of water.

“County, city, or town” means the governing body of the county, city, or town.

“Governmental activity” means any of the services provided by the Commonwealth or a county, city, or town to its citizens for the purpose of maintaining public facilities, including but not limited to, such services as constructing, repairing and maintaining roads; providing street lights and sewage facilities; supplying and treating water; and constructing public buildings.

“Nonvegetated wetlands” means unvegetated lands lying contiguous to mean low water and between mean low water and mean high water, including those unvegetated areas of Back Bay and its tributaries and the North Landing River and its tributaries subject to flooding by normal and wind tides but not hurricane or tropical storm tides.

“North Landing River and its tributaries” means the following, as shown on the United States Geological Survey Quadrangle Sheets for Pleasant Ridge, Creeds, and Fentress: the North Landing River from the Virginia-North Carolina line to Virginia Highway 165 at North Landing Bridge; the Chesapeake and Albemarle Canal from Virginia Highway 165 at North Landing Bridge to the locks at Great Bridge; and all named and unnamed streams, creeks and rivers flowing into the North Landing River and the Chesapeake and Albemarle Canal except West Neck Creek north of Indian River Road, Pocaty River west of Blackwater Road, Blackwater River west of its forks located at a point approximately 6400 feet due west of the point where Blackwater Road crosses the Blackwater River at the Village of Blackwater, and Millbank Creek west of Blackwater Road.

“Vegetated wetlands” means lands lying between and contiguous to mean low water and an elevation above mean low water equal to the factor one and one-half times the mean tide range at the site of the proposed project in the county, city, or town in question, and upon which is growing any of the following species: saltmarsh cordgrass (*Spartina alterniflora*), saltmeadow hay (*Spartina patens*), saltgrass (*Distichlis spicata*), black needlerush (*Juncus roemerianus*), saltwort (*Salicornia* spp.), sea lavender (*Limonium* spp.), marsh elder (*Iva frutescens*), groundsel bush (*Baccharis halimifolia*), wax myrtle (*Myrica* sp.), sea oxeye (*Bor-*

richia frutescens), arrow arum (*Peltandra virginica*), pickerelweed (*Pontederia cordata*), big cordgrass (*Spartina cynosuroides*), rice cutgrass (*Leersia oryzoides*), wildrice (*Zizania aquatica*), bulrush (*Scirpus validus*), spikerush (*Eleocharis* sp.), sea rocket (*Cakile edentula*), southern wildrice (*Zizaniopsis miliacea*), cattail (*Typha* spp.), three-square (*Scirpus* spp.), buttonbush (*Cephalanthus occidentalis*), bald cypress (*Taxodium distichum*), black gum (*Nyssa sylvatica*), tupelo (*Nyssa aquatica*), dock (*Rumex* spp.), yellow pond lily (*Nuphar* sp.), marsh fleabane (*Pluchea purpurascens*), royal fern (*Osmunda regalis*), marsh hibiscus (*Hibiscus moscheutos*), beggar's tick (*Bidens* sp.), smartweed (*Polygonum* sp.), arrowhead (*Sagittaria* spp.), sweet flag (*Acorus calamus*), water hemp (*Amaranthus cannabinus*), reed grass (*Phragmites communis*), or switch grass (*Panicum virgatum*).

"Vegetated wetlands of Back Bay and its tributaries" or "vegetated wetlands of the North Landing River and its tributaries" means all marshes subject to flooding by normal and wind tides, but not hurricane or tropical storm tides, and upon which is growing any of the following species: saltmarsh cordgrass (*Spartina alterniflora*), saltmeadow hay (*Spartina patens*), black needlerush (*Juncus roemerianus*), marsh elder (*Iva frutescens*), groundsel bush (*Baccharis halimifolia*), wax myrtle (*Myrica* sp.), arrow arum (*Peltandra virginica*), pickerelweed (*Pontederia cordata*), big cordgrass (*Spartina cynosuroides*), rice cutgrass (*Leersia oryzoides*), wildrice (*Zizania aquatica*), bulrush (*Scirpus validus*), spikerush (*Eleocharis* sp.), cattail (*Typha* spp.), three-square (*Scirpus* spp.), dock (*Rumex* sp.), smartweed (*Polygonum* sp.), yellow pond lily (*Nuphar* sp.), royal fern (*Osmunda regalis*), marsh hibiscus (*Hibiscus moscheutos*), beggar's tick (*Bidens* sp.), arrowhead (*Sagittaria* sp.), water hemp (*Amaranthus cannabinus*), reed grass (*Phragmites communis*), or switch grass (*Panicum virgatum*).

"Wetlands" means both vegetated and nonvegetated wetlands.

"Wetlands board" or "board" means a board created pursuant to § 28.2-1303.

"Wetlands zoning ordinance" means the ordinance set forth in § 28.2-1302. (1972, c. 711, § 62.1-13.2; 1973, c. 388; 1974, c. 297; 1975, c. 268; 1979, c. 524; 1982, c. 300; 1992, c. 836.)

Effective date. - Title 28.2 is effective October 1, 1992.

Law Review. - For note on purposes and types of wetlands regulation, see 58 Va. L. Rev. 876 (1972). For article, "Virginia Natural Resources Law and the New Virginia Wetlands Act," see 30 Wash. & Lee L. Rev. 19 (1973).

