

POLICY & PROCEDURES

MANAGEMENT OF YORK COUNTY TIDAL WETLANDS



PREPARED BY YORK COUNTY WETLANDS BOARD

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**PROPERTY OF
DEPARTMENT OF
PUBLIC WORKS**

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PREFACE

Since its inception in 1972, the York County Wetlands Board (hereinafter referred to as the Board) has attempted fairly and impartially to administer the policies and laws which apply to the County's tidal wetlands, as provided in Title 28.2, Chapter 13 of the Code of Virginia (1950, as amended)(Wetlands Act of 1972, as amended). As experience is gained in the different facets of wetlands management, procedures are established and continuously updated. As the County grows, an increase in applications for permits, reports of violations and requests for information can be anticipated. It is evident that a uniform set of policies and procedures employed by the Board is required to ensure that the public is informed and that all wetlands activities are resolved in an equitable manner.

This manual is a compilation of information believed to be helpful to individuals involved in any facet of tidal wetlands activity. It is intended to serve mainly as a guide that outlines the steps to be followed in obtaining permits for tidal wetlands projects or in resolving violations of the Wetlands Ordinance. Information relative to the Board's make-up and the manner in which it functions is also included.

All activities associated with York County's tidal wetlands are, of course, subject to the Virginia Wetlands Act and the information included in the following pages is merely intended to highlight some of the more important, selected sections of this law and to detail the methods and techniques employed by the Board to administer and enforce the law. If any contradictions appear, they are unintentional, and the Wetlands Ordinance is the governing document. From time to time, this document may be modified to incorporate any changes made in the State law or in the Board's basic policies or procedures.

APPENDIX A

INTRODUCTION

Wetlands Policy

The policy of the Commonwealth of Virginia (and the York County Wetlands Board) is clearly stated in the Virginia Wetlands Act (28.2-1301), as follows:

"Shall preserve and prevent the despoliation and destruction of wetlands within its jurisdiction while accommodating necessary economic development in a manner consistent with wetlands preservation."

In order to carry out this policy, the following standards (23.1-15, York County Code) are applied to the use and development of wetlands:

- 1) *Wetlands of primary ecological significance shall not be altered so that the ecological systems in the wetlands are unreasonably disturbed.*
- 2) *If wetlands must be disturbed or developed, development should be concentrated in wetlands of lesser ecological significance, in wetlands which have been irreversibly disturbed before July 1, 1972, in nonvegetated wetlands as described herein which have been irreversibly disturbed prior to January 1, 1983, and in areas of the County apart from the wetlands.*
- 3) *The provisions of the guidelines promulgated by the Commission (Virginia Marine Resources Commission), pursuant to 28.2-1301 of the Code of Virginia shall be considered in applying the foregoing standards.*

Area of Jurisdiction

In tidal areas, the Wetlands Board jurisdiction extends from mean low water to an elevation 1.5 times the mean tide range. This area may include both vegetated and/or nonvegetated wetlands as defined in 23.1-2, York County Code, as follows:

Nonvegetated wetlands means all the land lying contiguous to mean low water and which land is between mean low water and mean high water not otherwise included in the term "vegetated wetlands," as defined herein.

Vegetated wetlands means all that land lying between and contiguous to mean low water and an elevation above mean low water equal to the factor 1.5 times the mean tide range at the site of the proposed project in this County; and upon which is growing on the effective date of this article or grown thereon subsequent thereto, any one or more of the following: saltmarsh cordgrass (*Spartina alterniflora*), saltmeadow hay (*Spartina patens*), saltgrass (*Distichlis apicata*), black needlerush (*Juncus roemerianus*), saltwort (*Salicornia* sp.), sea lavender (*Limonium* sp.), marsh elder (*Iva frutescens*), groundsel bush (*Baccharis hamilifolia*), wax myrtle (*Myrica* sp.), sea oxeye (*Borrichia frutescens*), arrow arum (*Peltandra virginica*), pickerelweed (*Pontederia cordata*), big cordgrass (*Spartina cynosuroides*), rice cutgrass (*Leersia oryzoides*), wildrice (*Zizania aquatica*), bulrush (*Scirpus validus*), spikerush (*Eleocharis* sp.), sea rocket (*Cakile edentula*), southern wildrice (*Aizaniopsis miliacea*), cattail (*Typha* spp.), three-square (*Scirpus* spp.), buttonbush (*Cephalanthus occidentalis*), bald cypress (*Taxodium distichum*), black gum (*Nyssa sylvatica*), tupelo (*Nyssa aquatica*), dock (*Rumex* sp.), yellow pond lily (*Nuphar* sp.), marsh fleabane (*Pluchea purpurascens*), royal fern (*Osmunda regalis*), marsh hibiscus (*Hisbiscus moscheutos*), beggar's tick (*Bidens* sp.), smartweed (*Polygonum* sp.) arrowhead (*Sagittaria* spp.), sweet flag (*Acorus calamus*), water hemp (*Amaranthus cannabinus*), reed grass (*Phragmites communis*), and switch grass (*Panicum virgatum*).

