REPORT OF THE SECRETARY OF COMMERCE AND RESOURCES

TO

THE GOVERNOR

AND

THE GENERAL ASSEMBLY OF VIRGINIA

SENATE DOCUMENT NO. 8

COMMONWEALTH OF VIRGINIA
DIVISION OF PURCHASES AND SUPPLY
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REPORT OF THE SECRETARY OF COMMERCE AND RESOURCES

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GOVERNOR OF VIRGINIA

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REGARDING SENATE JOINT RESOLUTION NO. 62

Prepared by the

VIRGINIA COASTAL RESOURCES MANAGEMENT PROGRAM

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COMMONWEALTH of VIRGINIA

Office of the Governor

Richmond 23219

Maurice B. Rowe
Secretary of Commerce and Resources

Report of the

Secretary of Commerce and Resources

to

The Governor and the General Assembly of Virginia

TO: The Honorable John N. Dalton, Governor of Virginia

and

The General Assembly of Virginia

The 1978 General Assembly enacted Senate Joint Resolution No. 62 which requested the Secretary of Commerce and Resources to continue efforts to improve the operation of shoreline permit programs. It also called for further investigation into differences between State and federal permit programs, a review of current exemptions under Title 62.1 of the Code of Virginia (Waters of the State) as they relate to the proliferation of structures on State-owned bottoms and, finally, a study of the feasibility of allowing local governments to administer the State permit program for activities on subaqueous lands.

This report is presented to the Governor and General Assembly in accordance with the request contained in the Resolution.

I wish to thank all those who cooperated in the preparation of this report.

Sincerely,

Maurice B. Rowe

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REPORT OF THE SECRETARY OF COMMERCE AND RESOURCES
REGARDING SENATE JOINT RESOLUTION NO. 62

Introduction

Senate Joint Resolution 62 (Attachment 1) recommended by the Coastal Study Commission and adopted during the 1978 session of the General Assembly addresses the issues of public dissatisfaction with the process of obtaining permits to conduct activities in tidal waters and adjacent wetlands and concern over the proliferation of shoreline structures. Resulting from the 1977 legislative review of the Coastal Resources Management Program, SJR 62 requested the continuation of efforts to improve the operation of shoreline permit programs. It also called for further investigation into differences between State and federal permit programs, a review of current exemptions under Title 62.1 of the Code of Virginia (Waters of the State) as they relate to the proliferation of structures on State-owned bottoms and, finally, a study of the feasibility of allowing local governments to administer the State permit program for activities on subaqueous lands.

This report is presented to the Governor and General Assembly in accordance with the request contained in the resolution.

Issues and Findings

The process of obtaining the necessary permits for projects involving alterations of tidal waterways and adjacent wetlands has been one of the most frequently raised issues during the development of Virginia's Coastal Resources Management Program. Speaking out at public hearings on coastal issues, waterfront property owners, developers, community leaders and local officials have related incidents of confusion, frustration and costly delays in securing permits for shoreline and nearshore alterations. Regional reports identifying coastal issues have frequently cited the shoreline permitting process as a problem in need of investigation and corrective measures. On the basis of such concern, regulatory

programs governing activities in tidal waters and adjacent wetlands have been closely examined to determine where problems exist and to recommend improvements. This examination has led to several basic findings.

First, the number and diversity of shoreline permit requirements are a manifestation of the varied public concerns which intersect at the water's edge. The public interest in minimizing conflicting land uses, insuring adequate building standards, maintaining the navigability of waterways, protecting coastal fisheries and wildlife, preserving tidal wetlands, maintaining water quality, preventing health hazards and controlling private uses of public property are all the subjects of legislatively created or enabled permit programs. The permit approach protects these interests by establishing a process through which public policies and the standards, criteria and guidelines to implement them can be brought to bear on those projects likely to affect such interests. Aside from principally environmental concerns, most permit programs also recognize specific social and economic impacts of a project on the surrounding community and the rights of neighboring property owners as public interest factors and provide a forum for those who might be concerned with or affected by a project to register their concerns. For any permit program to operate effectively, then, it must be administered in an open, impartial and orderly manner to insure that due consideration of all relevant public interest factors is not foreclosed.