§ 28.2-1301. Powers and duties of the Commission.

A. The Commission may receive gifts, grants, bequests, and devises of wetlands and money which shall be held for the uses prescribed by the donor, grantor, or testator and in accordance with the provisions of this chapter. The Commission shall manage any wetlands it receives so as to maximize their ecological value.

B. The Commission shall preserve and prevent the despoliation and destruction of wetlands while accommodating necessary economic development in a manner consistent with wetlands preservation.

C. The Commission shall manage all unappropriated marsh or meadowlands lying on the Eastern Shore of Virginia which remain ungranted pursuant to the provisions of § 41.1-4.

D. In order to perform its duties under this section and to assist counties, cities, and towns in regulating wetlands, the Commission shall promulgate and periodically update guidelines which scientifically evaluate vegetated and nonvegetated wetlands by type and describe the consequences of use of these wetlands types. The Virginia Institute of Marine Science shall provide advice and assistance to the Commission in developing these guidelines by evaluating wetlands by type and continuously maintaining and updating an inventory of vegetated wetlands.

E. In developing guidelines or regulations under this chapter the Commission shall consult with all affected state agencies. Consistent with other legal rights, consideration shall be given to the unique character of the Commonwealth's tidal wetlands which are essential for the production of marine and inland wildlife, waterfowl, finfish, shellfish and flora; serve as a valuable protective barrier against floods, tidal storms and the erosion of the Commonwealth's shores and soil; are important for the absorption of silt and pollutants; and are important for recreational and aesthetic enjoyment of the people and for the promotion of tourism, navigation and commerce. (1972, c. 711, §§ 62.1-13.1, 62.1-13.4, 62.1-13.17; 1982, c. 300; 1990, c. 811; 1992, c. 836.)

Cross references. - As to application of the Open-Space Land Act to wetlands. see § 10.1-1700.

Law Review. - For survey of Virginia administrative law for the year 1971-1972, see 58 Va. L. Rev. 1159 (1972). For article assessing the adequacy of Virginia's water policy, see 14 Wm. & Mary L. Rev. 312 (1972). For article, "Virginia Natural Resources Law and the New Virginia Wetlands Act," see 30 Wash. & Lee L. Rev. 19 (1973). For comment on nonpoint pollution control in Virginia, see 13 U. Rich. L. Rev. 539 (1979). For article, "The Unresolved Structure of Property Rights in the Virginia Shore," see 24 Wm. & Mary L. Rev. 727 (1983).

Article 2. Wetlands Zoning Ordinance and Wetlands Boards.

§ 28.2-1302. Adoption of wetlands zoning ordinance; terms of ordinance.

Any county, city or town may adopt the following ordinance, which, after October 1, 1992, shall serve as the only wetlands zoning ordinance under which any wetlands board is authorized to operate. Any county, city, or town which has adopted the ordinance prior to October 1, 1992, shall amend the ordinance to conform it to the ordinance contained herein by October 1, 1992.

Wetlands Zoning Ordinance

§ 1. The governing body of _____ acting pursuant to Chapter 13 (§ 28.2-1300 et seq.) of Title 28.2 of the Code of Virginia, adopts this ordinance regulating the use and development of wetlands.

§ 2. As used in this ordinance, unless the context requires a different meaning:

“Back Bay and its tributaries” means the following, as shown on the United States Geological Survey Quadrangle Sheets for Virginia Beach, North Bay, and Knotts Island: Back Bay north of the Virginia-North Carolina state line; Capsies Creek north of the Virginia-North Carolina state line; Deal Creek; Devil Creek; Nawney Creek; Redhead Bay, Sand Bay, Shipps Bay, North Bay, and the waters connecting them; Beggars Bridge Creek; Muddy Creek; Ashville Bridge Creek; Hells Point Creek; Black Gut; and all coves, ponds and natural waterways adjacent to or connecting with the above-named bodies of water.

“Commission” means the Virginia Marine Resources Commission.

“Commissioner” means the Commissioner of Marine Resources.

“Governmental activity” means any of the services provided by this _____ (county, city, or town) to its citizens for the purpose of maintaining this _____ (county, city, or town) including but not limited to such services as constructing, repairing and maintaining roads; providing sewage facilities and street lights; supplying and treating water; and constructing public buildings.

“Nonvegetated wetlands” means unvegetated lands lying contiguous to mean low water and between mean low water and mean high water, including those unvegetated areas of Back Bay and its tributaries and the North Landing River and its tributaries subject to flooding by normal and wind tides but not hurricane or tropical storm tides.

“North Landing River and its tributaries” means the following, as shown on the United States Geological Survey Quadrangle Sheets for Pleasant Ridge, Creeds, and Fentress: the North Landing River from the Virginia-North Carolina line to Virginia Highway 165 at North Landing Bridge; the Chesapeake and Albemarle Canal from Virginia Highway 165 at North Landing Bridge to the locks at Great Bridge; and all named and unnamed streams, creeks and rivers flowing into the North Landing River and the Chesapeake and Albemarle Canal except West Neck Creek north of Indian River Road, Pocaty River west of Blackwater Road, Blackwater River west of its forks located at a point approximately 6400 feet due west of the point where Blackwater Road crosses the Blackwater River at the village of Blackwater, and Millbank Creek west of Blackwater Road.