This tidal area may also be regulated by the Virginia Marine Resources Commission (VMRC), the Army Corps of Engineers, and the Virginia Department of Environmental Quality (DEQ). Since permits may be required from all four agencies, the applicant submits a Joint Permit Application (Permit Procedures, Page 9) for concurrent evaluation of the proposed project.

A permit for waterfront construction channelward of a bulkhead against which there is always tidal water, even at low tide, is outside of the Wetlands Board jurisdiction if all impacts are on subaqueous land. A permit for waterfront construction channelward of a low profile bulkhead against which there is always tidal water, even at low tide, could require a wetlands permit if wetlands could be impacted by the alteration. A permit for waterfront construction channelward of a bulkhead which has any land exposed at low tide, will require a wetlands permit. The vertical face of a bulkhead upon which there is water even at low tide is not considered to be a wetland in accordance with the memo from the County Attorney.

York County Wetlands Board

The Board was established by the York County Board of Supervisors on July 6, 1972, by the adoption of the Wetlands Ordinance, as provided for under the Virginia Wetlands Act of 1972. The Board consists of seven residents of York County appointed by the Board of Supervisors. There are five permanent board members and two alternates. Terms of office are for five years each (this time does not include serving out an unexpired term).

Wetlands Board Organization

At its yearly June meeting, the Board elects from its membership a chair and a vice chair who serve one-year terms and who may succeed themselves. The term of the chair and vice chair runs from July through June. The vice chair, in the absence of the chair, conducts all necessary Board activities including the signing of necessary permits or other documents. A staff liaison, provided by the York County Administrator, assists the Board in technical and administrative matters and acts as the Board's representative from offices located at the York County Public Works Building, 105 Service Drive, Yorktown, Virginia. For the conducting of any hearing and the taking of any action, a quorum will be not less than three members of the Board. In considering any application for a permit, the Board may grant the application upon the concurring vote of the majority present.

Board Meetings

The Board meetings are held at 6:00 p.m. on the second Thursday of each month. These are normally held in the Multi-Purpose Room of the Public Works Building at 105 Service Drive,

Yorktown, Virginia. Any deviations from the time or location of scheduled meetings or work sessions may be scheduled as dictated by the Board's work load.

Time Limits for Speakers

When the public hearing is opened for a wetlands application or violation, the property owner or their agent will be given ten minutes to present information to the Board, after which, members of the audience at large will be given three minutes each to express their views on the application. The property owner or their agent will then be allowed a final summary or rebuttal not to exceed five minutes. The Board reserves the right to call a speaker back to the podium.

Records Management

The gathering of three or more Board members constitutes a meeting thus necessitating minutes and public notice. County staff will prepare minutes for all public hearings and meetings. Minutes will briefly summarize the meetings, not to exceed six pages if possible, and be retained permanently. Verbatim minutes will be prepared from electronic audio files should a decision of the Board be appealed.

The audiotapes of the public meetings and hearings must be retained for at least the ten-day appeal period. Staff will retain the audiotapes for six months after which they will be recycled. Audiotapes of meetings pertaining to wetlands violations will be retained until the violation is resolved to the satisfaction of the Board. Approved applications and supporting documentation must be retained for three years after the expiration of the permit.

Public Notice

Public hearings will be advertised as required by the Wetlands Ordinance; however, at any time when more than two members of the Wetlands Board meet, other than a social occasion, that constitutes a meeting and notice must be made and posted as outlined in Appendix C.

Inclement Weather Policy

If the Chair, or the Vice Chair if the Chair is unable to act, finds and declares that weather or other conditions are such that it is hazardous for board members to attend a regularly

scheduled meeting, the meeting shall be continued to the following Thursday at 6:00 p.m. in the Multi-Purpose Room of the Public Works Building. Such finding shall be communicated to the members of the Board and the press as promptly as possible. All hearings and other matters previously advertised shall be conducted at the continued meeting, and no further advertisement is required.