A review of permit records indicates there are many "unavoidable" sources of delay in processing permits. Some delays, for example, are traceable to the applicant. Incomplete applications, particularly inadequate drawings (which are important to determining whether the activity is subject to a particular permit program) are a frequent problem in reviewing project plans. Non-compliance with permit conditions have caused projects to be halted prior to completion. Protests and appeals, often by neighboring property owners, have caused lengthy delays in project commencement. Some project proposals clearly conflict with public policy and standards and must

be revised to be deemed acceptable. All of these causes of delay in project approval are essentially beyond the control of public agencies which must review permit applications.

Finally, although there is a wide variety in the size and scope of activities proposed in tidal waters and wetlands, the majority of permit applications processed is for smaller, non-controversial, predominantly residential projects designed to improve riparian access or to check shoreline erosion. Nearly sixty-five per cent of all projects authorized by the Corps of Engineers in coastal Virginia between July 1972 and January 1976 were of this type. Applications for such smaller projects are generally processed within sixty to ninety days. Virginia law requires that a decision on a wetlands application be rendered within ninety days, although most are made in less time. Federal guidelines for permit programs administered by the Army Corps of Engineers call for processing in ninety days also. During federal fiscal year 1978, the average processing time for non-controversial projects in the Norfolk District ranged from forty two days to fifty four days. This record was among the best of all Corps Districts in the Nation. Thus, State and federal permit programs appear to respond to smaller, non-controversial projects in a relatively expeditious manner.

These findings notwithstanding, however, the review of shoreline permit programs has revealed that the fundamental problem in the system of controlling development along the shore is the number and often overlapping nature of permit programs, and until recently, the lack of effective collaborative efforts to ensure the most efficient administration of the permitting system as it operates on all levels of government. The general increase in public sensitivity to environmental issues during the last decade has resulted in a general proliferation of permit programs. The impact of this trend has been felt as much along the shore as anywhere. Two of the principal programs controlling development in wetlands, the Virginia Wetlands Act (1972) and Section 404 of the Federal Water Pollution Control Act Amendments (1972) have both been enacted during the seventies. New policies and standards have been

added to other older permit programs substantially changing their nature. (The origin, purposes and policies of these permit programs and their institutional arrangements are reviewed in Attachment 2). The effect of this proliferation of programs is evident by the requirements placed on shoreline construction today. The sponsor of a commercial pier, for example, may have to obtain a building permit, a wetlands permit from the local wetlands board (or if no board is formed, from the Marine Resources Commission), a water quality certificate from the State Water Control Board, a permit for encroachment on State-owned bottoms from the Marine Resources Commission, approval of sanitary facilities by the State Health Department and finally, authorization from the Corps of Engineers under at least two permit programs.

Because of differences in timing, scope, emphasis and procedures, most of these permit programs have suffered from a lack of any means of coordination. Local, State and federal permit programs have, in many instances, evolved relatively independent of one another. This independence has, in the past, not been addressed by collaborative attempts to rectify policy conflicts and streamline administrative procedures. Multiple site visits inconveniencing project sponsors, duplications of information requested on permit applications, conflicting reference systems for identifying the same project, policy and project assessment conflicts and lengthy delays through written correspondence between and among agencies in resolving such conflicts have all been manifestations of inadequate collaboration. It is not difficult, then, to understand why some coastal residents perceive the shoreline permitting process to be a bewildering system of requirements and procedures.

Permit Processing Improvements

Efforts to improve the operation of the permit system as a whole, as well as procedures within individual agencies, have been underway for nearly two years as a result of general recognition by all levels of government of the need to improve and streamline permit processing. These efforts have concentrated on innovative

administrative procedures as a means of minimizing the difficulties caused by multiple permit requirements, thereby providing better service to the applicant. Activity at the State level has focused on five projects - development of a joint permit application, development of guidelines for activities in State-owned bottomlands, State interagency administrative agreements, joint State-federal permit application review meetings and finally, support for local wetlands boards.

