

ATTORNEY GENERAL AND VMRC ADVICE

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**Official Attorney General
Opinions On Matters
Related To Wetlands And
Dunes Issues**

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Wetlands Act And Land Office Act— Use or Encroachment Upon State-owned Wetlands of Eastern Shore— Public Right to Fish, Fowl or Hunt.

May 25, 1978

**The Honorable James E. Douglas, Jr.
Commissioner, Marine Resources Commission**

You ask whether § 41.1-4 of the Code of Virginia (1950), as amended, which is a provision of the Land Office Act, would prevent the Virginia Marine Resources Commission from permitting any use or encroachment upon the State-owned wetlands of the Eastern Shore.

Section 41.1-4 requires that the ungranted marsh or meadowlands of the Eastern Shore remain in public ownership and that they remain accessible to the public for fishing, fowling or hunting.¹ The Wetlands Act is directed primarily at the use and development of privately-owned wetlands by private property owners. The Act also permits, however, the granting of permits to use or develop ungranted, publicly-owned wetlands areas. Thus, § 62.1-13.9 provides that if “an applicant desires to use or develop wetlands owned by the Commonwealth, he shall apply for a permit directly to the Commission.”

Sections 41.1-4 and 62.1-13.9 both address the same subject matter—activities which may take place on wetlands. Statutes relating to the same subject or object must be construed together so that, if it can reasonably be done, effect is given to every provision of each. The provisions of one statute should not be construed to control those of another on the same subject matter unless, upon comparison, they are in irreconcilable conflict. II Sutherland, *Statutory Construction* § 5201 (1943); 73 Am. Jur.2d *Statutes* §§ 187-190 (1974).

I am of the opinion that these statutes do not conflict and that effect may be given to each. The Marine Resources Commission may grant a permit to “use or develop” the wetlands of the Eastern Shore. *See* § 62.1-13.9. Because no use may be permitted on any ungranted wetlands which would injure their public character, only limited activities or uses which do not require development of a private character may be authorized. Furthermore, no permit may be issued for an activity which would interfere with the public right to fish, fowl or hunt in the Eastern Shore marsh or meadowlands protected by § 41.1-4. Accordingly, the Commission should review each permit application for the use or development of these wetlands to determine that such interference will not occur. Any use listed in subsection 3 of § 62.1-13.5 must also be denied if it would interfere with public fishing, fowling, or hunting.

¹Section 41.1-4 provides as follows:

“All unappropriated marsh or meadowlands lying on the Eastern Shore of Virginia, which have remained ungranted, and which have been used as a common by the people of this state, shall continue as such common, and remain ungranted. Any of the people of this State may fish, fowl or hunt on any such marsh or meadowlands.

Wetlands Act. Public Notice and Hearing Required When Permittee Seeks Modification in Conditions and Limitations of Permit.

June 20, 1979

**The Honorable James E. Douglas, Jr., Commissioner
Marine Resources Commission**

You ask whether a local wetlands board followed lawful procedure when it modified a permit at an "administrative" meeting. The permit had been granted over a year earlier after a public hearing held pursuant to §§ 6 and 7 of the Wetlands Zoning Ordinance prescribed by § 62.1-13.5 of the Code of Virginia (1950), as amended.

You have advised me that the board follows the practice of holding an administrative meeting on the first Tuesday of each month. These meetings are scheduled on the annual calendar of the local government as to date and location, and are open to the public. There is no compliance, however, with § 6 of the Ordinance, as no agenda items are advertised for these meetings. The board also holds a public hearing or meeting on the third Tuesday of each month. Agenda items for these meetings are advertised in compliance with § 6 of the Ordinance.

The permit in question had been granted over a year earlier, but changed circumstances now prevent the permittees from complying with the conditions and limitations of the permit. At two recent administrative meetings, the permittees requested modifications in spoil sites and bond requirements. There was to be no change in the encroachment on the wetlands. At the first administrative meeting, the board decided to set the matter for public hearing. At the second administrative meeting, the board reconsidered and granted the modification. Appeal has been taken to the commission by 25 or more freeholders pursuant to § 62.1-13.11(3), alleging the modification was made upon unlawful procedure. *See* § 62.1-13.13(2)(c). I am advised that these appellants were not at the second administrative meeting, and did not know the modification was then under consideration.

Section 8 of the Ordinance provides that if a permittee fails to comply with the conditions and limitations in an issued permit, the permittee is entitled to a hearing before the permit can be suspended or revoked. Also, under § 9(a) of the Ordinance, the board may grant applications in modified form, but in so doing the board shall base its decision on matters raised through testimony of any person in support of or in rebuttal to the permit application. *See* Ordinance § 9(a)(1). Without notice pursuant to § 6 of the Ordinance, there may be no opportunity for rebuttal testimony.

Accordingly, I find that the decision of the board was made upon unlawful procedure. The commission should modify or reverse the decision of the board if the commission finds that the substantial rights of appellants have been prejudiced because of the unlawful procedure. *See* § 62.1-13.13(2).

Wetlands Act. Counties, Cities and Towns. Ordinances. Authority to Repeal Standard Wetlands Zoning Ordinance Once Adopted.

February 9, 1981

The Honorable Daniel M. Stuck
County Attorney for New Kent County

You ask whether a county, city or town is authorized to repeal the standard Wetlands Zoning ordinance provided for in § 62.1-13.5 of the Code of Virginia (1950), as amended, once the governing body has adopted the ordinance.

Section 62.1-13.5 provides that any county, city or town may adopt a standard Wetlands Zoning Ordinance, as set out in the statute. I find no specific provision in the wetlands law (Ch. 2.1 of Title 62.1) that authorizes repeal, but at the same time, I find no specific provision that prohibits repeal.

The adoption of ordinances is a legislative act, and ordinarily the legislative power of a local governing body is not limited or exhausted by one exercise, and an ordinance once adopted may be amended or repealed.¹

Accordingly, in the absence of any express statutory prohibition against repeal, I find that a county, city or town is authorized to repeal the standard Wetlands Zoning Ordinance provided for in § 62.1-13.5.²

¹See Opinion to the Honorable Stephen C. Harris, Commonwealth's Attorney for Louisa County, dated March 24, 1976, found in Report of the Attorney General (1975-1976) at 26; Opinion to the Honorable J. Richmond Low, Jr., Commonwealth's Attorney for King George County, dated July 14, 1980 (copy enclosed).

²Section 62.1-13.9 provides that when a county, city or town has not adopted the standard ordinance, applications for permits shall be made directly to the Marine Resources Commission, and the Commission shall process such applications in accordance with the standard ordinance. In the event a county, city or town repeals the standard ordinance, applications for permits shall again be made directly to the Commission under § 62.1-13.9.

Wetlands Act. Towns Do Not Have Option of Adopting Their Own Wetlands Zoning Ordinance Where County of Which They are a Part Has Had Wetlands Zoning Ordinance In Effect For Over One Year and Amends Such Laws To Conform With 1982 Amendments of § 62.1-13.5.

May 25, 1982

**The Honorable James E. Douglas, Jr., Commissioner
Marine Resources Commission**

You ask whether towns which previously lost their option to adopt a wetlands ordinance pursuant to § 62.1-13.6(b) of the Code of Virginia (1950), as amended, will again, in view of changes made in § 62.1-13.5, Ch. 300 [1982] Acts of Assembly, have authority to adopt their own ordinances if the county of which they are a part (1) amends its ordinance to conform with the recently enacted form of ordinance in § 62.1-13.5, or (2) fails to so amend its ordinance.

Chapter 300 requires the conformation of existing wetlands zoning ordinances to the new Act. Any non-conforming wetlands zoning ordinances will become ineffective January 1, 1983.

Section 62.1-13.6(b) provides that a town which “does not enact a wetlands zoning ordinance within one year from the time the county in which such town is found enacts a wetlands zoning ordinance, application for wetlands found in such town shall be made to the county wetlands board.” It is keyed to enactment of “a wetlands zoning ordinance.” It says nothing about later amendment. Towns were given an option by the original legislation to choose to administer their own programs, but this option was of limited duration. The provisions of § 62.1-13.6(b) suggest that, once a decision on local administration of the wetlands program was made, the need for certainty precluded leaving the town option perpetually available.

The fact that new legislation requires the conformance of all wetlands zoning ordinances to the amended law does not change this situation. Chapter 300 does not amend § 62.1-13.6(b). That provision clearly refers to enactment, not amendment. I am, therefore, of the opinion that your first question must be answered in the negative. A town does not have the option of adopting its own wetlands zoning ordinance merely because the county of which it is a part amends its wetlands zoning ordinance, as is required by the recent amendments to § 62.1-13.5.

The situation would be different, however, in the case posed by your second question. If the county should fail to bring its wetlands zoning ordinance into compliance with the amended law, that county would have no wetlands zoning ordinance in effect as of January 1, 1983. Section 62.1-13.6(b) only limits the adoption of town wetlands zoning ordinances where a county has enacted such an ordinance. Where a county enactment is no longer valid, there is nothing to prevent the town from enacting its own wetlands zoning ordinance. Because the obvious intent of the Wetlands Act is that the wetlands program be ultimately administered at the local level (*see* §§ 62.1-13.5 and 62.1-13.9), and because there would be no county regulations governing wetlands, the town would then be able to enact a wetlands zoning ordinance.

I am, therefore, of the opinion that your second question must be answered in the affirmative. If the county of which a town is a part does not amend its wetlands zoning ordinance to conform to the recent amendments to § 62.1-13.5, it will cease to have a wetlands zoning ordinance and a town may, at that time, adopt its own wetlands zoning ordinance.

**Wetlands Act. Subdivision Plat is Not a Plan as Contemplated By
Exemption Provision of Wetlands Act Unless it is a Monument to
Developer's Intention Diligently Pursued and it Represents Substantial
Expenditure.**

September 1, 1982

**The Honorable James E. Douglas, Jr., Commissioner
Marine Resources Commission**

You have asked that I reconsider a previous Opinion of this Office, found in the 1972-1973 Report of the Attorney General at 513, which discussed the meaning of the term “plan or plan of development” as used in the Wetlands Act.¹ Section 62.1-13.20 of the Code of Virginia provides, in pertinent part, that

“[n]othing in this chapter shall affect...(2) any project or development...for which, prior to July 1, 1972... a plan or plan of development thereof has been filed pursuant to ordinance or other lawful enactment....”

The 1973 Opinion stated that “a subdivision plat which clearly indicates lot lines and streets, the confines of which are identifiable, would constitute a plan or plan of development...” required for the exemption. You point out that a recent decision of the Circuit Court of Virginia Beach, in a case styled *City of Virginia Beach v. Virginia Marine Resources Commission, et al.* (C81-Z366-A), found a subdivision plat not to be a plan or plan of development for purposes of the above-quoted exemption from the provisions of the Wetlands Act.

The circuit court, in its Memorandum opinion issued May 19, 1982, interpreted “plan or plan of development” to mean either a “plan of development” submitted under a zoning ordinance adopted pursuant to § 15.1-491,² or a plan which would be equivalent to a plan of development, such as a site plan which had been filed and diligently pursued.

¹The Wetlands Act, § 62.1-13.1, *et seq.*, provides generally that all development of wetlands shall require prior permit from either a local wetlands board or the Marine Resources Commission.

²When the plat which was the subject of that case was recorded, State law did not require localities to enact subdivision ordinances, and Princess Anne County, which is now a part of the City of Virginia Beach, did not enact such an ordinance until December 22, 1952.

See Fairfax County v. Medical Structures, Inc., 213 Va. 355, 357-358, 192 S.E.2d 799, 801 (1972). The court reserved decision on whether a subdivision plat meeting the necessary criteria would be regarded as a “plan” for purposes of § 62.1-13.20.

The court's test for equivalency to a plan of development was a document filed pursuant to law, diligently pursued, which represented (1) a monument to the developer's intention (that is, his intended use of the property), and (2) a substantial good faith expense. The court determined the plat in the Virginia Beach case was only a schematic representation of land divided and had no purposes other than to facilitate the transfer of ownership of land within the plat. The developer was free to vacate the plat, resubdivide the property, or convey all or part of the parcels identified on it. The court further noted that the plat in that case did not dedicate property or serve to meet any of the other commitments required of developers recording subdivision plats under modern subdivision ordinances. Hence, it did not satisfy either the requirement of showing what the developer intended to build, or the requirement of a substantial expense. Accordingly, it was not exempt from the provisions of the wetlands ordinance.