Administering Oaths/Witness Attendance

§28.2-1302-7.B., Code of Virginia, authorizes the chair of a wetlands board to administer oaths and compel the attendance of witnesses. To administer an oath, the chair would ask a witness to raise his or her right hand and swear (or affirm) that “the testimony that they are about to give is the truth, the whole truth, and nothing but the truth.”

To compel the attendance of witnesses at hearings, the chair may issue a Witness Subpoena. The name and address of the person being subpoenaed, the style of the matter for which the witness is being compelled to attend and give testimony and the name of a contact person needs to be provided. The subpoena would be delivered in person well in advance of the hearing (no specific time is specified), preferably by the Board staff liaison. If the person failed or refused to appear, the Board would have to petition the circuit court for entry of an order compelling the person to appear.

Technical

The State agency charged with primary responsibility for the scientific evaluation of the tidal waters and near-shore lands of the Commonwealth is the Virginia Institute of Marine Science (VIMS). They act as a technical adviser in regard to the environmental facets of the many factors considered by the Board. As such, VIMS provides the Board with reports and applicable publications relative to York County's tidal wetlands and shoreline situations. In addition, VIMS personnel provide technical assistance in field investigations to classify, inventory and evaluate tidal marshes and provide the technical environmental analysis upon which the Board can base its decisions. Additional assistance is also available from VIMS to aid in project analysis, project improvement and in decision making. When required by the Board, various field measurements (i.e., tide measurements, salinity, area for mitigation, etc.) will be provided by VIMS.

Enforcement

Enforcement of the Wetlands Ordinance is a function of the York County Wetlands Board. Assistance in carrying out this function is available from VMRC. The rivers and creeks of York County are patrolled by VMRC inspectors and all noted wetlands violations are reported to the Board for further investigation and related actions. Boats and aircraft are available from VMRC upon request of the Board.

Review and Appeal of Wetlands Board Decision

The Commissioner of Marine Resources reviews all decisions of the Board and notifies VMRC of any decision which should be reviewed by the Commission. VMRC reviews a decision of the Board made under the Wetlands Ordinance when:

- 1) An appeal is taken from such decision by the applicant for a permit or by the County of York; or
- 2) The Commissioner of Marine Resources requests such review; or
- 3) Twenty-five or more freeholders of property within York County sign and submit a petition to VMRC requesting the review; or
- 4) Where not otherwise provided, the foregoing requests for review or appeal must be made within ten days from date of initial determination by the Board or forfeit all right of appeal.

An appeal from any decision of the Commission may be taken by an applicant, freeholders as set forth above, or by York County within 30 days after the rendering of such decision by VMRC, to the Circuit Court having jurisdiction in York County (§28.2-1315).

APPENDIX B

PERMIT PROCEDURE

General

Any person who desires to use or develop any tidal wetland within York County, other than for those activities exempted in §28.2-1302 of the Code of Virginia (1950, as amended) must first file an application for a permit with VMRC. The Board and/or staff liaison is available to meet on-site with owners of tidal wetlands to discuss permitting requirements and to advise on project technicalities prior to submission of a formal application.

Application and Processing Procedure

A joint permit application form complying with local, state and federal requirements is used by the Board. This application is submitted to VMRC by the applicant. The application is in turn forwarded by VMRC to the applicable local, state, and federal agencies. All Board members are provided with a copy of the application. A \$150 filing fee (payable to Treasurer, County of York) must be submitted to York County prior to the publication of the notice of the public hearing. For those applications filed in response to a wetlands violation, an “after-the-fact” filing fee is \$250.

A public hearing, to be held within 60 days after receipt of a completed application, will be scheduled by the Board's staff liaison. At least 20 days prior to the hearing, notices of the hearing will be sent to appropriate state agencies, local government, owners of adjacent property to wetlands, known claimants of water rights in or adjacent to the wetlands in question, the applicant, and members of the Board. The notice will be published in a local newspaper once a week for two weeks prior to the hearing.

Field Investigation

An on-site evaluation of the project proposed in the application will be made by one or more Board members accompanied by the Board's staff liaison or his/her assignee, and, if necessary, by representatives of VIMS, VMRC and other agencies. If possible, the applicant and/or contractor should be present.