One of the most frequent criticisms of the present permit system has been the number of permit applications a project sponsor must complete to secure the necessary local, State and federal authorizations. Comparision of these permit applications revealed a substantial overlap in information requested. Consequently, the development of a single joint permit application was begun during 1977. The new application, issued for use in September of this year, consolidates four previously separate forms and is available through local wetlands boards, thereby eliminating the expense of travel and phone calls to State and federal agencies. New processing procedures developed to compliment this application have also provided for the assignment of a standard processing number to be used by local, State and federal agencies. This simple procedure is eliminating confusion and administrative costs in cross-referencing permit applications.

Another frequent criticism of the permitting process has been the lack of guidelines for certain types of projects as a means of enabling project sponsors to incorporate environmental considerations into project design, thereby increasing the probability of project approval. The 1972 Virginia Wetlands Act directed the Marine Resources Commission to publish wetlands guidelines with the advice of the Virginia Institute of Marine Science. However, no such guidelines for subaqueous activities have been available in the past. During the last year work has begun on drafting guidelines for the use of State-owned bottomlands illustrating environmentally preferred means of shoreline alterations such as bulkheading, pier construction dredging, and the placement of boat moorings. Currently undergoing revision, these guidelines will incorporate many of the concerns of federal agencies and will be

available to the public upon adoption by the Marine Resources Commission. When completed, they will also be incorporated into a coastal development handbook presently being prepared by the Secretary of Commerce and Resources. This handbook will serve as a comprehensive guide to project sponsors proposing shoreline alterations.

In seeking to improve permit processing, one of the first areas of effort was within the State system of permits. A number of State interagency agreements have been developed during the past two years which have substantially improved permit processing. A joint site visit agreement between the Marine Resources Commission and the Virginia Institute of Marine Science was reached in 1977 and has subsequently been expanded to include project inspectors from the State Water Control Board as well. Joint site visits have not only reduced inconvenience to project sponsors but have also improved project assessments by facilitating on-site discussions between permit officers and the applicant. Administrative procedures for determining whether certain projects require Health Department review and approval have been improved through a memorandum of understanding between that agency and the Commission. These procedures have eliminated some of the delays in local and State health certifications of marinas and other places where boats are moored. Finally, during 1977, the State Water Control Board and the Marine Resources Commission developed a consolidated permit application which later evolved into the joint local-State-federal permit application recently instituted.

Perhaps the single most important improvement in permit processing, however, has been the continuation of joint project review meetings between State and federal environmental agencies. With the development of the permit requirement of Section 404 of the Federal Water Pollution Control Act Amendments and the infusion of environmental factors into the decision-making apparatus for older permit programs, principally the River and Harbor Act of 1899, the Army Corps of Engineers and other federal environmental agencies experienced increasing permit workloads. Consequently in the mid-seventies, at the same time State procedures were improving, federal agencies began to react to their increasing workload and

the need to coordinate with advisory agencies by streamlining procedures. During 1976 the Norfolk District of the Corps of Engineers commenced monthly meetings with regional representatives of the Fish and Wildlife Service, National Marine Fisheries Service and the Environmental Protection Agency to review pending applications. Expanded during 1977 to include State agencies as well (Marine Resources Commission, Institute of Marine Science, Health Department and Water Control Board), this initiative has substantially reduced processing time for many projects. In some instances, conflicting project assessments which would have taken weeks or months to resolve through the mail, have been settled at one meeting. Face-to-face interaction between permit administrators has also had the important effect of improving understanding and appreciation of the mandates, policies, procedures and perspectives of the various regulatory agencies and has fostered a greater trust between and among State and federal agencies. For example, the Marine Resources Commission has presented project plans for which State approval has been secured, explained the rationale for approval and responded to federal agency concerns over the acceptability of a project. Finally, joint processing has provided a forum for developing further improvements in permit processing such as the joint permit application discussed above.