The court's opinion limits the exemption from regulation to those projects for which developers have filed plans which represent a monument to the developer's intention diligently pursued and for which the developer has expended a substantial sum. This construction is sufficiently restrictive to accomplish the protection of undisturbed wetlands intended by the Wetlands Act. It also provides the protection intended by § 62.1-13.20(2) for those who have not yet begun construction but have so altered their position that in fairness they should be permitted to construct their project.

I am, therefore, of the opinion that a subdivision plat, standing alone, is not a plan or plan of development for purposes of the exemption provided in § 62.1-13.20(2), unless it is a monument to the developer's intention which has been diligently pursued and it represents a substantial good faith expense. This Opinion supersedes the Opinion found in the 1972-1973 Report of the Attorney General at 513 to the extent that the two Opinions are inconsistent.

Wetlands Act. Marine Resources Commission and Local Wetlands Boards Have No Authority to Regulate Federal Activities Affecting Federally Owned Wetlands.

September 1, 1982

**The Honorable James E. Douglas, Jr., Commissioner
Marine Resources Commission**

You have asked for my opinion as to whether, under the Wetlands Act and the Coastal Primary Sand Dune Protection Act, §§ 62.1-13.1, *et seq.*, and 62.1-13.21, *et seq.*, of the Code of Virginia, respectively,¹ local wetlands boards or the Marine Resources Commission can exercise jurisdiction over vegetated and non-vegetated wetlands and coastal primary sand dunes on lands owned by the federal government.

Article VI of the United States Constitution provides that federal law is the supreme law of the land. Thus, states cannot regulate or control the functioning of the federal government within their boundaries in any manner to impede the execution of constitutionally granted federal power, except where the federal government has voluntarily subjected itself to state regulatory processes. 1978-1979 Report of the Attorney General at 174. As pointed out in that Opinion, the 1977 Clean Water Act amended § 404 of the Federal Water Pollution Control Act, 33 U.S.C. § 1344(t), to expressly require that federal agencies comply with all substantive and procedural state requirements concerning the discharge of dredged or fill material. Therefore, to the extent that any project involves the discharge of dredged or fill material in any portion of the navigable waters within Virginia's jurisdiction, that activity is subject to regulation by State law.

The Coastal Zone Management Act of 1972, 16 U.S.C. § 1451, *et seq.*, does not waive federal immunity from state requirements, but § 1456(c)(2) directs federal agencies to ensure that any development project in the coastal zone is consistent, to the maximum extent practicable, with *approved* state coastal zone management programs. The requirements or approval are found in 16 U.S.C. § 1455(c). Because Virginia elected not to have an approved coastal zone management program, this provision is not applicable.*

¹Both acts require permits for use or development of "wetlands" and "coastal primary sand dunes" from either the Virginia Marine Resources Commission, or a wetlands board created pursuant to § 62.1-13.6. See §§ 62.1-13.5 §4(a) and 62.1-13.26.

*Virginia now has an "approved" coastal zone management plan and thus the directive to be consistent with state plans now applies in Virginia.—*Editor*

I am unaware of any federal laws which specifically waive federal immunity from state regulations for wetlands and primary sand dunes, as was done in the Clean Water Act of 1977. I am, therefore, of the opinion that the Marine Resources Commission and the local wetlands boards have no jurisdiction to regulate federal activities on federally owned wetlands and primary sand dunes unless (1) such activities involve the discharge of dredged or fill materials in any portion of the navigable waters within Virginia's jurisdiction or (2) federal immunity from state environmental requirements has been specifically waived in the legislation authorizing the project in question.

Fees. Local Wetlands Board May Charge Second Fee for Processing Modified Permit Application Where Justified By Cost of Processing Such Modified Application.

September 28, 1982

The Honorable Glenn B. McClanan
Member, House of Delegates

You have asked two questions concerning the processing of an application before a local wetlands board. You first ask whether an applicant for a permit from a local wetlands board must pay a second application fee for processing a modified application following the local board's denial of the first permit application, which denial was with leave to resubmit in modified form. The applicant appealed the ruling to the Marine Resources Commission, which, in turn, remanded the application to the local board for a review on the merits of the modified application.

The Wetlands Act, § 62.1-13.1, *et seq.*, of the Code of Virginia, provides generally that all non-exempt development of wetlands requires a prior permit from either a local wetlands board or the Marine Resources Commission. Section 62.1-13.5 provides the only form of Wetlands Zoning Ordinance allowed. Section 4(c) of that form deals with fees as follows:

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

Section 9(b) provides that if the local board denies the application, it shall do so “with leave to the applicant to resubmit the application in modified form.”

The statute authorizes the applicable governing body to set a fee to cover the cost of processing the application including the time, skill and administrator's expense involved. I am of the opinion that, if the amended application is equivalent to a new application which must be processed, the local wetlands board can determine that the cost involved in processing such amended application justifies the imposition of an additional fee.

You also ask whether consideration of the modified proposal must be readvertised. Sections 6 and 7 of the Wetlands Zoning Ordinance, as provided in § 62.1-13.5, require a hearing on each application after newspaper publication and mailed notification to certain designated persons. Any person may be heard at the hearing. This provision is clearly intended to

allow anyone interested to be heard, and to provide them with notice of their opportunity to be heard.

Because the modified application in the case referred to in your letter proposes to use pilings rather than fill, I assume that it is equivalent to a new application for purposes of advertising the hearing. The public has not had the statutorily required opportunity to be heard on the new proposal. *See* 1978-1979 Report of the Attorney General at 326. I am, therefore, of the opinion that a hearing on a modified application, which substantially differs from the original, must be advertised as required by the Wetlands Zoning Ordinance, as provided in § 62.1-13.5 (§ 6).

Wetlands Act. Members of Local Wetlands Board May Appear and Testify Before Marine Resources Commission Where Such Commission, in its Discretion, Decides to Hear Such Evidence.

December 16, 1982

The Honorable Glenn B. McClanan
Member, House of Delegates

You have asked whether it is appropriate for members of a local wetlands board to (1) appear and (2) testify before the Marine Resources Commission (the "Commission") in connection with a hearing of an appeal from a denial of an application by such local board where the local board members appearing and testifying previously participated in the vote to deny the application.

Decisions of a local wetlands board are subject to review by the Commission under the circumstances enumerated in § 62.1-13.11 of the Code of Virginia. The Commission is empowered by § 62.1-13.13 to modify, remand or reverse the decision of the wetlands board.¹

If the review by the Commission could be equated with appeals from lower courts, or limited to the record prepared by the board, I would be inclined to view as improper an appearance by a board member before the Commission. However, appeals from the board are not so limited. The procedure for review by the Commission is provided in § 62.1-13.12, which provides in pertinent part as follows:

¹Section 62.1-13.13 provides: "The Commission shall modify, remand or reverse the decision of the wetlands board:

- (1) If the decision of the wetlands board will not adequately achieve the policy and standards of this chapter or will not reasonably accommodate any guidelines which may have been promulgated by the Commission hereunder; or
- (2) If the substantial rights of the appellant or the applicant have been prejudiced because the findings, conclusions or decisions are
 - (a) In violation of constitutional provisions; or
 - (b) In excess of statutory authority or jurisdiction of the wetlands board; or
 - (c) Made upon unlawful procedure; or
 - (d) Affected by other error of law; or
 - (e) Unsupported by the evidence on the record considered as a whole; or
 - (f) Arbitrary, capricious, or an abuse of discretion."

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

This section gives the Commission full discretion to receive any evidence which the ends of justice require. If the Commission decides that testimony of members of the local wetlands board which adopted the position being challenged on appeal would be helpful, the Commission has the discretion to receive it. As long as the appellant has an opportunity to be present to hear and to rebut any adverse evidence presented, he will not be improperly prejudiced by such testimony.

I am, therefore, of the opinion that it is not inappropriate for members of a local wetlands board who participated in a vote denying an application to appear and testify in the appeal of such application before the Commission, provided the Commission, in its discretion, determines that such evidence is appropriate to permit it to render a proper decision.

Wetlands Act. Wetlands Permit Required for Setting of Pilings, for Construction of Residence on Pilings, for Construction on Pilings of Adjoining Open Wooden Deck.

January 10, 1983

The Honorable Owen B. Pickett
Member, House of Delegates

You have inquired whether the Wetlands Act (§ 62.1-13.1, *et seq.*, of the Code of Virginia) requires that a permit be obtained from the local wetlands board under the following fact situation: An owner of a parcel of wetlands proposes to improve his parcel by constructing a two-story frame residence on pilings with an adjoining open wooden deck on pilings. No fill dirt will be placed in the wetlands, and the pilings will permit the reasonably unobstructed flow of the tide and preserve the natural contour of the wetlands. The Army Corps of Engineers has advised that no Department of Army permit will be required.

You ask the following three questions. (1) Is a permit required for setting the pilings? (2) Is a permit required for construction of the dwelling on pilings? (3) Is a permit required for construction on pilings of the open wooden deck adjoining the dwelling?

Section 62.1-13.9 of the Wetlands Act requires a permit for any activity in wetlands if the local wetlands zoning ordinance contained in § 62.1-13.5 requires a permit for such activity. Section 4(a) of the local wetlands zoning ordinance requires a permit for “[a]ny person who desires to *use or develop* any wetland...other than for those activities specified in § 3 above....” (Emphasis added.) Section 3 sets forth the uses and activities on wetlands which are permitted without a permit. The pertinent portion of § 3 is subsection (a) which exempts:

“The construction and maintenance of non-commercial 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[.]”

I will address your first and second questions together, inasmuch as the pilings are to be set as part of the construction of a residence. The setting of pilings for a residence, and the construction of the house built on pilings, would clearly be a use or development of wetlands. Because no exemption is provided for such use or development, I am of the opinion that set-

ting pilings and building a house on pilings over wetlands would require a permit from the local wetlands board.

The last question is whether the construction on pilings of an open wooden deck adjoining the dwelling would be exempted. Section 3(a) permits the construction of observation decks and similar structures as long as they are built on pilings so as to permit the flow of the tide and preserve the contour of the wetlands. The exemptions listed describe small, isolated structures which are used intermittently and which would have minimal effect on the wetlands. The exemptions are not applicable to decks constructed in conjunction with residential development, where the effects of the pilings and the covering of wetlands by the deck would have to be added to the effects resulting from the construction of the dwelling house. I am, therefore, of the opinion that a permit must be obtained for the construction of an open wooden deck adjoining a residence.

Wetlands Act. Political Subdivision's Ownership of Easement or Right-of-Way Over Wetlands Exempts Its Governmental Activity Therein from Requirement to Get Wetlands Permit.

January 18, 1983

The Honorable William T. Parker
Member, Senate of Virginia

You have asked if a political subdivision undertaking governmental activities in wetlands through which it has an easement or right-of-way is exempt from the permit requirements of the Wetlands Act, § 62.1-13.1, *et seq.*, of the Code of Virginia.

Section 3(i) of the local wetlands zoning ordinance contained in § 62.1-13.5 reads as follows:

“§ 3. The following uses of and activities on wetlands are permitted, if otherwise permitted by law:

* * *

(i) Governmental activity on wetlands owned or leased by the Commonwealth of Virginia, or a political subdivision thereof...”

The question is whether wetlands subject to a political subdivision's easement or right-of-way are wetlands “owned or leased” by a political subdivision for the purpose of being permitted by this section. While your letter did not describe the easement or right-of-way, I will assume that such easement or right-of-way has been obtained by properly recorded deed or condemnation proceedings. I further assume that the proposed activity falls within the permissible limits of the terms of the deed.

An easement or right-of-way is a different estate from that which an “owner” is normally thought to have. Possession of an easement or right-of-way is, however, ownership of some of the rights to the land. The owner of an easement or right-of-way is the “dominant” tenant and has a right to use the land, thus making the record owner a servient tenant. In tax cases, the word “owner” has covered various types of ownership.

“The word ‘owner’ includes any person who has the usufruct, control or occupation of the land, whether his interest in it is an absolute fee, or an estate less than a fee,” *Stark v. City of Norfolk*, 183 Va. 282, 289, 32 S.E.2d 59 (1944), quoting from *Powers v. Richmond*, 122 Va. 328, 335, 94 S.E.803 (1918).