The presence and extent of wetlands and whether or not the Board has jurisdiction will be confirmed. Statements and benchmarks contained in the application will also be verified and, if necessary, corrections noted. Drawings with accurate benchmark references are a required part of the application. Overall environmental conditions will be assessed along with the environmental impacts of the proposed activity. An important aspect of the field evaluation is to ascertain if means exist to eliminate or minimize any adverse impacts.

Public Hearing and Board's Decision

All evidence relevant to the proposed project will be presented at the public hearing - the application, results of investigations of the Board and others, the testimony of the applicant, and the testimony of other interested parties. If necessary, the chair of the Board may administer oaths and compel the attendance of witnesses.

After hearing the evidence, the Board may:

- 1) Grant the permit as requested;
- 2) Grant the permit in a modified form;
- 3) Grant the permit with a reasonable surety and conditions securing compliance with conditions and limitations set forth in the permit;
- 4) Deny the permit;
- 5) Deny the permit without prejudice, permitting the applicant to submit a new application to accomplish the same purpose, but in a different manner;
- 6) Request the applicant to provide more information prior to final action;
- 7) When requested by the applicant, the Board can postpone the public hearing indefinitely.

In accordance with §23.1-12(a) of the York County Code, the Board has up to 30 days after the public hearing to make its decision. If the Board fails to make a decision within 30 days, it will notify the applicant and the Commission that 30 days has passed and therefore the application is deemed approved. Within forty-eight hours of its determination, the Board will notify the applicant and the Commission by mail of such determination. If the Board has not made a decision within 30 days it will notify the applicant and the Commission of this failure and the

application will be deemed approved. The Board's decisions can be reviewed by or appealed to the Commission within ten days; therefore, approvals are not valid until the ten days have elapsed. No work may be started on the project prior to approval by VMRC and other federal/state agencies.

The Board, after a hearing, may consider it a violation or suspend or revoke a permit if the applicant fails to comply with the terms and conditions set forth in the application.

All permits approved for issuance will provide for two years in which the work is to be accomplished. If the original expiration date is not met, the responsibility for applying for an extension of time rests solely with the applicant. Notice of such expiration date is sent to Permittee approximately 30 days prior to the permit expiration date to determine the status of the project. If additional time is needed, the notice should be returned requesting an extension of time by the Board. If the expiration date is not met and the Permittee does not apply for an extension of time, the work may not be permitted to proceed.

Emergency Permits

Emergency wetlands permits may be granted in accordance with the Virginia Marine Resources Commission "General Wetlands Permit for Emergency Situations" Regulation 4 VAC 20-345-10 Et Seq in Appendix A.

Wetlands Mitigation

York County has committed to Virginia's "no-net-loss" wetlands policy and the Wetlands Mitigation Compensation Policy in Appendix B adopted by the VMRC in 1989 and revised in 2005. The first choice of the Board is to site the structure and/or construction to AVOID fill of vegetated wetlands. If that is not possible due to the proximity of structures or other physical constraints, then unavoidable losses of vegetated wetlands must be MITIGATED either by creation of vegetated wetlands on-site in accordance with the VMRC Supplemental Guidelines or by purchase of an equal area of tidal wetlands credits at a permitted wetlands bank in the same Hydrologic Unit Code (HUC). The third and last option is to compensate for vegetated wetlands losses with an "in-lieu fee". The in-lieu fee has been established to be 1% higher than the current

rate at the closest permitted tidal wetlands bank, is made payable to the County and is set aside in a special fund dedicated to tidal wetlands restoration and creation.

Determination of Wetlands Loss: In determining the total area of wetlands loss requiring mitigation, the Board will consider filled vegetated wetlands which may include the shoreward half of a riprap footprint, the FILL, not the total impact. The VIMS report will be used to determine the square footage.

APPENDIX C

VIOLATION PROCEDURE

General

A permit is required from the Board if tidal wetlands (vegetated and/or nonvegetated) within the County are to be used or developed for any activities other than those specifically exempted in the Wetlands Act of 1972 (28.2-1302). Any person who knowingly, intentionally, negligently or continually violates any rule or regulation of the Board or violates any provision of the Wetlands Act or of the Wetlands Ordinance or any provision of a permit granted by the Board shall be guilty of a misdemeanor. The Board has the authority to investigate all projects, whether proposed or ongoing, which alter tidal wetlands within the County. The Board may obtain injunctions when necessary and has the power to prosecute all violations of any order of said Board, or any violation of any provision of the Wetlands Ordinance.