Local environmental management has been an important part of Virginia's coastal resources management effort since the enactment of the Commonwealth's wetlands program. In the six years since this law was passed, the Virginia Institute of Marine Science has conducted a number of wetlands workshops to train local wetlands boards members in the ecological value of wetlands, the types of tidal marshes found in Virginia, and methods of mitigating the effects of development on wetlands. Similarly, the Marine Resources Commission has traditionally maintained a close working relationship with local boards. During the past year the Commission staff has moved to further improve cooperation. Periodic consultations with local board members have been instituted. These consultations have reviewed permit

processing and enforcement problems and have explored the expansion of avenues of State support to local wetlands boards in the discharge of their duties. Commission engineers have increased the frequency of contact with these boards and provided advice on numerous occasions regarding provisions of law, technical information and procedural matters. This effort has helped to foster a greater confidence on the part of some board members and served to generally improve project assessments by wetlands boards. To supplement these consultations, a conference designed principally for local wetlands boards has been scheduled for early December at which boards members and permit administrators from State and federal environmental agencies will convene to discuss permitting procedures and enforcement problems. If successful, this effort may become an annual gathering.

The improvements in permit processing discussed above have all been instituted within the last two years. Many of these changes are only now reaching fruition and being realized in a more efficient system of permit processing. Since by its very nature a permit program is a restraint on individual freedoms to which many applicants would not voluntarily submit, these changes may not be reflected in an immediate shift in the public perception of the permitting system. Undoubtedly projects will continue to be modified or in some cases denied in order to protect the valid public interests for which these programs were created. Disagreements between agencies will continue to occur, as well as occasional clerical errors. But taken together these new administrative procedures represent a substantial improvement in the operation of the current shoreline permitting system. As a result, project sponsors are receiving fairer treatment, better service and a decision in less time than in the past. Thus, the improvements outlined above have moved the entire permitting system closer to the objective of one-stop permit processing for the applicant.

Potential For Further Improvements

Despite the considerable progress in alleviating the problems caused by numerous permit requirements, the basic framework of multiple and overlapping permit

programs has remained unchanged. Only procedures have been changed to make the system, as it is currently structured, operate more efficiently. In investigating the permit process the CRM program has found that despite the differing responsibilities, the requirements of local, State and federal agencies are often substantially similar in terms of the type of projects which are considered environmentally acceptable. This is particularly true of smaller projects.

In Virginia, agreed-upon wetlands guidelines are now utilized by all three levels of government in their project reviews. Joint permit meetings have brought policies closer together and steadily increased the number of projects upon which all agencies agree. Consequently, the Coastal Resources Management Program staff believes that greater federal reliance could be placed on the project assessments and decisions of local and State permitting agencies for smaller, non-controversial projects. This would help separate in the review process those types of projects which do not present individual or cumulative environmental impacts from those of relatively greater environmental, social or economic controversy. The lack of a formal procedure for doing so has been a frequent criticism of the permitting system as it has operated in the past. As the degree of concurrence on projects between local and State permit administrators on the one hand, and federal permit administrators on the other has increased, the foundation of trust upon which such federal reliance must be constructed has been established. Thus it appears that further efficiencies in the review of shoreline projects can be realized if primary responsibility for supervising smaller types of projects is vested with the Marine Resources Commission and local wetlands boards. State permit programs - locally administered where practicable - can adequately protect the national interest in controlling alterations to tidal waterways and adjacent wetlands. Such a system would allow greater State and local leadership in the protection of coastal resources, remove some of the administrative redundancy in the permitting system, and enable State and federal agencies to focus greater attention on those projects posing significant hazards as well as on enforcement.