Interpreting “owned or leased by...a political subdivision” to include the ownership of an easement or right-of-way will not subvert the legislative purpose expressed in § 62.1-13.1, because the Commonwealth's political subdivisions will necessarily be guided by the wetlands policy established by the General Assembly.

For the foregoing reasons, I am of the opinion that local governmental activity on wetlands over which the local government has an easement or right-of-way is authorized by § 3(i) of the local wetlands zoning ordinance contained in § 62.1-13.5.¹

¹As previously stated, this conclusion is based upon an assumption that the activity falls within the permissible limits and terms of a properly recorded deed or condemnation proceeding.

**Parliamentary Procedure. local Wetlands Board May Adopt
Procedures Not Inconsistent With Local Ordinances or State Law.**

February 27, 1984

**The Honorable Owen B. Pickett
Member, House of Delegates**

You have requested my opinion on the Virginia Beach Wetlands Board's proposed procedure for acting on permit applications under Chapter 2.1 (§ 62.1-13.1 *et seq.*) of Title 62.1 of the Code of Virginia (the "Wetlands Act").

Virginia Beach has adopted the wetlands ordinance found in § 62.1-13.5 and has recently expanded its wetlands board to seven members as authorized by § 62.1-13.6. Section 62.1-13.5(4)(a) provides that anyone wishing to use or develop wetlands for purposes not otherwise permitted must file an application for a permit with the local wetlands board. Section 62.1-13.5(6) requires the wetlands board to hold a public hearing within 60 days of receipt of the application. Section 62.1-13.7 provides that a quorum of four members of a seven-member board is required for conducting a hearing or "taking of any action." Section 62.1-13.5(7) provides that:

"In *acting* on any application for a permit, the board shall grant the application upon the concurring vote of...four members of a seven-member board.... The board shall *make its determination* within thirty days from the hearing. If the board *fails* to *act* within such time, the application shall be deemed approved." (Emphasis added.)

Before considering the proposed procedure, it is helpful to consider the legislature's policy in the Wetlands Act. Section 62.1-13.1 sets forth this policy as one of preserving an irreplaceable resource and accommodating necessary development in a manner consistent with such preservation. To ensure this protection, the legislature required a majority vote of the whole board rather than just a majority vote of a quorum, for permits to alter wetlands. At the same time, the legislature wished to protect wetlands owners from indefinite procedural delays, by providing in § 62.1-13.5(7) for the automatic approval of applications not acted on within thirty days after the hearing. With the legislative intent in mind, I turn to the proposal.

As I understand the proposed procedure enclosed with your request, the chairman of the Virginia Beach Wetlands Board will call for a vote on an application after all persons have been heard and all deliberations completed. If four members of the seven-member board vote favorably, the application is approved, and the permit will issue. If less than four members vote favorably, even if there should be a 3-2 or a 3-1 majority for approval, or a 3-3 or

2-2 tie, the application will be deemed to be denied because of the lack of the statutorily required four concurring votes.

The taking of a vote on the application will be considered “acting” on the application, and the resulting approval or non-approval will be considered the “determination” of the board. If the application receives less than four concurring votes, this will be considered a board determination to deny the permit, and the board will so notify the applicant within forty-eight hours of its determination as required by SS 62.113.5(7). The vote on the application must, of course, be taken when there is a quorum present and must be taken within the applicable time limits.

Section 62.1-13.7 provides in part that “the board may make, alter and rescind rules and forms for its procedures, consistent with ordinances of the county, city or town and general laws of the Commonwealth, including this chapter.” Inasmuch as this section specifies that wetlands boards may make their own rules, the procedures selected by the Virginia Beach Wetlands Board will comply with statutory requirements if they are consistent with local ordinances, general laws of the Commonwealth and Chapter 2.1 of Title 62.1. The procedures are not inconsistent with any requirements of local ordinances or general law of which I am familiar. They are also consistent with the requirements of the Wetlands Act.

The procedures meet the requirement of § 62.1-13.5(7) that the board grant the application upon the concurring votes of four members of the seven-member board. Even if there is no such concurring vote, the procedures are sufficient to comply with the § 62.1-13.5(7) requirement of taking action or making a determination within thirty days of the public hearing. The “action” is the board’s vote. The “determination” required by that section is the action of granting or denying the application.

Section 62.1-13.5(7) contains no language expressly referring to the denial of an application. Nevertheless, I think it is clear that an application which is not approved by at least four concurring votes is necessarily denied. There is a third possibility, however, and that is when the board does not bring an application to a vote with a quorum present within the time limit. In that case the board has not taken any action, and the application is deemed approved 30 days after the hearing.

I am, therefore, of the opinion that the procedure proposed by the Virginia Beach Wetlands Board is consistent with its authority to form its own procedures and complies with the general laws of the Commonwealth including the Wetlands Act.

Wetlands. Local Wetlands Board May Consider Effects on Wetlands of Portions of Project Beyond Jurisdiction.

October 31, 1984

The Honorable William A. Pruitt
Commissioner, Marine Resources Commission

You have requested my opinion regarding the authority of a local wetlands board to regulate the length of structures known as groins (structures built out from a shore to prevent erosion) and other similar structures constructed as part of a single project extending beyond the wetlands in both the intertidal zone and below mean low water.

The Wetlands Act, § 62.1-13.1 *et seq.* of the Code of Virginia, provides for local wetlands boards and gives them authority to regulate wetlands which are contiguous to and above mean low water, including the intertidal zone.

The lands below mean low water, unless previously conveyed away, are owned by the Commonwealth. *See* § 62.1-1. Section 62.1-3 allows certain uses of these lands and gives the Marine Resources Commission (the “Commission”) authority to permit other uses. *See* 1981-1982 Report of the Attorney General at 242.

The Wetlands Act prohibits any use or development of wetlands without a wetlands permit issued by a wetlands board. *See* §§ 62.1-13.9 and 62.1-13.5(4)(a). A wetlands board must base its decision to issue or deny a permit on the impact the use or development will have on the public health and welfare as expressed by the Act's policy of preserving wetlands. Sections 62.1-13.5(9) and 62.1-13.1. The Commission is empowered by § 62.1-13.13 to modify, remand or reverse the decision of the wetlands board. *See* 1982-1983 Report of the Attorney General at 761.

In granting or denying any permit for the use of State-owned bottom lands, the Commission must consider the effect of the project “upon the wetlands of the Commonwealth, except when its effect upon said wetlands has been or will be determined under the provisions of Chapter 2.1 (§ 62.1-13.1 *et seq.*) [The Wetlands Act]....” Section 62.1-3, ¶ 6.

By reading a wetlands board's authority to carry out the Commonwealth's strong policy favoring wetlands preservation, together with the deference to Wetlands Act decisions contained in § 62.1-3, I conclude that a local wetlands board should consider the impact on wetlands from the total project, including that portion of the project resting on subaqueous lands beyond the wetland. Although not expressly authorized to do so by statute, regulation of the length of a structure is vital to exercising the authority to regulate the use of wet-

lands. Whether such consideration will require imposition of a limitation on the length of structures located below mean low water is a factual determination which must be made on a case-by-case basis. That decision is subject to review by the Commission. If the wetlands board does not consider the wetlands impact of the total project, the Commission must consider, pursuant to § 62.1-3, the effect of such a subaqueous project on wetlands, when it determines whether or not to grant a permit to use subaqueous lands.

I am, therefore, of the opinion that a local wetlands board is authorized to regulate the length of a structure which is constructed through both the intertidal zone and channelward of mean low water, subject to superior jurisdiction of the Commission to modify or reverse the decision.

Wetlands. Repair or Replacement of Bulkheads Exempt from Permit Requirements as Long as No Additional Wetlands Covered.

December 19, 1984

The Honorable John H. Foote
County Attorney for Prince William County

This letter is in response to your request for an interpretation of the Wetlands Act, § 62.1-13.1 *et seq.* of the Code of Virginia, as it pertains to bulkheads and their repair. Your inquiries are motivated by a proposal to completely remove an existing wooden bulkhead and replace it with new metal materials. Such operation will disturb nonvegetated wetlands. You did not indicate if additional wetlands will be covered by the construction.

Section 62.1-13.5 authorizes counties, cities and towns to adopt a wetlands zoning ordinance. The provisions are specified in the statute. Section 3 of the ordinance exempts certain uses of wetlands from the necessity of obtaining a wetlands permit. It reads, in pertinent part, as follows:

“The following uses of and activities on wetlands are permitted, if otherwise permitted by law:

* * *

(h) The *normal maintenance, or addition* to presently existing roads, highways, railroad beds, or the facilities of any person, firm, corporation, utility, federal, State, county, city or town abutting on or crossing wetlands, *provided* that no waterway is altered and *no additional wetlands are covered....*” (Emphasis added.)

Your first inquiry is whether bulkheads are “facilities,” as described in SS 3(h) of an ordinance authorized in § 62.1-13.5. When reading a statute, the general rule is that its words should be given their usual, commonly understood meaning. *See The Covington Virginian v. Woods*, 182 Va. 538, 29 S.E.2d 406 (1944); 1980-1981 Report of the Attorney General at 58. The commonly understood meaning of “facility” is “something...that is built...installed, or established to perform some particular function....” *Webster’s Third New International Dictionary* 812 (1968). The same publication defines “bulkhead” as a device designed to resist pressure or shut off water, especially “the retaining wall along a waterfront.” A bulkhead is commonly used to perform a particular function: to prevent the erosion of the bank of a waterway or to contain fill material; accordingly, a bulkhead comes within the broad definition of “facility.” I am, therefore, of the opinion that bulkheads are included within the word

“facilities” in § 3(h), and that the normal maintenance, repair or additions to a bulkhead would be permitted under that section if no further wetlands were covered.

Your second question is whether the phrase “normal maintenance, repair or addition to” in § 3(h) would include the complete replacement or reconstruction of a bulkhead in the same location. It is my understanding that such replacement may disturb existing nonvegetated wetlands, but you did not state whether it will result in the *covering of any additional wetlands*. The answer to your inquiry hinges upon that fact.

The exemption contained in § 3(h) applies not only to maintenance and repair but also to an “addition to” a facility, the key condition being that “no additional wetlands are covered.” I am advised that when a bulkhead begins to suffer serious deterioration, a common practice is to completely replace it. The replacement may occupy the exact location or it may be constructed seaward of the existing bulkhead. If not built on the same location, it would necessarily mean that additional wetlands will be covered by the facility.

I am, therefore, of the opinion that replacement of a bulkhead is within the contemplation of “normal maintenance, repair or addition to presently existing...facilities....” If, however, any additional wetlands will be covered, such replacement will require a wetlands permit inasmuch as it would not then be exempted as provided in § 3(h) of the wetlands ordinance.

Counties, Cities and Towns. Zoning. Restrictions on Private, Noncommercial Piers Constructed By Riparian Landowners. Permissible Exercise of Zoning Power.

October 22, 1985

The Honorable W. Tayloe Murphy, Jr.
Member, House of Delegates

You inquire as to a local governing body's authority to regulate, by zoning ordinance, private, noncommercial piers constructed by riparian landowners beyond the mean low water line of their properties into State waters. You also inquire as to other sources of regulation affecting riparian landowners who wish to construct private, noncommercial piers.

There are three possible sources of regulation at the State and local level, including the local governing body, the Virginia Marine Resources Commission ("VMRC"), and the local Wetlands Board.¹

Comprehensive zoning powers have been delegated by statute to counties and municipalities. *See* Art. 8, Ch. 11, Title 15.1 of the Code of Virginia, § 15.1-486 *et seq.* Section 15.1-486 authorizes local governing bodies to restrict and otherwise regulate:

- "(a) The use of land, buildings, structures and other premises for agricultural, business, industrial, residential, flood plain and other specific uses;
- (b) The size, height, area, bulk, location, erection, construction, reconstruction, alteration, repair, maintenance, razing, or removal of structures;
- (c) *The areas and dimensions of land, water, and air space to be occupied by buildings, structures and uses....*" (Emphasis added.)

¹A riparian landowner must also comply with the general permit requirements of the United States Army Corps of Engineers.