“Person” means any individual, corporation, partnership, association, company, business, trust, joint venture, or other legal entity.

“Vegetated wetlands” means lands lying between and contiguous to mean low water and an elevation above mean low water equal to the factor one and one-half times the mean tide range at the site of the proposed project in the county, city, or town in question, and upon which is growing any of the following species: saltmarsh cordgrass (*Spartina alterniflora*), saltmeadow hay (*Spartina patens*), saltgrass (*Distichlis spicata*), black needlerush (*Juncus roemerianus*), saltwort (*Salicornia* spp.), sea lavender (*Limonium* spp.), marsh elder (*Iva frutescens*), groundsel bush (*Baccharis halimifolia*), wax myrtle (*Myrica* sp.), sea oxeye (*Borrchia frutescens*), arrow arum (*Peltandra virginica*), pickerelweed (*Pontederia cordata*), big cordgrass (*Spartina cynosuroides*), rice cutgrass (*Leersia oryzoides*), wildrice (*Zizania aquatica*), bulrush (*Scirpus validus*), spikerush (*Eleocharis* sp.), sea rocket (*Cakile edentula*), southern wildrice (*Zizaniopsis miliacea*), cattail (*Typha* spp.), three-square (*Scirpus* spp.), buttonbush (*Cephalanthus occidentalis*), bald cypress (*Taxodium distichum*), black gum (*Nyssa sylvatica*), tupelo (*Nyssa aquatica*), dock (*Rumex* spp.), yellow pond lily (*Nuphar* sp.), marsh fleabane (*Pluchea purpurascens*), royal fern (*Osmunda regalis*), marsh hibiscus (*Hibiscus moscheutos*), beggar’s tick (*Bidens* sp.), smartweed (*Polygonum* sp.), arrowhead (*Sagittaria* spp.), sweet flag (*Acorus calamus*), water hemp (*Amaranthus cannabinus*), reed grass (*Phragmites communes*), or switch grass (*Panicum virgatum*).

“Vegetated wetlands of Back Bay and its tributaries” or “vegetated wetlands of the North Landing River and its tributaries” means all marshes subject to flooding by normal and wind tides but not hurricane or tropical storm tides, and upon which is growing any of the following species: saltmarsh cordgrass (*Spartina alterniflora*), saltmeadow hay (*Spartina patens*), black needlerush (*Juncus roemerianus*), marsh elder (*Iva frutescens*), groundsel bush (*Baccharis halimifolia*), wax myrtle (*Myrica* sp.), arrow arum (*Peltandra virginica*), pickerelweed (*Pontederia cordata*), big cordgrass (*Spartina cynosuroides*), rice cutgrass (*Leersia oryzoides*), wildrice (*Zizania aquatica*), bulrush (*Scirpus validus*), spikerush (*Eleocharis* sp.), cattail (*Typha* spp.), three-square (*Scirpus* spp.), dock (*Rumex* sp.), smartweed (*Polygonum* sp.), yellow pond lily (*Nuphar* sp.), royal fern (*Osmunda regalis*), marsh hibiscus (*Hibiscus moscheutos*), beggar’s tick (*Bidens* sp.), arrowhead (*Sagittaria* sp.), water hemp (*Amaranthus cannabinus*), reed grass (*Phragmites communis*), or switch grass (*Panicum virgatum*).

“Wetlands” means both vegetated and nonvegetated wetlands.

“Wetlands board” or “board” means a board created pursuant to § 28.2-1303 of the Code of Virginia.

§ 3. The following uses of and activities in wetlands are authorized if otherwise permitted by law:

1. The construction and maintenance of noncommercial catwalks, piers, boathouses, boat shelters, fences, duckblinds, wildlife management shelters, footbridges, observation decks and shelters and other similar structures, provided that such structures are so constructed on pilings as to permit the reasonably unobstructed flow of the tide and preserve the natural contour of the wetlands;
 2. The cultivation and harvesting of shellfish, and worms for bait;
 3. Noncommercial outdoor recreational activities, including hiking, boating, trapping, hunting, fishing, shellfishing, horseback riding, swimming, skeet and trap shooting, and shooting on shooting preserves, provided that no structure shall be constructed except as permitted in subdivision 1 of this section;
 4. Other outdoor recreational activities, provided they do not impair the natural functions or alter the natural contour of the wetlands;
 5. Grazing, haying, and cultivating and harvesting agricultural, forestry or horticultural products;
 6. Conservation, repletion and research activities of the Commission, the Virginia Institute of Marine Science, the Department of Game and Inland Fisheries and other conservation-related agencies;
 7. The construction or maintenance of aids to navigation which are authorized by governmental authority;
 8. Emergency measures decreed by any duly appointed health officer of a governmental subdivision acting to protect the public health;
 9. The normal maintenance and repair of, or addition to, presently existing roads, highways, railroad beds, or facilities abutting on or crossing wetlands, provided that no waterway is altered and no additional wetlands are covered;
 10. Governmental activity in wetlands owned or leased by the Commonwealth or a political subdivision thereof; and
 11. The normal maintenance of manmade drainage ditches, provided that no additional wetlands are covered. This subdivision does not authorize the construction of any drainage ditch.
- § 4. A. Any person who desires to use or develop any wetland within this _____ (county, city, or town), other than for the purpose of conducting the activities specified in § 3 of this ordinance, shall first file an application for a permit directly with the wetlands board or with the Commission.

