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SENATE BILL NO. 1355

Offered January 11, 2017

Prefiled January 11, 2017

A BILL to amend and reenact §§ 28.2-556, 28.2-603, 28.2-630, and 28.2-1205 of the Code of Virginia, relating to riparian owner; dredging; oyster or clam grounds.

Patrons—DeSteph; Delegate: Knight

Referred to Committee on Agriculture, Conservation and Natural Resources

Be it enacted by the General Assembly of Virginia:

1. That §§ 28.2-556, 28.2-603, 28.2-630, and 28.2-1205 of the Code of Virginia are amended and reenacted as follows:

§ 28.2-556. Erosion control devices within the Baylor survey.

The public oyster beds, rocks, and shoals shall not include any area needed for an erosion control structure if the Commission, after considering the comments of the Virginia Institute of Marine Science and the Department of Conservation and Recreation, and any other relevant evidence, finds that: (i) shoreline erosion has occurred at the site and is expected to continue; (ii) such erosion is increasing the sediment load to public waters, causing degradation of water quality; (iii) the proposed project is a technically and environmentally acceptable way to control erosion at the site unless such Baylor ground is productive under subsection B of § 28.2-630 of the Code of Virginia in which case the environmentally preferable erosion control shall be utilized; and (iv) the Commonwealth's interest in protecting water quality by controlling erosion at the site outweighs the value of the portion of the natural oyster beds, rocks, and shoals affected by the erosion control structure. Whenever the area of the natural oyster beds, rocks, and shoals is so changed, the Commission shall make the changes on its Baylor survey charts.

§ 28.2-603. General oyster planting grounds.

Waterfront that is not already assigned or reserved for the riparian owners, and the beds of the bays, rivers, and creeks and shores of the sea lying outside the limits of navigation projects adopted and authorized by the Congress, the Commonwealth, or the locality in which a navigation project is located, and not required for the disposal of materials dredged incident to the maintenance of such projects, and grounds other than public oyster beds, rocks, or shoals, as defined by law and included in the Baylor survey, may be occupied for the purpose of planting or propagating oysters, including the use of temporary protective enclosures in compliance with this chapter and Commission regulations, and may be leased by the Commissioner upon the receipt of a proper application.

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

All assignments or leases A. Every assignment or lease 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, including by dredging or participating with a locality to dredge a navigable channel inside or outside of his riparian area for access to his property, or to mark such 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 the project area 12 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, or wharf, or opening, dredging, or marking the channel shall cease.

This twelve-month B. The 12-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 to 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 that 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.

C. If the bulkhead, wharf, or channel has not commenced as specified in the notice within three months after the oyster or clam grounds were are vacated, the former lessee or holder shall have the right to resume possession of the such oyster or clam grounds he has vacated in favor of such landowners, subject to the provisions of this chapter.

D. Any person constructing, dredging, or marking a channel under this section shall compensate the

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59 lessee of any oyster or clam grounds for all losses or damages, including the value of the ground taken
60 for the construction, *dredging, or marking* of the channel. The lessee shall ~~have recourse under be~~
61 *entitled to bring a civil action of the law in the court of the proper in a court of competent* jurisdiction
62 of the Commonwealth of Virginia to recover damages.

63 **§ 28.2-1205. Permits for the use of state-owned bottomlands.**

64 A. When determining whether to grant or deny any permit *or lease* for the use of state-owned
65 bottomlands, the Commission shall be guided in its deliberations by the provisions of Article XI, Section
66 I of the Constitution of Virginia. In addition to other factors, the Commission shall also consider the
67 public and private benefits of the proposed project and shall exercise its authority under this section
68 consistent with the public trust doctrine as defined by the common law of the Commonwealth adopted
69 pursuant to § 1-200 in order to protect and safeguard the public right to the use and enjoyment of the
70 subaqueous lands of the Commonwealth held in trust by it for the benefit of the people as conferred by
71 the public trust doctrine and the Constitution of Virginia. The Commission shall also consider the
72 project's effect on the following:

73 1. ~~Other~~ *Navigation and other* reasonable and permissible uses of state waters and state-owned
74 bottomlands;

75 2. Marine and fisheries resources of the Commonwealth;

76 3. Tidal wetlands, except when this has or will be determined under the provisions of Chapter 13 of
77 ~~this title~~ (§ 28.2-1300 *et seq.*);

78 4. Adjacent or nearby properties;

79 5. Water quality; and

80 6. Submerged aquatic vegetation (SAV).

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

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

88 D. A permit is required and shall be issued by the Commission for placement of any private pier
89 measuring 100 or more feet in length from the mean low-water mark, which is used for noncommercial
90 purposes by an owner of the riparian land in the waters opposite the land, and that traverses
91 commercially productive leased oyster or clam grounds, as defined in *subsection B of § 28.2-630*,
92 provided that the pier does not extend beyond the navigation line established by the Commission or the
93 United States Army Corps of Engineers. The permit may reasonably prescribe the design and location of
94 the pier for the sole purpose of minimizing the adverse impact on such oyster or clam grounds or the
95 harvesting or propagation of oysters or clams therefrom. The permit shall contain no other conditions or
96 requirements. Unless information or circumstances materially alter the conditions under which the permit
97 would be issued, the Commission shall act within 90 days of receipt of a complete joint permit
98 application to approve or deny the application. If the Commission fails to act within that time, the
99 application shall be deemed approved and the applicant shall be notified of the deemed approval.

100 E. All permits issued by the Commission for the use of state-owned bottomlands pursuant to
101 § 28.2-1204, or to recover underwater historic property shall be in writing and specify the conditions and
102 terms that the Commission determines are appropriate, and royalties unless prohibited under other
103 provisions of this chapter.

104 F. Any person aggrieved by a decision of the Commission under this section is entitled to judicial
105 review in accordance with the provisions of the Administrative Process Act (§ 2.2-4000 *et seq.*).
106 However, any decision made by the Commission hereunder consistent with the public trust doctrine as
107 defined by the common law of the Commonwealth adopted pursuant to § 1-200 shall not be deemed to
108 have been made pursuant to the police power. No person shall reapply for the same or substantially
109 similar use of the bottomlands within 12 months of the denial of a permit by the Commission. Nothing
110 in this subsection shall be construed to deprive a riparian landowner of such rights as he may have
111 under common law.