The purpose of zoning ordinances is to promote the health, safety or general welfare of the public. Among the purposes to be considered by such ordinances are:

“(1) to provide for adequate light, air, convenience of access, and safety from fire, flood and other damages;

* * *

(3) to facilitate the creation of a convenient, attractive and harmonious community;

* * *

(6) to protect against one or more of the following: overcrowding of land, undue density of population in relation to the community facilities existing or available, obstruction of light and air, danger and congestion in travel and transportation, or loss of life, health, or property from fire, flood, panic or other dangers....”

Section 15.1-489.

A prior Opinion of this Office addressed the similar question of whether a local government may enact a zoning ordinance restricting the erection of structures on the beaches and shores of the locality. The Opinion concludes that such a restriction is permissible and consistent with the purposes for which a zoning ordinance may be enacted. *See* 1977-1978 Report of the Attorney General at 518.² In my opinion, a local government may, by ordinance, *reasonably* regulate the construction of private, noncommercial piers, consistent with the purposes for which zoning ordinances may be enacted.³

²Compare 1983-1984 Report of the Attorney General at 475 (flood plain regulations in local zoning ordinances which restrict property development not facially invalid).

³As described in the concluding paragraph of this Opinion, the locality's zoning regulations must be reasonable. They may not be arbitrary. If a landowner believes the zoning ordinance to be arbitrary, he may seek judicial review in an appropriate proceeding.

Accord People v. Anton, 431 N.Y.S.2d 807, 105 Misc.2d 124 (1980); *Harbor Island, Etc. v. Bd. of Cty. Com'rs*, 407 A.2d 738 (Md. 1979); *Itasca County v. Rodenz*, 268 N.W.2d 423 (Minn. 1978); *Town of Islip v. Powell*, 358 N.Y.S.2d 985, 78 Misc.2d 1007 (1974); *Brady v. Board of Appeals of Westport*, 204 N.E.2d 513 (Mass. 1965).⁴

The General Assembly also has enacted in Title 62.1 a comprehensive statutory scheme concerning the uses of watercourses and wetlands, and the Commonwealth's policies concerning such uses. Certain of the materials which were provided to you suggest that a local governing body has no authority to regulate private, noncommercial piers because such structures are statutorily authorized and exempted from regulation by any local wetlands board. See § 62.1-13.5. I do not share that conclusion.

A riparian landowner has a common law right to construct a pier or wharf opposite his riparian lands, subject to reasonable regulation by the State. See *Grinels v. Daniel*, 110 Va. 874, 877, 67 S.E. 534 (1910); *Taylor v. Commonwealth*, 102 Va. 759, 771, 47 S.E. 875 (1904); 1975-1976 Report of the Attorney General at 215. This common law right has been codified in § 62.1-164 as the right to erect a private, noncommercial pier or wharf in a watercourse opposite the land, subject to the conditions that navigation not be obstructed nor the private rights of any person injured. The existence of a riparian landowner's right to "wharf out" is not absolute under the common law or under § 62.1-164. Where the legislature has delegated to localities the authority to regulate the rights of riparian landowners, such regulation is not inconsistent with § 62.1-164.

Section 62.1-3(10) provides statutory authorization for "the placement of private piers for noncommercial purposes by owners of the riparian lands in the waters opposite such riparian lands, *provided such private shall not extend beyond the navigation line or lawful private pier lines established by proper authority.*" (Emphasis added.) This authority operates to exempt private piers from the permit requirements of VMRC for encroachments on subaqueous beds which are the property of the Commonwealth.

⁴Section 15.1-1031 provides that the boundary of every county, city or town bordering on the Chesapeake Bay and its tidal tributaries or the Atlantic Ocean shall embrace all wharves, piers and docks. See also § 15.1-11.3, which authorizes counties, cities and towns to adopt ordinances requiring the removal, repair or securing of wharves and piers which might constitute an obstruction or hazard.

Section 62.1-13.5 sets out a “Wetlands Zoning Ordinance” which may be adopted by a local governing body. Section 3 of the Wetlands Zoning Ordinance provides, in pertinent part, as follows:

“The following uses of and activities on wetlands are permitted, *if otherwise permitted by law*:

(a) 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....” (Emphasis added.)

Those uses permitted by § 3 of the Wetlands Zoning Ordinance are exempted from the application and permit process set out in § 4. The exemption of private piers from the permit requirements of VMRC and the permit process under a local Wetlands Zoning Ordinance is based on the legislative determination that piers and other structures built on pilings permit the continued flow of the tide and preserve the contour of the wetlands. Also, such structures are generally small, isolated structures which are used intermittently and which would have minimal effect on the wetlands. *See* 1982-1983 Report of the Attorney General at 765. Finally, they must be otherwise permitted by law.

To summarize, in enacting § 62.1-164, the General Assembly intended to preserve the common law right of riparian landowners to erect private, noncommercial piers and wharves, subject to reasonable State regulation. Private piers are exempted by § 62.1-3(10) from VMRC permit requirements which restrict most uses which encroach on subaqueous beds owned by the Commonwealth. Under a Wetlands Zoning Ordinance adopted by a locality, a private pier is a use of right and, therefore, is exempt from the application and permit procedure of that particular ordinance. *See* § 62.1-13.5 (§§ 3 and 4). In § 15.1-486(c), however, the General Assembly has delegated to localities the authority through zoning ordinances to regulate water space to be occupied by structures and uses.

It is a basic rule of statutory construction that when construing statutes on the same subject matter *in pari materia*, the statutes should be harmonized if possible. See, e.g., 1982-1983 Report of the Attorney General at 484. Construing the above statutes together in accordance with this basic rule, I am of the opinion that the regulation of private, noncommercial piers and wharves is a permissible exercise of a locality's zoning power, subject to the same requirements as to reasonableness and constitutional limitations as are other zoning restrictions.⁵ See generally 1983-1984 Report of the Attorney General, *supra* note 2. In the event a riparian landowner is subject to arbitrary or unreasonable action by zoning officers or subject to an arbitrary or unreasonable provision of a zoning ordinance, he may apply for judicial review. See *City of Richmond v. County Board*, 199 Va. 679, 687, 101 S.E.2d 641 (1958).

⁵A related question is whether local limitations on a riparian landowner's right to construct private, noncommercial piers are inconsistent with the principle that the property of the Commonwealth is not subject to local zoning restrictions. See Reports of the Attorney General: 1981-1982 at 467; 1971-1972 at 103. As noted above, the subaqueous beds of the bays, rivers, creeks and shores of the sea are the property of the Commonwealth unless conveyed by special grant. See § 62.1-1. Riparian landowners, however, have substantial property rights derived from their status. These rights include the right to "wharf out," discussed above, and to sever and alienate riparian rights as a separate property interest. See *Marine Resources Commission v. Forbes*, 214 Va. 109, 197 S.E.2d 195 (1973); *Thurston v. City of Portsmouth*, 205 Va. 909, 140 S.E.2d 678 (1965). The character of an area could not be preserved if a riparian landowner were to be permitted to use property rights derived from his status to circumvent other validly enacted limitations on his property rights. Compare *Harbor Island, Etc.*, 407 A.2d at 747. In other words, the State's use of State-owned bottom is not subject to local regulation, but the exercise of a riparian landowner's property rights which encroach on State-owned bottom is validly subject to local regulation.

Waters, Ports And Harbors: Wetlands - Coastal Primary Sand Dune Protection Act.

No conflict exists between compliance with time requirements to hold hearing and make decision on application under Wetlands Act and concurrent prosecution of violations; issuance of permit and decision to prosecute separate issues.

August 5, 1988

The Honorable Robert Tata
Member, House of Delegates

You ask two questions concerning how the Virginia Beach Wetlands Board (the "Board") should administer the Wetlands Act, §§ 62.1-13.1 through 62.1-13.20 of the Code of Virginia, and the Coastal Primary Sand Dune Protection Act, §§ 62.1-13.21 through 62.1-13.28, in light of the time requirements established in these Acts and the need to take enforcement action against persons who are in violation of either Act.

1. Applicable Statutes

The Wetlands Act and the Sand Dune Protection Act are similar in structure, and § 62.1-13.27 provides for enforcement of the Sand Dune Protection Act under Wetlands Act provisions.

Section 62.1-13.9 of the Wetlands Act prohibits any person from conducting "any activity which would require a permit under a wetlands zoning ordinance unless he has a permit therefor." Section 4(a) of the Wetlands Zoning Ordinance in § 62.1-13.5 (the "Ordinance") provides that "[a]ny person who desires to use or develop any wetland ... other than for those activities specified in § 3 ... shall first file an application for a permit with the wetlands board." The activities specified in § 3 of the Ordinance are exempted from the permit requirement. Section 6 of the Ordinance requires the Board to hold a public hearing not later than sixty days after receipt of the application. Section 7 requires the Board to make its decision within thirty days of the hearing. If the Board fails to act in thirty days, the application is deemed approved.

Section 62.1-13.18 provides for the enforcement of certain violations of the Wetlands Act.

Any person who knowingly, intentionally, negligently or continually violates . . . any provision of this chapter or of a wetlands zoning ordinance enacted pursuant to this chapter or any provision of a permit granted by a wetlands board or the [Virginia Marine Resources] Commission pursuant to this chapter shall be guilty of a misde-

meanor. Following a conviction, every day the violation continues shall be deemed a separate offense.

II. No Conflict Exists Between Compliance with Time Requirements to Hold Hearing and Make Decision on Application Under Wetlands Act and Concurrent Prosecution of Violations

You first ask whether the Board is required to hear applications within the time limits in §§ 6 and 7 of the Ordinance if the application is for a nonexempt use or development of a wetland which has already been completed or begun without a permit.

It is important to separate the regulatory provisions of the Wetlands Act from its enforcement provision. The regulatory provisions require in evaluation of the project, as described in the application, under the standards in the Wetlands Act. Nonexempt construction without a permit is a violation of this Act. *See* § 62.1-13.18. The enforcement provision authorizes criminal punishment for such a violation, to encourage compliance with the Wetlands Act and to vindicate and maintain the authority of the wetlands program.

Except in § 4(a) of the Ordinance, which specifies that an application shall “first” be filed, the Wetlands Act provides for applications without referring to whether the application is filed before or after any nonexempt use or development is begun. Nevertheless, this Act clearly requires that an application be filed and a permit issued before any nonexempt use or development of a wetland is begun. *See* § 62.1-13.9. It is my opinion, however, that nothing in the Wetlands Act requires that the Board treat a particular application differently because it was untimely filed. It is further my opinion, therefore, that when an application is filed after any nonexempt use or development of a wetland is begun, the Board must consider that application under the time schedules set forth in §§ 6 and 7 of the Ordinance, but that such consideration does not prevent and should not delay any prosecution of the nonexempt use or development under § 62.1-13.18.¹

¹I am aware that the United States Army Corps of Engineers does not accept applications for such an after-the-fact permit where legal action is deemed appropriate until such legal action has been completed. *See* 33 C.F.R. § 326.3(e)(1)(ii) (1987). A similar policy by the Board, in my opinion, would serve to delay a final resolution of the application and would be contrary to the intent of the Wetlands Act that decisions are to be made within the times specified.

You next ask whether the Board is required to hear an application to amend a permit where the permittee is alleged to have violated the permit and court action is pending. As discussed above, there is nothing in the Wetlands Act to exempt this type of application from the time limits placed on applications in general. It is my opinion, therefore, that acting on the application within the time limits specified in §§ 6 and 7 of the Ordinance should have no effect on the court action, since court action concerns a violation which is alleged to have occurred previously.

III. Issuance of Permit and Decision to Prosecute Are Separate Issues

In summary, the failure to secure the necessary permits in the facts you present is a violation of the Wetlands Act which may be referred for prosecution pursuant to § 62.1-13.18. Whether a permit should issue is a separate question which should be determined in the most efficient manner possible as provided in the Wetlands Act. If the application is denied, and the violation is not corrected, a suit may be brought pursuant to SS 62.1-13.18:1 to enjoin the violation.²

²I also note that § 8 of the Ordinance grants the Board, after a hearing, the authority to suspend or revoke a permit if the permittee has not complied with its terms and conditions. *See* 1978-1979 Att'y Gen. Ann. Rep. 326, 327.

Waters of the State, Ports and Harbors: State Water Control Law.