B. The permit application shall include the following: the name and address of the applicant; a detailed description of the proposed activities; a map, drawn to an appropriate and uniform scale, showing the area of wetlands directly affected, the location of the proposed work thereon, the area of existing and proposed fill and excavation, the location, width, depth and length of any proposed channel and disposal area, and the location of all existing and proposed structures, sewage collection and treatment facilities, utility installations, roadways, and other related appurtenances or facilities, including those on adjacent uplands; a description of the type of equipment to be used and the means of equipment access to the activity site; the names and addresses of owners of record of adjacent land and known claimants of water rights in or adjacent to the wetland of whom the applicant has notice; an estimate of cost; the primary purpose of the project; any secondary purposes of the project, including further projects; the public benefit to be derived from the proposed project; a complete description of measures to be taken during and after the alteration to reduce detrimental offsite effects; the completion date of the proposed work, project, or structure; and such additional materials and documentation as the wetlands board may require.

C. A nonrefundable processing fee shall accompany each permit application. The fee shall be set by the applicable governing body with due regard for the services to be rendered, including the time, skill, and administrator's expense involved.

§ 5. All applications, maps, and documents submitted shall be open for public inspection at the office designated by the applicable governing body and specified in the advertisement for public hearing required under § 6 of this ordinance.

§ 6. Not later than sixty days after receipt of a complete application, the wetlands board shall hold a public hearing on the application. The applicant, local governing body, Commissioner, owner of record of any land adjacent to the wetlands in question, known claimants of water rights in or adjacent to the wetlands in question, the Virginia Institute of Marine Science, the Department of Game and Inland Fisheries, the Water Control Board, the Department of Transportation, and any governmental agency expressing an interest in the application shall be notified of the hearing. The board shall mail these notices not less than twenty days prior to the date set for the hearing. The wetlands board shall also cause notice of the hearing to be published at least once a week for two weeks prior to such hearing in a newspaper of general circulation in this _____ (county, city, or town). The published notice shall specify the place or places within this _____ (county, city, or town) where copies of the application may be examined. The costs of publication shall be paid by the applicant.

§ 7. A. Approval of a permit application shall require the affirmative vote of three members of a five-member board or four members of a seven-member board.

B. The chairman of the board, or in his absence the acting chairman, may administer oaths and compel the attendance of witnesses. Any person may testify at the public hearing. Each witness at the hearing may submit a concise written statement of his tes-

timony. The board shall make a record of the proceeding, which shall include the application, any written statements of witnesses, a summary of statements of all witnesses, the findings and decision of the board, and the rationale for the decision.

C. The board shall make its determination within thirty days of the hearing. If the board fails to act within that time, the application shall be deemed approved. Within forty-eight hours of its determination, the board shall notify the applicant and the Commissioner of its determination. If the board fails to make a determination within the thirty-day period, it shall promptly notify the applicant and the Commission that the application is deemed approved. For purposes of this section, "act" means taking a vote on the application. If the application receives less than four affirmative votes from a seven-member board or less than three affirmative votes from a five-member board, the permit shall be denied.

D. If the board's decision is reviewed or appealed, the board shall transmit the record of its hearing to the Commissioner. Upon a final determination by the Commission, the record shall be returned to the board. The record shall be open for public inspection at the same office as was designated under § 5 of this ordinance.

§ 8. The board may require a reasonable bond or letter of credit in an amount and with surety and conditions satisfactory to it, securing to the Commonwealth compliance with the conditions and limitations set forth in the permit. The board may, after a hearing held pursuant to this ordinance, suspend or revoke a permit if the applicant has failed to comply with any of the conditions or limitations set forth in the permit or has exceeded the scope of the work described in the application. The board may, after a hearing, suspend a permit if the applicant fails to comply with the terms and conditions set forth in the application.

§ 9. In fulfilling its responsibilities under this ordinance, the board shall preserve and prevent the despoliation and destruction of wetlands within its jurisdiction while accommodating necessary economic development in a manner consistent with wetlands preservation.

§ 10. A. In deciding whether to grant, grant in modified form or deny a permit, the board shall consider the following:

1. The testimony of any person in support of or in opposition to the permit application;
2. The impact of the proposed development on the public health, safety, and welfare; and
3. The proposed development's conformance with standards prescribed in § 28.2-1308 of the Code of Virginia and guidelines promulgated pursuant to § 28.2-1301 of the Code of Virginia.

B. The board shall grant the permit if all of the following criteria are met:

1. The anticipated public and private benefit of the proposed activity exceeds its anticipated public and private detriment.
2. The proposed development conforms with the standards prescribed in § 28.2-1308 of the Code of Virginia and guidelines promulgated pursuant to § 28.2-1301 of the Code of Virginia.
3. The proposed activity does not violate the purposes and intent of this ordinance or Chapter 13 (§ 28.2-1300 et seq.) of Title 28.2 of the Code of Virginia.

C. If the board finds that any of the criteria listed in subsection B of this section are not met, the board shall deny the permit application but allow the applicant to resubmit the application in modified form.