Report of Alleged Violation

Any activity suspected of violating the Wetlands Ordinance should be reported to the staff liaison of the Board, Department of Environmental and Development Services (890-3538) or to any Board member. In general, these reports are originated by private citizens, local, state or federal agencies, or from routine field inspections conducted by the Board and/or staff liaison. It is the policy of the Board to protect the anonymity of the individual reporting the suspected violation.

Probable Violations

All reports of probable violations will be investigated by the Board or the staff liaison and a Violation Worksheet will be initiated. Upon receipt of a report, one or more members of the Board and/or the staff liaison will conduct an on-site investigation with written notification to the property owner, who shall be given an opportunity to accompany the site inspector, to establish whether or not a violation actually exists. If permission is not granted for an on-site inspection, a search warrant must be obtained prior to entering the property. The Board members will, when circumstances permit, establish their identity to residents on the property at the time of the on-site investigation. If necessary, appraisals of the situation may be requested from VIMS and/or VMRC. Any action must have the concurrence of the Board at its next regularly scheduled meeting and a copy of any action notice will be forwarded to each Board member.

If, after conducting an on-site investigation, it is the opinion of the inspecting Board member(s) or staff liaison that a violation does not exist, a memo for the files which affirms this conclusion and documents the supporting facts will be written.

Any violation will be acted upon in accordance with §28.2-1317 of the Code of Virginia. The Board may accept an “after-the-fact” application for the project; however, it is the Board's position that submission of an application does not constitute approval, but rather is an affirmation of due process which could allow for civil charges.

The policy of the Board is to make every reasonable effort to affect an acceptable recovery of wetlands jeopardized by activities deemed to be in violation of the Wetlands Ordinance. The Board will, however, be aggressive in enforcement of the Wetlands Ordinance in order to ensure effective management of the wetlands existing in the County of York, Virginia. Civil charges (not to exceed \$10,000 per violation) may be assessed in accordance with the civil charges matrix or other reasonable method. The Board may use their discretion at arriving at a charge. The objective should be consistency without being unyielding.

Monitoring, Inspections, Compliance, and Restoration.

(a) The Board chair may require a Permittee to implement reasonable monitoring and reporting procedures the chair believes are reasonably necessary to ensure compliance with the provisions of the permit and this chapter.

(b) The Board chair may require such on-site inspections necessary to determine whether the measures required by the permit are being properly performed, or whether the provisions of this chapter are being violated. Prior to conducting any inspection, the Board chair shall provide notice to the resident owner, occupier, or operator, who shall be given an opportunity to accompany the site inspector. If it is determined that there is a failure to comply with the permit, the Board chair shall serve a Notice to Comply upon the Permittee at the address specified in his/her permit application or by delivery at the site of the permitted activities to the person supervising those activities and designated in

the permit to receive the notice. The notice shall describe the measures needed for compliance and the time within which these measures shall be completed. Failure of the person to comply within the specified period is a violation of this section. Such notice shall be presented to the Board at its next regularly scheduled meeting and receive the concurrence of a majority of the Board. Failure to obtain this concurrence shall void the notice.

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

(d) Upon receipt of a sworn complaint of a substantial violation of this chapter from a designated enforcement officer, the Board may issue a Restoration Order that the affected site be restored to predevelopment conditions if the Board finds that restoration is necessary to recover lost resources or to prevent further damage to resources. The order shall specify the restoration necessary and establish a reasonable time for its completion. The order shall be issued only after a hearing with at least thirty days' notice to the affected person of the hearing's time, place, and purpose, and shall become effective

immediately upon issuance by the Board. The Board shall require any monitoring plan they believe necessary to ensure the successful re-establishment of wetlands protected by this chapter and may require that a prepaid contract acceptable to the Board be in effect for the purpose of carrying out the monitoring plan. The Board may also require a reasonable bond or letter of credit in an amount and with surety and conditions satisfactory to it securing to the Commonwealth compliance with the conditions set forth in the restoration order. The appropriate court, upon petition by the Board, may enforce any such restoration order by injunction, mandamus, or other appropriate remedy. Failure to complete the required restoration is a violation.

(e) The duties of the Board chair may be delegated to a member of the Board; however, this designee shall not be a designated enforcement officer.