State Water Control Board may define surface water by regulation to include wetlands. Authority to regulate wetlands in water quality management program limited to extent allowable under § 401 of federal Clean Water Act of 1977 and State Water Control Law. When granting without condition or denying § 401 water quality certification, Board must consider those water quality considerations found in § 401; when issuing conditional § 401 certifications, Board may apply § 401 water quality considerations and any other state law requirements consistent with water quality standards.

June 19, 1991

**The Honorable Joseph V. Gartlan Jr.
Member, Senate of Virginia**

You ask three questions about the authority of the State Water Control Board (the “State Board”) to regulate wetlands in Virginia:

1. May the State Board define “state waters” or “surface water” by regulation to include wetlands?
2. May the State Board establish a comprehensive wetlands regulatory program pursuant to either §401 of the federal Clean Water Act of 1977 (the “Clean Water Act”), 33 U.S.C.A. § 1341 (West 1986) (“§ 401”)¹ or existing state authority?
3. Does the State Board have the authority, pursuant to § 401, to certify or refuse to certify on a basis other than water quality those permits issued by federal agencies pursuant to § 404 of the Clean Water Act, 33 U.S.C.A. § 1344 (West 1986 & Supp. 1991) (“§ 404”)?²

1. Applicable Statutes and Regulations

A. State Water Control Law

The State Water Control Law, §§ 62.1-44.2 through 62.1-44.34:28 of the Code of Virginia, establishes the responsibilities of the State Board. Its purpose is set forth in § 62.1-44.2:

It is the policy of the Commonwealth of Virginia and the purpose of this law to: (1) protect existing high quality state waters and restore all other state waters to such condition of quality that any such waters will permit all reasonable public uses and will support the propagation and growth of all aquatic life, including game fish, which might reasonably be expected to inhabit them, (2) safeguard the clean waters of the Commonwealth from pollution, (3) prevent any increase in pollution, (4) reduce existing pollution, and (5) promote water resource conservation, management and distribution, and encourage water consumption reduction in order to provide for the health, safety, and welfare of the present and future citizens of the Commonwealth.

¹Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 401, 86 Stat. 816, 877-80 (1973), amended and commonly referred to as the Clean Water Act of 1977, Pub. L. No. 95-217, §§61(b), 64, 91 Stat. 1566, 1598-99 (1980), codified at 33 U.S.C. § 1341 (1989).

²*Id.* §404, 86 Stat. at 884, amended *supra* note 1, § 67(a)-(b), 91 Stat. at 1600, codified at 33 U.S.C. § 1344 (1989).

Under § 62.1-44.5, it is unlawful for any person to discharge wastes or otherwise alter water quality except as authorized by a permit. That section provides:

Except in compliance with a certificate issued by the [State] Board, it shall be unlawful for any person to (1) discharge into state waters sewage, industrial wastes, other wastes, or any noxious or deleterious substances, or (2) otherwise alter the physical, chemical or biological properties of such state waters and make them detrimental to the public health, or to animal or aquatic life, or to the uses of such waters for domestic or industrial consumption, or for recreation, or for other uses. [Emphasis added.]

In order to achieve these purposes, the State Board is authorized, among other things, to “issue certificates for the discharge of sewage, industrial wastes and other wastes into or adjacent to or the alteration otherwise of the physical, chemical or biological properties of state waters under prescribed conditions.” Section 62.1-44.15(5). The State Board, therefore, has the power to limit water pollution, in part, by issuing certificates to allow such discharges into, or alteration of, state waters.

B. State and Federal Definitions of “Waters”

Section 62.1-44.3 defines “state waters” as “all water, on the surface and under the ground, wholly or partially within or bordering the Commonwealth or within its jurisdiction.” (Emphasis added.)

One State Board regulatory program, which implements the State Board’s water pollution control permit program under the national pollutant discharge elimination system (“NPDES”), 33 U.S.C.A. § 1342 (West 1986 & Supp. 1991), uses a definition of “surface water” that includes wetlands. While this definition does not have direct application to the § 401 state certification program, it nonetheless demonstrates the extent to which the State Board has regulated wetlands in another water quality program.

In that program, “surface water” means

- (i) all waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- (ii) all interstate waters, including interstate “wetlands”;
- (iii) all other waters such as inter/intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, “wetlands,” sloughs, prairie pot-holes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:
 - (1) Which are or could be used by interstate or foreign travelers for recreational or other purposes;
 - (2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
 - (3) Which are used or could be used for industrial purposes by industries in interstate commerce;
- (iv) all impoundments of waters otherwise defined as surface waters under this definition;

- (v) tributaries of waters identified in paragraphs (i)-(iv) of this definition;
- (vi) the territorial sea; and
- (vii) “Wetlands” adjacent to waters, other than waters that are themselves wetlands, identified in paragraphs (i)-(vi) of this definition.

St. Water Control Bd. Regs., Permit Reg. VR 680-14-01 § 1.1 (eff. Sept. 27, 1989) (“Permit Regulation” or “Permit Reg.”) (emphasis added).

In a definition that is virtually identical to the State Board’s definition of state “surface water,” both the United States Environmental Protection Agency (“EPA”) and the United States Army Corps of Engineers (the “Corps”) define “waters of the United States” to include wetlands.

The EPA definition, which relates to the administration of the NPDES program, is set forth in 40 C.F.R. § 122.2 (1990):

- (a) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- (b) All interstate waters, including interstate “wetlands,”
- (c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, “wetlands,” sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:
 - (1) Which are or could be used by interstate or foreign travelers for recreational or other purposes;
 - (2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
 - (3) Which are used or could be used for industrial purposes by industries in interstate commerce;
- (d) All impoundments of waters otherwise defined as waters of the United States under this definition;
- (e) Tributaries of waters identified in paragraphs (a) through (d) of this definition;
- (f) The territorial sea; and
- (g) “Wetlands” adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) through (f) of this definition.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of [the Clean Water Act] (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States. This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States. [Emphasis added.]

The Corps definition, relating to the §404 permitting program, is set forth in 33 C.F.R. § 328.3 (1990):

- (a) The term “waters of the United States” means

- (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- (2) All interstate waters including interstate wetlands;
- (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie pot-holes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:
 - (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
 - (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
 - (iii) Which are used or could be used for industrial purpose by industries in interstate commerce;
- (4) All impoundments of waters otherwise defined as waters of the United States under the definition;
- (5) Tributaries of waters identified in paragraphs (a)(1) through (4) of this section;
- (6) The territorial seas;
- (7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) (1) through (6) of this section.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of [the Clean Water Act] (other than cooling ponds as defined in 40 CFR 123.11(m) which also meet the criteria of this definition) are not waters of the United States. [Emphasis added.]

C. Water Quality Certification Program Administered by State Board

As part of its program to control pollution, the State Board, as the designated state certifying agency under the Clean Water Act, administers the water quality certification program established under § 401. Section 401 authorizes the State Board to consider the effects of certain projects requiring a federal license on water quality. Specifically, the State Board is authorized to grant or deny a water quality certification for federally licensed activities that may result in a discharge to navigable waters. Under § 401, the State Board may place conditions on a water quality certification to ensure compliance with Clean Water Act limitations and standards and with “any other appropriate requirement of State law.” 33 U.S.C.A. § 1341(d). The State Board has issued a number of these § 401 water quality certifications that include wetland protection measures as a condition of certification.

The State Board acts on these water quality certifications in connection with, among other matters, water pollution permits issued by the EPA, 33 U.S.C.A. § 1342, and hydroelectric projects licensed by the Federal Energy Regulatory Commission, 18 C.F.R. § 4.38(e)(2) (1990). The most common water quality certification applications considered by the State Board, however, are those reviewed under § 404 in connection with dredge and fill permits issued by the Corps. Those permits allow the Corps to manage the discharge of dredged or fill material into navigable waters. The Clean Water Act defines “navigable waters” as “waters of the United States” 33 U.S.C.A. § 1362(7) (West 1986). As noted above, the Corps, in turn, defines “waters of the United States” by regulation to include wetlands. 33 C.F.R. § 328.3(a). In conjunction with this permit program, the State Board certifies whether dredge and fill per-

mits, issued under § 404, comply with certain provisions of the Clean Water Act and any other appropriate requirement of state law.

In 1989, the General Assembly enacted § 62.1-44.15:5 requiring the State Board to issue a Virginia Water Protection Permit (“State Permit”) to serve as the Commonwealth’s § 401 certification. Section 62.1-44.15:5(A) authorizes the State Board to implement the State Permit program by adopting regulations. When issuing a State Permit, the State Board must assure that the proposed activity is consistent with the provisions of the Clean Water Act and will protect instream beneficial uses under state law. Section 62.1-44.15:5(B). “Beneficial uses” of state waters are defined in the State Board regulation establishing water quality standards to include “recreational uses, e.g., swimming and boating; and production of edible and marketable natural resources, e.g., fish and shellfish.” St. Water Control Bd. Regs., Water Quality Standard VR 680-21-01.2(A) (eff. July 1, 1988) (“Water Quality Standard”); *see also* § 62.1-44.2. To implement the State Permit, the State Board has proposed regulations, but has not yet promulgated final regulations that establish a comprehensive management scheme for the protection of nontidal wetlands in Virginia. The proposed regulations include “wetlands” within their definition of “state waters.”

II. State Board May Define Surface Water by Regulation to Include Wetlands

The definition of “state waters” in the State Water Control Law includes “all water, on the surface and under the ground.” Section 62.1-44.3 (emphasis added). The State Water Control Law contains no definition, however, of “surface water.” In another regulatory program, not directly related to § 401 state certification, the State Board has defined “surface water” to include wetlands. Permit Reg., *supra* Pt. I(B), § 1.1. The Permit Regulation was promulgated, as authorized by 1972 amendments to the State Water Control Law, to conform to EPA’s requirements for Virginia to assume responsibility for the NPDES program. 33 U.S.C.A. § 1342. EPA also requires periodic amendments to the Permit Regulation in order for Virginia to maintain its authority to administer the NPDES program. As noted above, the definition of “surface water” was included in the Permit Regulation in 1988 to conform to EPA’s regulatory definition of “waters of the United States,” which includes “wetlands.”³ This same definition appears in the proposed State Permit regulations.

The Supreme Court of Virginia has recognized a presumption in favor of an administrative agency’s regulatory interpretation of the statutes that agency implements. *Commonwealth v. Wellmore Coal*, 228 Va. 149, 320 S.E.2d 509 (1984); *Peyton v. Williams*, 206 Va. 595, 145 S.E.2d 147 (1965); *Aetna Ins. Co. v. Commonwealth*, 160 Va. 698, 169 S.E. 859 (1933). It is well within an administrative agency’s power to interpret statutory terms of doubtful meaning. *Huffman Co. v. Unemploy. Comm.*, 184 Va. 727, 36 S.E.2d 641 (1946). Regulations are required, however, to be consistent with the provisions of the statute, and an agency may not issue regulations that are arbitrary, unreasonable or inconsistent with the controlling statute. *Dickerson v. Comm.*, 181 Va. 313, 24 S.E.2d 550 (1943), *aff’d sub nom. Carter v. Virginia*, 321 U.S. 131 (1944).

In this instance, the State Water Control Law defines “state waters” broadly to include “all” waters in the state, including surface water. The Corps’ counterpart definition of “waters of the United States” includes wetlands and has been upheld by the Supreme Court of the United States. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). Since 1974, the State Board has had a written policy to protect wetlands⁴. Wetlands involve “water” to some

³ 40 C.F.R. § 122.2.

⁴ St. Water Control Bd. Regs., Wetlands Policy (eff. June 23, 1974).

degree,⁵ and the State Board is charged with control of all the waters of the Commonwealth. Section 62.1-44.3. Since 1988, the reference to “surface water” contained in the definition of “state waters” in § 62.1-44.3 has been construed in the Permit Regulation to include wetlands. Based on the statutory construction principles and easements discussed above, that interpretation is entitled to great weight. *See Lee v. Employment Commission*, 1 Va. App. 82, 335 S.E.2d 104 (1985).

Based on the above, it is my opinion that the State Board has the authority to define “surface water” by regulation to include “wetlands.”