§ 11. The permit shall be in writing, signed by the chairman of the board, and notarized. A copy of the permit shall be transmitted to the Commissioner.

§ 12. No permit shall be granted without an expiration date established by the board. Upon proper application, the board may extend the permit expiration date.

§ 13. No permit granted by a wetlands board shall in any way affect the applicable zoning and land use ordinances of this _____ (county, city, or town) or the right of any person to seek compensation for any injury in fact incurred by him because of the proposed activity. (1972, c. 711, §§ 62.1-13.1, 62.1-13.5; 1973, cc. 382, 388; 1975, c. 268; 1979, c. 418; 1982, c. 300; 1985, c. 541; 1988, c. 587; 1989, c. 360; 1992, c. 836.)

Cross references - As to application of the Open-Space Land Act to wetlands, see § 10.1-1700. As to adoption of coastal primary sand dune zoning ordinance, see § 28.2-1403.

Law Review - For survey of Virginia administrative law for the year 1971-1972, see 58 Va. L. Rev. 1159 (1972). For article assessing the adequacy of Virginia's water policy, see 14 Wm. & Mary L. Rev. 312 (1972). For article, "Virginia Natural Resources Law and the New Virginia Wetlands Act," see 30 Wash. & Lee L. Rev. 19 (1973). For comment on nonpoint pollution control in Virginia, see 13 U. Rich. L. Rev. 539 (1979). For article, "Public Access to Virginia's Tidelands: A Framework for Analysis of Implied Dedications and Public Prescriptive Rights," see 24 Wm. & Mary L. Rev. 669 (1983). For article, "The Unresolved Structure of Property Rights in the Virginia Shore," see 24 Wm. & Mary L. Rev. 727 (1983).

§ 28.2-1303. Appointment, terms, compensation, etc., of local wetlands boards; jurisdiction of county wetlands board over wetlands in town.

A. Every county, city, or town which enacts a wetlands zoning ordinance pursuant to this chapter shall create a wetlands board, consisting of five or seven residents of that jurisdiction appointed by the local governing body. All board members' terms shall be for five years, except that the term of at least one of the original appointments shall expire during each of the succeeding five years. The chairman of the board shall notify the local governing body at

least thirty days prior to the expiration of any member's term and shall promptly notify the local governing body if any vacancy occurs. Vacancies shall be filled by the local governing body without delay upon receipt of such notice. Appointments to fill vacancies shall be for the unexpired portion of the term. Members may serve successive terms. A member whose term expires shall continue to serve until his successor is appointed and qualified. Members of the board shall hold no public office in the county or city other than membership on the local planning or zoning commission, the local erosion commission, the local board of zoning appeals, or as director of a soil and water conservation board. When members of these local commissions or boards are appointed to a local wetlands board, their terms of appointment shall be coterminous with their membership on those boards or commissions.

B. Upon a hearing with at least fifteen days' notice thereof, any board member may be removed for malfeasance, misfeasance, or nonfeasance in office, or for other just cause, by the local governing body.

C. If a town does not enact a wetlands zoning ordinance within one year of its enactment by the surrounding county, application for permits to use and develop wetlands within the town shall be made to the county wetlands board.

D. Any county, city, or town which creates a local wetlands board pursuant to this section may compensate the members of the board in accordance with such terms and conditions as the locality may prescribe.

E. Notwithstanding any other provision of this section, the Town of Dumfries in Prince William County may enact a wetlands zoning ordinance pursuant to the provisions of this chapter. (1972, c. 711, §§ 62.1-13.6, 62.1-13.8; 1977, c. 15; 1978, c. 585; 1982, cc. 300, 446; 1983, c. 87; 1987, c. 62; 1992, c. 836.)

Law Review. - For survey of Virginia administrative law for the year 1971-1972, see 58 Va. L. Rev. 1159 (1972). For article, "Virginia Natural Resource Law and the New Virginia Wetlands Act," see 30 Wash. & Lee L. Rev. 19 (1973).

§ 28.2-1304. Officers, meetings, rules, etc., of wetlands boards; records and reports.

The board shall annually elect from its membership a chairman and such other officers as it deems necessary for terms of one year. For the conduct of any hearing and the taking of any action, a quorum shall be not less than three members of a five-member board nor less than four members of a seven-member board. The board may make, alter, and rescind rules and forms for its procedures, provided they are consistent with state law and local ordinances. The board shall keep a full public record of its proceedings and shall submit a report of its activities to the local governing body at least once each year. The board shall forward a copy of each report to the Commission. (1972, c. 711, § 62.1-13.7; 1977, c. 15; 1982, c. 446; 1992, c. 836.)

§ 28.2-1305. Local governing body to supply meeting space and services for wetlands board.

Every county, city, or town creating a wetland board shall supply the board with reasonable meeting space and necessary secretarial, clerical, legal, and consulting services. The local governing body is authorized to expend the public funds necessary to comply with the provisions of this section. (1972, c. 711, § 62.1-13.8; 1992, c. 836.)

Law Review. - For article, "Virginia Natural Resources Law and the New Virginia Wetlands Act," see 30 Wash. & Lee L. Rev. 19 (1973).

Article 3. Permits and Review.

§ 28.2-1306. Permits required for certain activities; issuance of permits by Commission.

