

VIRGINIA ACTS OF ASSEMBLY -- 2000 SESSION

CHAPTER 167

An Act to amend and reenact §§ 28.2-630, 28.2-1203, and 28.2-1205 of the Code of Virginia, relating to impacts on oyster and clam grounds.

[H 667]

Approved March 24, 2000

Be it enacted by the General Assembly of Virginia:

1. That §§ 28.2-630, 28.2-1203, and 28.2-1205 of the Code of Virginia are amended and reenacted as follows:

§ 28.2-630. Rights of riparian owners to build bulkhead or wharf.

All assignments or leases of oyster *or clam* grounds under this chapter shall be subject to the rights vested in riparian claimants under Article 1 (§ 28.2-600 et seq.) of this chapter and also to the following condition: That any landowner who desires to erect a bulkhead or wharf in front of his property or to open a channel, and who is not a lessee or riparian holder of suitable bottoms for that purpose, shall give the lessee or other holder of oyster *or clam* grounds in front of his property twelve months' notice of such intention; and upon the expiration of that time, the rights of the lessee or holder of so much of the oyster *or clam* grounds as are reasonably needed for building the bulkhead, wharf, or channel shall cease. *This twelve-month notice and waiting period shall not apply if, at the time the landowner provides notice to the lessee or other holder of the oyster or clam grounds in front of his property, the landowner provides the Commissioner sufficient information describing the dimensions and location of the bulkhead, wharf or channel and the Commissioner subsequently finds, in writing, that the proposed bulkhead, wharf or channel will not adversely impact commercially productive oyster or clam grounds. For purposes of this section "commercially productive oyster or clam grounds" are those areas which can be demonstrated to have (i) suitable substrate for oyster or clam production and (ii) evidence of commercial oyster or clam production within the past three years.* If the bulkhead, wharf, or channel has not commenced as specified in the notice within three months after the oyster *or clam* grounds were vacated, the former lessee or holder shall have the right to resume possession of the oyster *or clam* grounds he has vacated in favor of such landowners, subject to the provisions of this chapter. Any person constructing a channel under this section shall compensate the lessee of any oyster *or clam* grounds for all losses or damages including the value of the ground taken for the construction of the channel. The lessee shall have recourse under action of the law in the court of the proper jurisdiction of the Commonwealth of Virginia to recover damages.

§ 28.2-1203. Unlawful use of subaqueous beds; penalty.

A. It shall be unlawful for any person to build, dump, trespass or encroach upon or over, or take or use any materials from the beds of the bays, ocean, rivers, streams, or creeks which are the property of the Commonwealth, unless such act is performed pursuant to a permit issued by the Commission or is necessary for the following:

1. Erection of dams, the construction of which has been authorized by proper authority;
2. Uses of subaqueous beds authorized elsewhere in this title;
3. Construction and maintenance of congressionally approved navigation and flood-control projects undertaken by the United States Army Corps of Engineers, *the* United States Coast Guard, or other federal agency authorized by Congress to regulate navigation, navigable waters, or flood control;
4. Construction of piers, docks, marine terminals, and port facilities owned or leased by or to the Commonwealth or any of its political subdivisions; or

5. *Except as provided in subsection D of § 28.2-1205*, placement of private piers for noncommercial purposes by owners of the riparian lands in the waters opposite those lands, provided that the piers do not extend beyond the navigation line or private pier lines established by the Commission or the United States Army Corps of Engineers. Subject to any applicable local ordinances, such piers may include an attached boat lift and an open-sided roof designed to shelter a single boat slip or boat lift. In cases in which such roofs will exceed 700 square feet in coverage, and in cases in which an adjoining property owner objects to a proposed roof structure, permits shall be required as provided in § 28.2-1204.

B. A violation of this section is a Class 1 misdemeanor.

§ 28.2-1205. Permits for the use of state-owned bottomlands.

A. When determining whether to grant or deny any permit for the use of state-owned bottomlands, the Commission shall be guided in its deliberations by the provisions of Article XI, Section I of the Constitution of Virginia. In addition to other factors, the Commission shall also consider the public and private benefits of the proposed project and shall exercise its authority under this section consistent with the public trust doctrine as defined by the common law of the Commonwealth adopted pursuant to § 1-10 in order to protect and safeguard the public right to the use and enjoyment of the subaqueous

lands of the Commonwealth held in trust by it for the benefit of the people as conferred by the public trust doctrine and the Constitution of Virginia. The Commission shall also consider the project's effect on the following:

1. Other reasonable and permissible uses of state waters and state-owned bottomlands;
2. Marine and fisheries resources of the Commonwealth;
3. Tidal wetlands, except when this has or will be determined under the provisions of Chapter 13 of this title;
4. Adjacent or nearby properties;
5. Water quality; and
6. Submerged aquatic vegetation (SAV).

B. The Commission shall consult with other state agencies, including the Virginia Institute of Marine Science, the State Water Control Board, the Virginia Department of Transportation, and the State Corporation Commission, whenever the Commission's decision on a permit application relates to or affects the particular concerns or activities of those agencies.

C. No permit for a marina or boatyard for commercial use shall be granted until the owner or other applicant presents to the Commission a plan for sewage treatment or disposal facilities which has been approved by the State Department of Health.

D. A permit is required and shall be issued by the Commission for placement of any private pier measuring 100 or more feet in length from the mean low-water mark, which is used for noncommercial purposes by an owner of the riparian land in the waters opposite the land, and that traverses commercially productive leased oyster or clam grounds, as defined in § 28.2-630, provided that the pier does not extend beyond the navigation line established by the Commission or the United States Army Corps of Engineers. The permit may reasonably prescribe the design and location of the pier for the sole purpose of minimizing the adverse impact on such oyster or clam grounds or the harvesting or propagation of oysters or clams therefrom. The permit shall contain no other conditions or requirements.

~~D.~~ E. All permits issued by the Commission for the use of state-owned bottomlands or to recover underwater historic property shall be in writing and specify the conditions, terms and royalties which the Commission determines are appropriate.

~~E.~~ F. Any person aggrieved by a decision of the Commission under this section is entitled to judicial review in accordance with the provisions of the Administrative Process Act (§ 9-6.14:1 et seq.). However, any decision made by the Commission hereunder consistent with the public trust doctrine as defined by the common law of the Commonwealth adopted pursuant to § 1-10 shall not be deemed to have been made pursuant to the police power. Nothing in this subsection shall be construed to deprive a riparian land owner of such rights as he may have under common law.