III. State Board May Regulate Wetlands in State Permit Regulatory Program Only to Extent Allowed by § 401 and State Water Control Law

The language of § 62.1-44.15:5 requiring the State Board to issue the State Permit does not, on its face, provide any additional authority to the State Board regarding wetlands. Section 62.1-44.15:5 can be read, moreover, as a legislative affirmation of the State Board’s previous regulatory determination that preservation of instream flows is a beneficial use of state waters. That determination was made by the State Board in 1988 when it adopted regulations establishing water quality standards. Those standards provide that “[m]anmade alterations in stream flow shall not contravene reasonable, beneficial uses including protection of the propagation and growth of aquatic life.” Water Quality Standard, *supra* Pt. I(C), VR 680-21-01.4; *see also* § 62.1-44.5. Section 62.1-44.15:5(C) requires an interagency consultation to ensure a full analysis of the effect of an activity receiving a State Permit on these instream beneficial uses.

The legislative history of § 62.1-44.15:5 supports the conclusion that it grants the State Board no additional power. In a 1989 report, the State Water Commission recommended establishment of a state water quality permit to “clarify the state legislature’s emphasis on protecting a range of instream values [and] give Virginia a higher profile in the regulatory process and . . . bring those state agencies with jurisdiction over water use into a cooperative relationship.” 4 H. & S. Docs., *Report of the State Water Commission*, H.D. No. 69, at 10 (1989 Sess.). The Commission indicated, however, that the new permit “would not expand the current [§ 401 certification] procedure or create a new administrative process,” and further acknowledged that the permit “may not add to the authority of the [State Board], since it may already have been delegated such authority under federal law.” *Id.* (emphasis added). This report supports the conclusion that the General Assembly did not intend § 62.1-44.15:5 to provide the State Board with any broader authority than it possesses under § 401.

This conclusion is further supported by actions of the General Assembly involving proposed nontidal wetlands legislation.⁶ In 1988, legislation was introduced in the House of Delegates which, if enacted, would have established a comprehensive regulatory program to protect nontidal wetlands, H.B. No. 1037 (1988 Reg. Sess.). The program was to be administered by the Departments of Forestry and Conservation and Historic Resources. That legislation passed the House but was carried over to the 1989 Session by the Senate Committee on Agriculture, Conservation and Natural Resources. The bill was not acted upon by the 1989 General Assembly. The failure of the General Assembly to enact proposed legislation granting an entity

⁵ *See Riverside Bayview Homes, Inc.*, 474 U.S. at 132-35. *See generally* Odum, *Non-Tidal Freshwater Wetlands in Virginia*, 7 Va. J. Nat. Resources L. 421 (1988).

⁶ The General Assembly previously enacted wetland management legislation for tidal wetlands. Va. Code Ann. §§ 62.1-13.1 to 62.1-13.20. Although subject to a separate state permit, development in these wetlands also may be subject to § 404 federal permits and, therefore, § 401 state certification by the State Board.

authority for a particular action can raise an inference that the General Assembly did not intend the entity to have that authority. See *Commonwealth v. Arlington County Bd.*, 217 Va. 558, 580-81, 232 S.E.2d 30, 44 (1977); see also 1974-1975 Att’y Gen. Ann. Rep. 77, 77-78; 2A Norman J. Singer, *Sutherland Statutory Construction* § 48.14 (Sands 4th ed. 1984). In my opinion, therefore, it would be inconsistent with the intent of the General Assembly to construe § 62.1-44.15:5 of the State Water Control Law to authorize the State Board to implement by regulation the kind of comprehensive nontidal wetlands program the General Assembly impliedly rejected when it failed to enact House Bill No. 1037.

Because the State Permit is intended to serve as the § 401 certification, it is necessarily limited in scope. Because wetlands may properly be a component of “surface water” and, therefore, constitute “state waters,” it is my opinion that the State Board is entitled to grant, deny, or grant conditionally, certifications for those projects affecting Virginia wetlands that require § 401 certification. For these reasons, and based on the legislative history discussed above, however, it is further my opinion that the State Board is not empowered by § 62.1-44.15:5 to expand its regulation of wetlands beyond the scope contemplated by § 401 and the State Water Control Law, and, therefore, that the State Board may regulate wetlands in its State Permit program only to the extent allowed by those statutes.

IV. State Board Must Relate Any Grant, Denial or Conditional Grant of Certification to Authority Granted It by Statute

Section 401 allows state regulatory agencies to consider several water quality issues specified in the Clean Water Act when making the determination whether to grant or deny certification. 33 U.S.C.A. § 1341(a). As the § 401 certifying agency in Virginia, the State Board also is allowed to consider “any other appropriate requirement of State law” when conditioning a certification. 33 U.S.C.A. § 1341(d). The scope of water quality certifications under this latter provision, therefore, must be determined by examining the authority granted to the State Board by state law.

Courts in other states have addressed the proper scope of § 401 water quality certifications. In *Arnold Irrigation Dist. v. DEQ*, 79 Or. App. 136, 717 P.2d 1274 (1986), the Oregon Court of Appeals held that the Oregon Department of Environmental Quality, in deciding whether to grant or deny certification, is limited to considering sections of the Clean Water Act related to effluent limitations, water quality standards and other water protection provisions listed in § 401(a)(1) (33 U.S.C.A. § 1341(a)(1)). The Oregon court held, however, that the state agency could condition certification under § 401(d) (33 U.S.C.A. § 1341(d)) on any provision of state law relating to water quality. The court emphasized that “an ‘other appropriate requirement of State law’” in § 401(d) (33 U.S.C.A. § 1341(d)) refers only to those Oregon laws related to water quality. 79 Or. App. at 142, 717 P.2d at 1279. Courts in other states, however, have taken the opposite view, approving the imposition of conditions that reach beyond traditional water quality concerns.⁷ In my opinion, the Oregon Court of Appeals’ opinion is the better view.

The water quality duties of the State Board appear in the State Water Control Law⁸. Under Virginia law, agencies may not act beyond the authority granted them by the General Assembly.

⁷ See *Hollis v. Tenn. Water Quality Control Bd.*, slip op. No. 83-1352-1 (Tenn. Ch. App. Feb. 28, 1984); *Marmac Corp. v. Dep’t Nat. Resources W. Va.*, slip op. No. 81-1792 (Cir. Ct. Kanawha Co., W. Va., June 9, 1982).

⁸The State Board implements several statutes in addition to the State Water Control Law, including Conservation of Water Resources (§§ 62.1-44.36 to 62.1-44.44); the Groundwater Act of 1973 (§§ 62.1-44.83 to 62.1-44.107); and Surface Water Management Areas (§§ 62.1-242 to 62.1-253), but these statutes are not part of Virginia’s water quality management program.

Segaloff v. City of Newport News, 209 Va. 259, 163 S.E.2d 135 (1968). The State Board is bound, therefore, by the State Water Control Law when conditioning permits under § 401. The State Water Control Law empowers the State Board to “adopt such regulations as it deems necessary to enforce the general water quality management program of the [State] Board,” § 62.1-44.15(10), and to “establish... standards and policies for any state waters consistent with the general policy set forth in [the State Water Control Law].” Section 62.1-44.15(3a) (emphasis added). The purpose of State Board’s “water quality management program” and the stated policy of the Commonwealth includes protecting public uses of water, protecting propagation and growth of all aquatic life, preventing and reducing pollution of state waters, and promoting water resource conservation, management and distribution, all for the protection of the health, safety and welfare of the citizensof the Commonwealth. Section 62.1 44.2.

In response to your third question, therefore, it is my opinion that the State Board may consider the impact on surface water of a federally permitted project requiring a § 401 certification, based upon those water quality related considerations found in 401(a)(1) (33 U.S.C.A. § 1341(a)(1)), when granting without condition, or denying, a certification. It is further my opinion that the State Board also may condition certification on “any other appropriate requirement of State law” under the State Water Control Law, consistent with its water quality management program. 33 U.S.C.A. § 1341(d). That program includes water quality, maintenance of instream flows, maintenance of recreational uses, support of propagation and growth of all aquatic life, and other uses identified by the State Water Control Law and its implementing regulations.

V. Summary

In summary, it is my opinion that the State Board is authorized to define “surface water” by regulation to include “wetlands.” The State Board authority to regulate wetlands is limited, however, to those federally permitted activities that require § 401 certification. Neither § 401 nor § 62.1-44.15:5 authorizes establishment of a comprehensive nontidal wetlands program beyond the authority granted in § 401. When granting without condition or denying a § 401 certification, the State Board may consider only those water quality considerations found in § 401(a)(1). When issuing a conditional § 401 certification, the State Board may apply those water quality considerations found in § 401(d) and “any other appropriate requirement of State law” included in the State Water Control Law that is consistent with its water quality management program. 33 U.S.C.A. S 1342(d).

Enforcement Procedures

—Update—

Introduction

The purpose of this document is to provide a review of the enforcement procedures and penalties set forth in Chapters 12, 13, and 14 under Title 28.2 of the Code of Virginia. These chapters represent the various code sections governing the regulation of Virginia's submerged lands, tidal wetlands, and coastal primary sand dunes and beaches. This review is designed to be used as a guide to aid your interpretation of the law and should therefore not take the place of advice from knowledgeable counsel.

In the past, violations of the aforementioned code sections usually resulted in either voluntary restoration or more frequently, the submittal of an after-the-fact application for a permit. Violators were usually asked to appear before the Commission or wetlands board and reprimanded for their actions with the intent of producing a lasting impression through public admonishment. The prospect of prosecution within the judicial system was previously and remains a viable option. Unfortunately, the inherent problems associated with preparing a case to go to Circuit Court remained unchanged. The difference now is that once in Circuit Court, a judge can levy a civil penalty up to \$25,000 for each day of a violation.

This hopefully will serve as a strong deterrent to violating the law and a powerful incentive for resolving the matter at an administrative level. In that regard, Sections 28.2-1213, 28.2-1320, and 28.2-1420, of the Code of Virginia, grant the Commission and/or local wetland boards the authority to assess civil charges of up to \$10,000 per violation. Civil charges are to be paid in lieu of any appropriate civil penalty and can be assessed only with the consent of the person in violation. The obvious intent of both civil penalties and charges is to provide financial disincentives against violating the law while at the same time providing the impetus to resolve these issues at an administrative level. A \$10,000 civil charge may seem extreme but when compared to perhaps a \$500,000 civil penalty (\$25,000 x each day of the violation, 20 days in this example) the more cost effective solution remains at the administrative level. It should be noted that civil charges may be in addition to the cost of any restoration so ordered.

The adoption of financial disincentives not only commands the attention of those parties involved in coastal development but also those responsible for administering Virginia's coastal law. Enforcement procedures within Virginia's 35 wetland boards has in the past reflected the varying degrees of complexity found in each local government. Unifying these procedures to conform to rigid standards is perhaps not desirable but a review of the basic enforcement components does provide a basis from which localities can refine an enforcement mechanism which is legally complete and reflects the unique character of each locality.

Enforcement

Figure 1 - Enforcement Procedures, represents an outline of the enforcement components incorporated into Subtitle III of Section 28.2 of the Code. This approach is intended to be used only as a guide and is not a substitute for a more comprehensive review and understanding of individual Code sections.