A. It shall be unlawful for any person to conduct any activity which would require a permit under a wetlands zoning ordinance without such a permit. Until the county, city, or town in which a person proposes to conduct an activity which would require a permit under a wetlands zoning ordinance adopts the wetlands zoning ordinance, the person shall apply for a permit directly to the Commission, except as provided in subsection C of § 28.2-1303. If an applicant desires to use or develop wetlands owned by the Commonwealth, he shall apply for a permit directly to the Commission, and in addition to the application fee required by the wetlands zoning ordinance, he shall pay those fees and royalties assessed under § 28.2-1206.

B. Upon notification by any county, city, or town that it has adopted the wetlands zoning ordinance, the Commission shall immediately forward to that jurisdiction's wetlands board any pending permit application over which that board would have had jurisdiction if the ordinance had been in effect at the time the application was filed. However, if requested by the applicant, the application shall remain within the Commission's jurisdiction.

C. The Commission shall process permit applications in accordance with the provisions of the wetlands zoning ordinance and the Commissioner shall sign such permit; however, the Commission may designate one or more hearing officers who may, in lieu of the Commission, conduct public hearings as required under § 28.2-1302, and thereafter report their findings and recommendations to the Commission. (1972, c. 711, §§ 62.1-13.5, 62.1-13.9; 1973, cc. 382, 388; 1975, c. 268; 1979, c. 418; 1982, c. 300; 1985, c. 541; 1988, c. 587; 1989, c. 360; 1992, c. 836.)

Cross references. - As to adoption of coastal primary sand dune zoning ordinance, see § 28.2-1403.

Effective date. - Title 28.2 is effective October 1, 1992.

Law Review. - For survey of Virginia administrative law for the year 1971-1972, see 58 Va. L. Rev. 1159 (1972). For article, "Virginia Natural Resources Law and the New Virginia Wetlands Act," see 30 Wash. & Lee L. Rev. 19 (1973). For article, "Public Access to Virginia's Tidelands: A Framework for Analysis of Implied Dedications and Public Prescriptive Rights," see 24 Wm. & Mary L. Rev. 669 (1983). For article, "The Unresolved Structure of Property Rights in the Virginia Shore," see 24 Wm. & Mary L. Rev. 727 (1983).

§ 28.2-1307. Administrative procedures.

The Commission may, in conjunction with local wetlands boards and other affected state and federal agencies, develop administrative procedures to expedite the processing of applications for permits required under this chapter. Whenever an application is received by the Commission for a permit over which a local board has jurisdiction under a wetlands zoning ordinance, the Commission shall forward a copy of the application to that board within seven days. (1982, c. 300, § 62.1-13.5:2; 1992, c. 836.)

§ 28.2-1308. Standards for use and development of wetlands; utilization of guidelines.

A. The following standards shall apply to the use and development of wetlands and shall be considered in the determination of whether any permit required by this chapter should be granted or denied:

1. Wetlands of primary ecological significance shall not be altered so that the ecological systems in the wetlands are unreasonably disturbed; and
2. Development in Tidewater Virginia, to the maximum extent practical, shall be concentrated in wetlands of lesser ecological significance, in vegetated wetlands which have been irreversibly disturbed before July 1, 1972, in nonvegetated wetlands which have been irreversibly disturbed prior to January 1, 1983, and in areas of Tidewater Virginia outside of wetlands.

B. The provisions of guidelines promulgated by the Commission pursuant to § 28.2-1301 shall be considered in applying the standards listed in subsection A of this section. (1972, c. 711, § 62.1-13.3; 1982, c. 300; 1992, c. 836.)

Law Review. - For note on purposes and types of wetlands regulation, see 58 Va. L. Rev. 876 (1972). For article, "Virginia Natural Resources Law and the New Virginia Wetlands Act," see 30 Wash. & Lee L. Rev. 19 (1973). For article, "The Unresolved Structure of Property Rights in the Virginia Shore," see 24 Wm. & Mary L. Rev. 727 (1983).

Violation of Wetlands Act as pendent state claim. - It was proper for aggrieved riparian owner to allege a violation of the Wetlands Act as a pendent state claim to its suit brought pursuant to the Clean Water Act, 33 U.S.C. § 1251 et seq. *City of Norfolk v. Harold*, 662 F. Supp. 959 (E.D. Va. 1987) (decided under former § 62.1-13.3).

§ 28.2-1309: Not set out.

Editor's note. - This section, relating to emergency sand grading activities on nonvegetated wetlands located on the Atlantic Shoreline of Virginia Beach, was enacted by Acts 1984, c. 518, as amended by Acts 1992, c. 836. In furtherance of the general policy of the Virginia Code Commission to include in the Code only provisions having general and permanent application, this section, which is limited in its purpose and scope, is not set out here, but attention is called to it by this reference.

§ 28.2-1310. Commissioner to review all decisions of wetlands boards.

The Commissioner shall review all decisions of wetlands boards and request the Commission to review a decision only when he believes the board failed to fulfill its responsibilities under the wetlands zoning ordinance. (1972, c. 711, § 62.1-13.10; 1992, c. 836.)