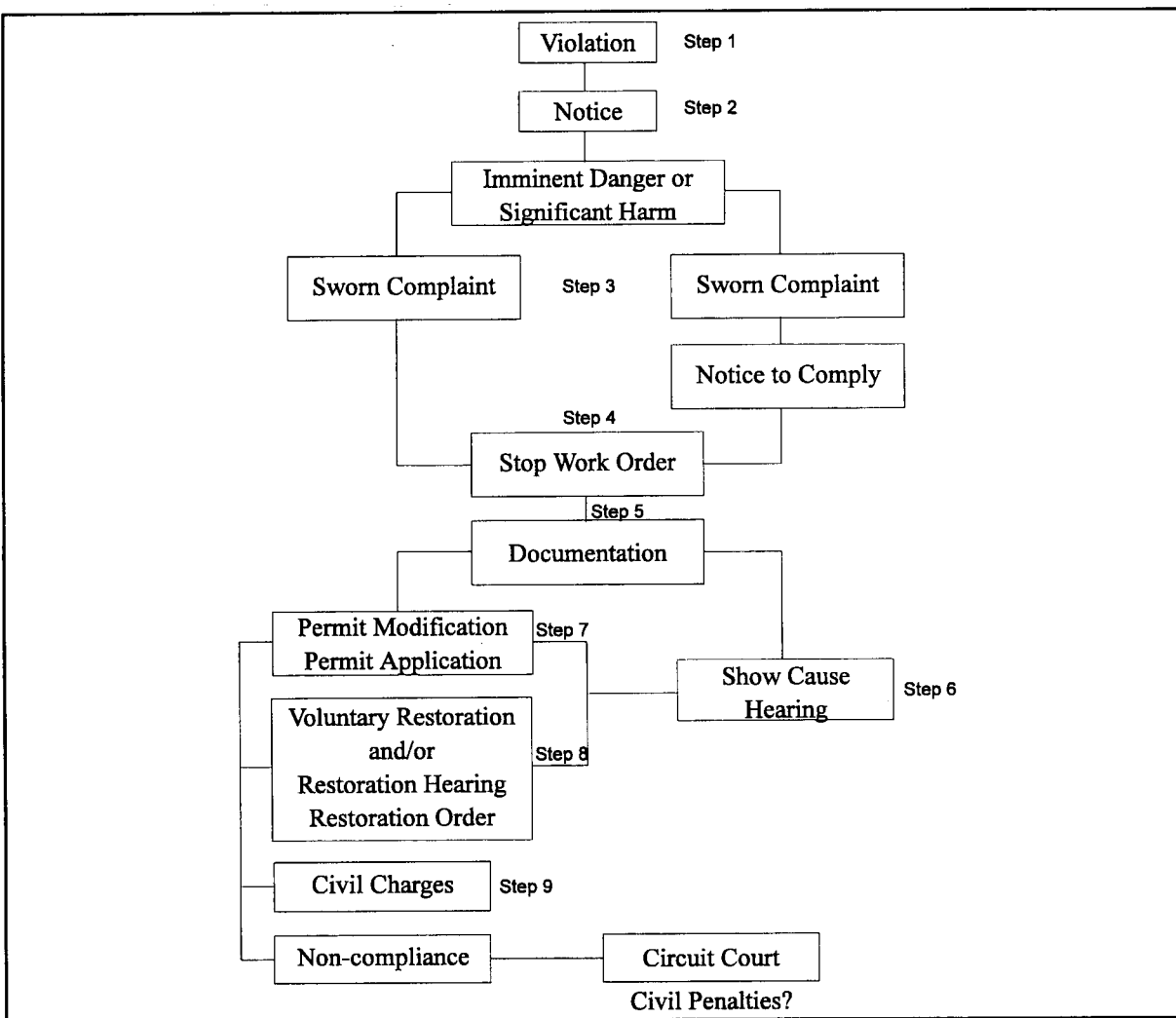
Report of a violation (Step 1), either through citizen response or staff awareness, usually requires a thorough site inspection by staff to determine the extent, if any, of the potential violation. Such an inspection is preceded by providing notice of staff's inspection to the resident owner, occupier or operator with an opportunity for said individual to accompany the site inspector (Step 2). Upon determination that a substantial violation exists, staff must evaluate whether the activity is causing or is in imminent danger of causing significant harm to the protected resource. If the potential violation appears to involve substantial impact to natural resources and further delay could lead to increased despoliation, it may be necessary to forgo the standard Notice to Comply requirement and proceed with the issuance of a Stop Work Order. Otherwise, code dictates that a Stop Work Order may only be issued after failure to comply with a Notice to Comply.

If it is determined there is failure to comply with a permit or that unauthorized activities have transpired, a Sworn Complaint (Step 3) from the designated enforcement officer should be completed. Upon receipt of a Sworn Complaint, the board chairman issues a Notice to Comply (Step 4), indicating the measures needed for compliance and a specified time within which such measures shall be completed. Non-compliance can also result in the issuance of a Stop Work Order from the board chairman. The effect of a Stop Work Order is directly related to the desired outcome of any given situation. A Stop Work Order is usually viewed administratively as an "attention getter" designed to reinforce the need for compliance with the law. As such, Stop Work Orders can be issued in conjunction with the Notice to Comply. In the absence of compliance, the Stop Work Order serves as the precursor to application for appropriate relief to a Circuit Court in the jurisdiction wherein the violation was alleged to have occurred.

The Sworn Complaint is an important component of the violation procedure and is required as a precursor to the issuance of a Stop Work Order or a Restoration Order. Care should also be taken at this time to completely document and photograph the violation (Step 5).

Compliance can reasonably involve one of two separate approaches. In one instance the Board can request the property owner appear before the Board during the next regularly scheduled meeting and show cause why he or she is not in violation (Step 6). The show cause hearing allows the Board members an opportunity to bring forth and put to record pertinent facts. On the other hand, the Board might also recognize the project was not constructed in a fashion which warrants removal. In such a case, the Board could move to accept an application and permit a project with the appropriate application of civil charges (Step 7).

Figure 1 - Enforcement Procedures



In the former example, a Notice to Comply would request the party responsible for the violation to cease the activity and for the owner to appear before the Board to show cause at a specified date and time. It should be understood, however, that the show cause hearing is not the public interest review. Rather, it is merely a fact finding session. At its conclusion, the Board must decide which path is most reasonable. A move toward immediate restoration could be viewed as depriving the property owner of due process and a full public interest review under the law. This approach stems from *Petzinger vs. VMRC 1980*. In this proceeding, VMRC, on advice from counsel, vacated its own order to restore and allowed the appellant, Frederick J. Petzinger, III the opportunity to apply for an after-the-fact permit. In this case, the appellant had knowingly installed a number of mooring pilings in excess of that authorized by an existing permit. The VMRC originally moved for immediate restoration, but upon further consideration from the Attorney General's office, decided to subject the project to a full public interest review providing the

property owner with due process. The application was subsequently denied during review and the applicant was directed to remove the offending structures. The decision was later upheld on appeal to the Circuit Court.

The submission of an application or allowance thereof is not a predilection for approval. It is an affirmation of due process which now also allows for the application of civil charges (Step 9) for projects which might reasonably have been approved in normal channels.

Restoration

Sections 28.2-1212, 28.2-1317 and 28.2-1417 provide the Boards with additional remedies under the law in the form of a Restoration Order. The restoration order should not be considered a position of last resort. In cases where restoration is a desirable outcome, a Notice to Comply with voluntary restoration may preclude a formal restoration hearing.

A restoration hearing is appropriate in those instances where substantial damage to resources, beyond that which would normally have been permitted, has occurred. Even in instances where voluntary restoration is deemed a viable alternative, the restoration order may be useful in specifying the details necessary to ensure an effective restoration effort.

A restoration order results from the issuance of a Sworn Complaint along with the provision of the necessary 30 day notice to the affected party including the time, place and purpose of the restoration hearing. Such an order should require the submission of a complete restoration monitoring plan to ensure successful re-establishment of the affected resources. In general, these plans define project details and formalize the performance standards by which the restored area will be evaluated over the long term. The restoration order *may* also require a prepaid contract acceptable to the board be in affect for the purpose of carrying out a Monitoring Plan. In addition, the board *may* require a reasonable bond or letter of credit in an amount and with surety and conditions satisfactory to securing compliance with the conditions set forth in the Restoration Order. Failure to complete the required restoration constitutes a separate violation.

Compliance Monitoring

The adoption of financial disincentives places a burden not only on developers but also on individual wetlands boards. As briefly touched on earlier, many of the problems previously associated with enforcement efforts remain today. While it may prove relatively easy to determine that a bulkhead was constructed without authorization, it is somewhat harder to determine the extent of encroachment beyond that which was authorized by a particular permit. The basis for such determinations frequently hinges on the permit drawings that became a part of the permit document at issuance.

As such, it would certainly behoove each local board to adopt a more demanding stance in determining adequacy of application drawings. Effective enforcement of permit noncompliance can only be achieved with more rigorous application standards. In a report produced by the Wetlands Advisory Program at VIMS, "Monitoring of Compliance with Permits Granted by Local Wetlands Boards," they concluded that without compliance monitoring for permitted projects, the regulatory process may be undermined by unnecessary wetland losses. Thus producing a false impression of the degree to which wetland resources are being protected (Bradshaw, 1990).

Civil Penalties and Civil Charges

The provision in code for the issuance of civil penalties and civil charges does nothing to ease the burden of identifying and legally documenting the existence of a violation. As previously discussed, application drawings become the only reliable standard by which permit compliance can be determined.

The review of enforcement procedures identified two available paths for invoking civil penalties or charges, step 7 or step 8. Both paths involve identifying the presence of a violation. Only after a violation has been determined and sufficiently documented can the board proceed. In cases where restoration is a desirable conclusion, the individual has the option of restoring the area to pre-existing conditions. (Voluntary restoration in this manner may still benefit from a restoration hearing to establish the formal conditions for restoration. A minimum 30 day notice of a restoration hearing applies.) Otherwise, application for a permit modification or after-the-fact approval is necessary. The show cause hearing again provides the setting for discussion of the available options.

Any violation, whether voluntarily restored or not, should be considered an agenda item and fully discussed during a regularly scheduled meeting of the wetlands board. Standard notification procedures apply. The party involved should be contacted and informed that the violation in question will be discussed at the following board meeting and that their presence is requested at the hearing.

In the absence of complete and satisfactory restoration, individuals found in violation of these Code sections may subject themselves to either a civil penalty (Circuit Court) or to a civil charge (Commission/local wetland board). These are the only options available under this Code section. The ramifications of each need to be clearly explained to the individual(s) in violation. Only with the individual's concurrence can the board assess a civil charge.

Table 1 - Civil Charge Determination

Environmental Impact	Relative Degree of Deviation or Non-Compliance		
	<u>Minor</u>	<u>Moderate</u>	<u>Major</u>
Significant	\$5,000	\$7,500	\$10,000
Moderate	\$1,500	\$3,000	\$4,500
Minimal	\$500	\$1,000	\$1,500

Section 28.2-1320 indicates that a board may order a one-time payment of civil charges for each violation not to exceed \$10,000. Table 1 - Civil Charge Determination, has been developed to help ensure continuity between the boards as they individually arrive at an actual dollar amount representative of the violation in question. This assessment is designed to contain the flexibility necessary for the Board to arrive at a conclusion based on the specific terms of each specific violation. These amounts are by no means absolute and are intended to be used as a guide rather than a template.

Environmental Impact in this table refers more to the relative environmental value of the resource lost and less to the actual square footage of area impacted. The values for each wetland type may be found in the *Wetlands Guidelines*. For example, 100 square feet of impact to two stands of vegetated wetlands may be viewed differently depending on the dominant plant species. A Group One wetland ranks higher in value than a Group Five wetland and therefore would tend to be a more significant loss even though on an areal basis the impacts might at first appear relatively equal, (Wetland Guidelines 1974, amended 1982).

Relative Degree of Deviation or Non-compliance refers to the extent of a violation. This could include not only the magnitude of the area of impact but other mitigating factors such as:

- ▷ Good Faith
- ▷ Degree of Willfulness
- ▷ History of Non-compliance
- ▷ Cooperation

(Professing an ignorance of the law should *not* be considered a mitigating factor.)

Conclusion

While it is appealing to believe that successful implementation of these Code changes will solve all of the problems with respect to wetland violations and after-the-fact applications, such a situation is unlikely. As long as individuals choose to live along the shores, development activities within this coastal fringe will continue to exert tremendous pressure on Virginia's tidal wetlands and submerged lands.

The success or failure of these Code changes will be directly related to each of Virginia's local wetlands boards. Enforcement needs to be accomplished in as uniform and consistent a manner as possible. At a minimum, each board should thoroughly review its present enforcement procedures and determine how the current changes need to be incorporated within their existing administrative infrastructure.

This expanded authority is not the ultimate answer. A great deal of the problem with enforcement and permit compliance rests in a lack of attention to detail, crossed communication, and poor follow-up. Remember, "as close to the bank as possible" may be viewed in a variety of ways. It may mean within three feet to the wetlands board, but it could mean "as far as I care to go" for someone building the structure.

Literature Cited

- Bradshaw, J.G. 1990, Monitoring of compliance with permits granted by local wetlands boards. Technical Report No. 90-1. 7p. College of William and Mary, Virginia Institute of Marine Science, School of Marine Science, Wetlands Program, Gloucester Point, Virginia.
- Virginia Marine Resources Commission. 1974. Wetlands Guidelines. Available from VMRC, Newport News, Virginia.

SWORN COMPLAINT

SAMPLE

No. _____

Date _____

Pursuant to Section 28.2-1212 (B) of the Code of Virginia, I hereby certify that a substantial violation of Chapter 12, Article 2 of the Code of Virginia has occurred at

_____. (Location).

I have personally inspected the site and noted the following unauthorized activity:

_____.

_____, 19_____

(Designated Enforcement Officer)

Appropriate Wetlands Board

I, _____, a Notary Public within and for
_____, hereby certify that
_____, a designated Enforcement Officer whose
name is signed to the foregoing, has acknowledged the same before me.

Given under my hand this _____ day of _____, 19_____.

My Commission expires: _____.

Notary Public

NOTICE TO COMPLY

SAMPLE

No. _____

Date _____

Pursuant to Section 28.2 - 1212 (B) of the Code of Virginia, my field staff inspected your construction site at _____ (Location), on _____ (Date), at _____ (Time), having provided prior notice of such inspection to _____ on _____.

The following discrepancies were noted: _____.

The following corrective measures are needed to bring you into compliance:

_____.

These measures are to be completed by _____ (Date).

Notice ordered by _____ (Wetlands Board Chairman)

on _____, 19____.

Notice served to _____ (Signature of Person Notified)

on _____, 19____.

STOP WORK ORDER

SAMPLE

No. _____

Date _____

Pursuant to Section 28.2-1212 (C) of the Code of Virginia, having received a Sworn Complaint from my designated Enforcement Officer (Copy Attached), issued Notice to Comply No. _____ on _____, (Copy Attached), that a substantial violation of Chapter 12 of Subtitle III of the Code exists as noted on the attached, you are hereby notified that further work at _____ (Site Location),

must be **IMMEDIATELY DISCONTINUED**.

Work may be resumed under the following conditions:

Ordered by _____ (Wetlands Board Chairman)

on _____, 19____.

Notice served to _____ (Signature of Person Notified)

on _____, 19____.

Signature of Enforcement Officer

General Permit VGP #2

Commonwealth of Virginia

Virginia Marine Resources Commission

VMRC general permit for groin projects designed to control shoreline erosion, which conform to certain criteria and are undertaken by riparian owners in, on or over state-owned subaqueous lands in waters of the Commonwealth.

1. Authority - Effective Date:

- (a) This General Permit is promulgated pursuant to the authority contained in Sections 28.1-23 and 62.1-3 of the Code of Virginia, as amended.
- (b) This General Permit conforms with current Commission policy in its establishment of general permits for projects which meet certain restrictive criteria.
- (c) This General Permit is consistent with the official opinion of the Attorney General issued on October 31, 1984 and attached hereto.
- (d) The effective date of this General Permit is July 1, 1985.

2. Discussion:

- (a) A principal objective of the permit streamlining efforts of this agency is the achievement of a single permit wherever possible for minor projects with minimal cumulative impacts.
- (b) The Norfolk District U.S. Army Corps of Engineers has approved a general permit for groin projects in Virginia waters which are authorized by a local wetlands board and/or VMRC (83 GP-19).
- (c) Local wetlands boards now process applications and issue permits for groins under the 1982 amendments to the Wetlands Act which placed the non-vegetated intertidal area of the "Tidewater Virginia" shoreline under their jurisdiction.
- (d) The Virginia Institute of Marine Science reviews all applications for groins in tidal waters and submits a written evaluation to local boards for their use in the decision process.
- (e) All local wetlands board decisions are made at public hearings which are public noticed in accordance with Section 62.1-13.5 of the Code of Virginia.
- (f) The Commissioner reviews all decisions of local wetlands boards in compliance with Section 62.1-13.10.
- (g) Any applicant, or 25 or more freeholders of property within the locality, aggrieved by a final decision of the local board, whether such decision is affirmative or negative

in form, may appeal that decision to the Commission which will then review the local record in accordance with Sections 62.1-13.11, 13.12, and 13.13.

(h) The Commission has promulgated guidelines to assist local boards in determining the appropriateness and suitability of proposed groin structures.

3. Procedures:

The Chief, Habitat Management Division will administer the General Permit and assure:

(a) That the approved Local-State-Federal Joint Permit application form is completed and filed in accordance with the instructions contained therein.

(b) That applications are processed in accordance with the procedures established in Section 62.1-13.5 of the Wetlands Act and the local ordinance adopted thereunder.

(c) That groin projects authorized by this permit achieve the policy and standards implicit in Title 62.1 of the Code of Virginia, reasonably accommodate guidelines promulgated by the Commission and are consistent with the attached opinion of the Attorney General.

(d) That groins authorized by local boards meet the following criteria: (1) are of "low profile" design, (2) do not extend more than 48 feet channelward of mean high water, (3) if constructed of riprap or stone material do not exceed 6 feet in base width, and (4) any spur associated with an approved groin must be properly designed and located.

Projects which do not meet the criteria in (a) through (d) above will be processed for an individual VMRC permit with appropriate fees and royalties.

4. Authorization/Conditions:

All proposals for groin structures to encroach in, on or over State-owned subaqueous land which meet the criteria in paragraph 3 (a) through (d) above are hereby permitted subject to the following standard conditions:

(1) This permit grants no authority to the Permittee to encroach upon property rights, including riparian rights, of others.

(2) The duly authorized agents of the Commission shall have the right to enter upon the premises at reasonable times, for the purposes of inspecting the work being done pursuant to this permit.

- (3) The Permittee shall comply with the water quality standards as established by the State Water Control Board and all other applicable laws, ordinances, rules and regulations affecting the conduct of the project. The granting of this permit shall not relieve the Permittee of the responsibility of obtaining any and all other permits or authority for the project.
- (4) This permit shall not affect or interfere with the right vouchsafed to the people of Virginia concerning fowling and the catching of and taking of oysters and other shellfish in and from the bottom of areas and waters not included within the terms of this permit.
- (5) The Permittee shall, to the greatest extent practicable, minimize the adverse effects of the project upon adjacent properties and wetlands and upon the natural resources of the Commonwealth.
- (6) This permit may be revoked at any time by the Commission upon the failure of the Permittee to comply with any of the terms and conditions hereof or at the will of the General Assembly of Virginia.
- (7) There is expressly excluded from this permit any portion of the waters within the boundaries of the Baylor Survey (Public Oyster Ground).
- (8) This permit is subject to any lease of oyster planting ground in effect on the date of this permit. Nothing in this permit shall be construed as allowing the Permittee to encroach on any lease without the consent of the leaseholder. The Permittee shall be liable for any damages to such lease.
- (9) The issuance of this permit does not confer upon the Permittee any interest or title to the beds of the waters.
- (10) All structures authorized by this permit which are not maintained in good repair shall be completely removed from State-owned bottom within three (3) months after notification by the Commission.
- (11) The Permittee agrees to indemnify and save harmless the Commonwealth of Virginia from any liability arising from the establishment operation or maintenance of said project.
- (12) This permit authorizes no claim to archaeological artifacts which may be encountered during the course of construction. If, however, archaeological remains are encountered, the Permittee agrees to notify the Commission, who will, in turn, notify the Virginia Historic Landmarks Commission. The Permittee further agrees to cooperate with agencies of the Commonwealth in the recovery of archaeological remains if deemed necessary.

5. This General Permit should be retained by the Permittee for the life of his project as evidence of authorization.

Criteria for the Placement of Sandy Dredged Material Along Beaches in the Commonwealth

Virginia Marine Resources Commission

VR 450-01-0052

Section 1

Objective and Goals

- A. The objective is to assure that all suitable dredged material is utilized on eroding beach shorelines to the maximum extent practicable.
- B. In considering dredging permit applications, the Commission will endeavor to:
 - 1. Support Section 10.1-704 of the Code of Virginia which provides that the beaches of the Commonwealth be given priority consideration as sites for the disposal of that portion of dredged material determined to be suitable for beach nourishment.
 - 2. Coordinate and cooperate with the appropriate state and federal agencies to the extent that VMRC regulatory actions can support those agencies in administering House Joint Resolution No. 223, 1987 session, regarding the use of dredged material for beach nourishment.
 - 3. Resolve or minimize legal, environmental and engineering problems which can result from inadequate planning of dredged material placement.

Section 2

Purpose

The purpose of this is to develop manageable criteria and threshold levels for use by Commission staff in determining which projects justify a requirement for the expenditure of funds by an applicant for sediment tests as well as investigation of legal, environmental and engineering implications inherent in every dredged material placement proposal.

Section 3

Policy

The Commission will strive to achieve maximum beneficial uses of suitable dredged material for those projects which qualify under criteria established herein while protecting the interests of the Commonwealth in the land and the resources lying channelward of the

mean low water shoreline which land and resources are owned by the Commonwealth and are to be held as a common for use by all its citizens.

Section 4

General Criteria

Increasing interest in the beneficial uses of dredged material dictates a more structured approach to the processing of dredging permit applications. Parameters to be considered in attempting to utilize suitable material for beach nourishment are frequently economic, legal, political, or technical, as well as environmental, and most often a combination of all these factors.

Because of the complexity of interests involved, certain threshold levels are needed to more readily define projects which justify the time and expense of determining whether beach nourishment is a reasonable alternative.

The following general criteria should be used to determine candidate projects suitable for detailed evaluation:

1. More than 7,500 cubic yards of material are to be removed and, based on previous experience, there is a reasonable expectation that usable quantities of suitable beach nourishment material free from toxic compounds is present in the material to be dredged.
2. Beaches with a demonstrated need for and capability of accepting all or a part of the available material are within proximity of the dredging site.
3. The political subdivision within which the potential placement site is located has expressed an interest in obtaining beach nourishment material.
4. The applicant understands that he will be required to undertake the research necessary to locate private property owners willing to accept the material if no publicly owned shoreline is in reasonable proximity.
5. When beach nourishment is incorporated into a dredging project, a more comprehensive subsurface investigation plan is required than if dredging is the only consideration.

Section 5

Specific Criteria

1. Sufficient borings must be made and analyzed to develop a clear picture of the vertical and horizontal limit of sand deposits in the dredging area. Such borings are the responsibility of the dredging applicant.
2. Shoreline investigations at the nourishment site must determine the characteristics of the native material, the location of utilities, structures, outfall pipes, property lines along shore transport, and other basic engineering considerations.
3. Engineering information must be analyzed to determine acceptable grain size range of fill material, design berm height, width and length, probable fate of the material, expected loss rates and the resulting maintenance requirements.
4. Legal easements and public rights-of-way must be obtained from property owners which preserve public use and State ownership of all State-owned submerged land existing channelward of mean low water shoreline prior to the placement of any material. These legal documents are the responsibility of the dredging applicant or property owners, or both.
5. The project should be engineered in a manner which results in the least environmental impact while providing an efficient and cost effective construction plan. Consideration will be given, but not limited to, the project's potential impacts on existing natural resources and habitats. These include, *inter alia*, existing finfish, shellfish, turtle and avian species and their critical time periods for spawning, nesting and nursery functions in areas of submerged aquatic vegetation, wetlands and submerged or intertidal and beach habitat.

Memorandum of Agreement between the U.S. Army Corps of Engineers, Norfolk District and the Virginia Marine Resources Commission for the Implementation of a Certificate of Compliance with Norfolk District's Regional Permit 90-17

I. Purpose

The United States Army Corps of Engineers, Norfolk District (COE) and the Virginia Marine Resources Commission (VMRC) hereby establish cooperative procedures for the implementation of a Certificate of Compliance with Norfolk District's Regional Permit (RP) 90-17. Regional Permit 90-17 regulates the construction, maintenance, and repair of private, non-commercial piers and mooring piles in certain navigable waters of the United States within the Commonwealth of Virginia.

II. Procedures

Applicants will complete, sign, and submit a copy of the Certificate of Compliance along with their permit application to the VMRC. Applications which have a completed certificate of compliance attached when received at VMRC will be processed without copies of the applications or related correspondence being furnished to the COE.

The Certificate of Compliance may be reproduced locally and is approved by the COE for immediate use. The responsibility for certifying compliance with the conditions outlined in the permit rests with either the applicant or the agent. This certification will constitute legal documentation from the COE that a project meets the conditions of RP 90-17. No additional COE documentation will be provided.