Law Review. - For survey of Virginia administrative law for the year 1971-1972, see 58 Va. L. Rev. 1159 (1972). For article, "Virginia Natural Resources Law and the New Virginia Wetlands Act," see 30 Wash. & Lee Rev. 19 (1973).

§ 28.2-1311. When Commission to review decision of wetlands board.

A. The Commission shall review a decision of a wetlands board when any of the following events occur:

1. An appeal is taken from the decision by the applicant or the county, city, or town where the wetlands are located.
2. The Commissioner requests the review. In order to make the request, the Commissioner shall notify the board, applicant, and the county, city, or town where the wetlands are located within ten days of receiving notice of the board's decision.
3. Twenty-five or more freeholders of property within the county, city, or town in which the proposed project is located sign and submit a petition to the Commission requesting the review. The petition shall indicate those specific instances where the petitioners allege that the board failed to fulfill its responsibilities under the wetlands zoning ordinance.

B. All requests for review or appeal shall be made within ten days of the date of the board's decision. The Commission shall hear and decide the review or appeal within forty-five days of receiving the request for review or notice of appeal. A continuance may be granted by the Commission on a motion of the applicant, the freeholders specified in subsection A of this section, or the county, city, or town where the wetlands are located. (1972, c. 711, § 62.1-13.11; 1992, c. 836.)

Law Review. - For survey of Virginia administrative law for the year 1971-1972, see 58 Va. L. Rev. 1159 (1972).

§ 28.2-1312. Procedure for review; notice of decision.

A. The Commissioner shall cause notice of the review or appeal to be given to the board, the applicant, the county, city, or town where the wetlands are located, and where applicable, to the freeholders specified in § 28.2-1311.

B. The Commission shall hear the appeal or conduct the review of the record transmitted by the board to the Commissioner. The Commission may take such additional evidence as may be necessary to resolve any controversy as to the correctness of the record. The Commission, in its discretion, may also receive such other evidence as the ends of justice require.

C. The Commission shall notify the parties of its decision within forty-eight hours of the appeal or review hearing. (1972, c. 711, §§ 62.1-13.12, 62.1-13.14; 1992, c. 836.)

Law Review. - For article, "Virginia Natural Resources Law and the New Virginia Wetlands Act," see 30 Wash. & Lee L. Rev. 19 (1973).

§ 28.2-1313. When Commission to modify, remand, or reverse decision of wetlands board.

The Commission shall modify, remand, or reverse the decision of the wetlands board if:

1. The wetlands board, in reaching its decision, failed to fulfill its responsibilities under the wetlands zoning ordinance; or

2. The substantial rights of the appellant or the applicant have been prejudiced because the findings, conclusions, or decisions of the board are:

a. In violation of constitutional provisions;

b. In excess of statutory authority or jurisdiction of the wetlands board;

c. Made upon unlawful procedure;

d. Affected by other error of law;

e. Unsupported by the evidence on the record considered as a whole; or

f. Arbitrary, capricious, or an abuse of discretion. (1972, c. 711, § 62.1-13.13; 1975., c. 467; 1992, c. 836.)

Law Review. - For survey of Virginia administrative law for the year 1971-1972, see 58 Va. L. Rev. 1159 (1972).

§ 28.2-1314. Time for issuance of permit.

No permit shall be issued until the period within which a request for review or an appeal to the Commission may be made has expired. If a request for review is made or an appeal is noted, no activity for which the permit is required shall be commenced until the Commission has notified the parties of its determination. (1973, c. 65, § 62.1-13.14:1; 1992, c. 836.)

§ 28.2-1315. Judicial review.

An appeal from any Commission decision granting or denying a permit or from any Commission decision on the review of or appeal from a board decision may be taken by the applicant, any of the freeholders specified in subsection A of § 28.2-1311, or the county, city, or town where the wetlands are located. Judicial review shall be pursuant to the provisions of the Administrative Process Act (§ 9-6.14:1 et seq.). (1972, c. 711, § 62.1-13.15; 1982, c. 300; 1986, c. 615; 1992, c. 836.)

Law Review. - For article, "Virginia Natural Resources Law and the New Virginia Wetlands Act," see 30 Wash. & Lee L. Rev. 19 (1973).

Article 4. Enforcement and Penalties.

§ 28.2-1316. Investigations and prosecutions.

The Commission may investigate all projects, whether proposed or ongoing, which alter wetlands. The Commission may prosecute all violations of any order, rule, or regulation of the Commission or of a wetlands board, or violation of any provision of this chapter. Wetlands boards may investigate all projects, whether proposed or ongoing, which alter wetlands located within their jurisdiction. Wetlands boards may prosecute all violations of their orders and any violation of the wetlands zoning ordinance under which they were established. (1972, c. 711, § 62.1-13.16; 1975, c. 467; 1992, c. 836.)

Effective date. - Title 28.2 is effective October 1, 1992.

§ 28.2-1317. Monitoring, inspections, compliance, and restoration.

A. The Commissioner or board chairman may require a permittee to implement monitoring and reporting procedures they believe are reasonably necessary to ensure compliance with the provisions of the permit and this chapter.

B. The Commissioner or board chairman may require such on-site inspections as he believes are reasonably necessary to determine whether the measures required by the permit are being properly performed, or whether the provisions of this chapter are being violated. Prior to conducting any inspection, the Commissioner or board chairman shall provide no-

tice to the resident owner, occupier, or operator, who shall be given an opportunity to accompany the site inspector. If it is determined that there is a failure to comply with the permit, the Commissioner or board chairman shall serve notice upon the permittee at the address specified in his permit application or by delivery at the site of the permitted activities to the person supervising those activities and designated in the permit to receive the notice. The notice shall describe the measures needed for compliance and the time within which these measures shall be completed. Failure of the person to comply within the specified period is a violation of this section.

C. Upon receipt of a sworn complaint of a substantial violation of this chapter from the designated enforcement officer, the Commissioner or board chairman may, in conjunction with or subsequent to a notice to comply as specified in subsection B of this section, issue an order requiring all or part of the activities on the site to be stopped until the specified corrective measures have been taken. In the case of an activity not authorized under this chapter or where the alleged permit noncompliance is causing, or is in imminent danger of causing, significant harm to the wetlands protected by this chapter, the order may be issued without regard to whether the person has been issued a notice to comply pursuant to subsection B of this section. Otherwise, the order may be issued only after the permittee has failed to comply with the notice to comply. The order shall be served in the same manner as a notice to comply, and shall remain in effect for a period of seven days from the date of service pending application by the enforcing authority, permittee, resident owner, occupier, or operator for appropriate relief to the circuit court of the jurisdiction where the violation was alleged to have occurred. Upon completion of corrective action, the order shall immediately be lifted. Nothing in this section shall prevent the Commissioner or board chairman from taking any other action specified in § 28.2-1316.

D. Upon receipt of a sworn complaint of a substantial violation of this chapter from a designated enforcement officer, the Commission or a wetlands board may order that the affected site be restored to predevelopment conditions if the Commission or board finds that restoration is necessary to recover lost resources or to prevent further damage to resources. The order shall specify the restoration necessary and establish a reasonable time for its completion. The order shall be issued only after a hearing with at least thirty days' notice to the affected person of the hearing's time, place, and purpose, and shall become effective immediately upon issuance by the Commission or board. The Commission or board shall require any scientific monitoring plan they believe necessary to ensure the successful reestablishment of wetlands protected by this chapter and may require that a prepaid contract acceptable to the Commission or board be in effect for the purpose of carrying out the scientific monitoring plan. The Commission or board may also require a reasonable bond or letter of credit in an amount and with surety and conditions satisfactory to it securing to the Commonwealth compliance with the conditions set forth in the restoration order. The appropriate court, upon petition by the Commission or board, may enforce any such restoration order by injunction, mandamus, or other appropriate remedy. Failure to complete the required restoration is a violation of this chapter.

E. The duties of the Commissioner or the board chairman under this section may be delegated to their respective designees; however, these designees shall not be designated enforcement officers. (1987, c. 436, § 62.1-13.16:1; 1990, c. 811; 1992, c. 836.)

§ 28.2-1318. Violations; penalty.

Any person who knowingly, intentionally, or negligently violates any order, rule, or regulation of the Commission or of a wetlands board established pursuant to this chapter, any provision of this chapter or of a wetlands zoning ordinance enacted pursuant to this chapter, or any provision of a permit granted pursuant to this chapter is guilty of a Class 1 misdemeanor. Following a conviction, every day the violation continues is a separate offense. (1972, c. 711, § 62.1-13.18; 1992, c. 836.)

Cross references. - As to punishment for Class 1 misdemeanors, see § 18.2-11.

§ 28.2-1319. Injunctions.

Upon the petition of the Commission or a wetlands board to the circuit court of the county or city where any act is done or threatened which is unlawful under this chapter, the court may enjoin the unlawful act and order the defendant to take any steps necessary to restore, protect, and preserve the wetlands involved. This remedy shall be exclusive of and in addition to any criminal penalty which may be imposed under § 28.2-1318. (1973, c. 65, § 62.1-13.18:1; 1992, c. 836.)

§ 28.2-1320. Penalties.

A. Without limiting the remedies which may be obtained under this chapter, any person who violates any provision of this chapter or who violates or fails, neglects, or refuses to obey any Commission or wetlands board notice, order, rule, regulation, or permit condition authorized by this chapter shall, upon such finding by an appropriate circuit court, be assessed a civil penalty not to exceed \$25,000 for each day of violation. Such civil penalties may, at the discretion of the court assessing them, be directed to be paid into the treasury of the county, city, or town in which the violation occurred for the purpose of abating environmental damage to or restoring wetlands therein, in such a manner as the court may, by order, direct, except that where the violator is the county, city, or town itself, or its agent, the court shall direct the penalty to be paid into the state treasury.

B. Without limiting the remedies which may be obtained under this chapter, and with the consent of any person who has violated any provision of this chapter or who has violated or failed, neglected, or refused to obey any Commission or wetlands board order, rule, regulation, or permit condition authorized by this chapter, the Commission or wetlands board may provide, in an order issued by the Commission or wetlands board against such person, for the one-time payment of civil charges for each violation in specific sums, not to exceed

\$10,000 for each violation. Civil charges shall be in lieu of any appropriate civil penalty which could be imposed under subsection A of this section. Civil charges may be in addition to the cost of any restoration ordered by the Commission or a wetlands board. (1990, c. 811, § 62.1-13.18:2; 1992, c. 836.)