Federal regulatory authority may only be delegated to State governments through Congressional authorization. Generally this is accomplished not through actual delegation, but rather through recognition of federally approved State permit programs designed to enforce federal standards. It is on this basis that the State Water Control Board administers the National Pollution Discharge Elimination System permit program controlling industrial and municipal outfalls into Virginia's waters. Upon certification of a State permit program as meeting its standards, the federal government suspends its own permit processing. This concept was applied to the Section 404 permit program in the 1977 Clean Water Act Amendments. These amendments, among other things, established a process whereby federal recognition would be afforded certified State permit programs governing activities in certain non-tidal waters. The concept was not, however, extended to tidal waters apparently because of the paramount navigation servitude enjoyed by the federal government. There may, though, be a future role for coastal states in administering permit programs for activities requiring a Section 404 water quality permit, should the concept be extended to activities in tidal waters.

In the absence of a means for coastal states to obtain legislative recognition of permit programs in tidal waters, the Coastal Resources Management Program staff has explored alternative means of assuming a greater role in administering shoreline development control programs. A provision in Department of the Army regulations governing permit programs created by the River and Harbor Act of 1899 and the Federal Water Pollution Control Act Amendments allows such an alternative arrangement through the issuance of "general permits". Designed principally to reduce the federal permit workload, the general permit provision enables the District Engineer of the Corps of Engineers to publicly authorize, subject to certain conditions, those projects which are substantially similar in nature and will cause only minimal adverse individual or cumulative environmental effects. Before the Corps issues a general permit, however, the category of activities under consideration undergoes

a thorough environmental review. The activity itself must usually meet several conditions, including design restrictions, project size limitations, and a requirement that appropriate State or local permits be obtained first. In most cases, if a proposed project meets the general permit conditions, the sponsor need only notify the District Engineeer prior to beginning the project. Federal advisory agency opinions, such as those of the U. S. Fish and Wildlife Service or the Environmental Protection Agency, are not normally required unless specified as a condition of the permit. The Corps of Engineers may revoke the general permit at any time and a proposed project must meet all conditions in order to qualify for such treatment. Because the general permit is still a permit per se, no authority is actually delegated, nor are any agency mandates changed. The net result, however, is to streamline administrative procedures for those projects the Corps deems to be of only minor interest and where State and local governments operate similar permit programs, to move the decision-making process closer to those most affected by it, while leaving all avenues of appeal open.

The Baltimore and Norfolk Districts each have issued a number of general permits during the last several years. These permits have authorized such activities as the construction or placement of private, non-commercial mooring buoys, pilings and piers, as well as maintenance and replacement of bulkheads and placement of rip-rap for shoreline stabilization. The Baltimore District of the Corps of Engineers reports that applications meeting general permit conditions are generally processed in 14 days or less, while individually permitted projects generally require a minimum of 45 days to be approved. Thus the general permit system also has the potential to serve as an inducement to project sponsors to design more environmentally acceptable projects as reflected in general permit conditions in order to take advantage of reduced processing time.

In November 1977 the former Secretary of Commerce and Resources convened a meeting of representatives from several State environmental agencies concerned with

shoreline construction and the two Corps Districts to discuss the permitting proposals of the Coastal Resources Management Program and commence formal discussions on the question of issuing further general permits. Several subsequent meetings were held during the first six months of this year. From these discussions it became evident that it was encumbent upon the Commonwealth to recommend the types of projects appropriate for general permit action. Consequently, during the spring and early summer of 1978, the Marine Resources Commission and the Institute of Marine Science conducted a joint project to review all categories of shoreline construction permits and develop recommendations for general permits. Researchers at the Institute developed data for various types of private, non-commercial projects (Attachment 3). From this information the average size of various types of projects was determined. The Marine Resources Commission, in the meantime, reviewed all general permits issued by Corps Districts from Louisiana to New England. From the information gathered, a draft set of project sizes and conditions was developed and forwarded to the Norfolk and Balitmore Districts on June 8 of this year (Attachment 4). A briefing of the National Marine Fisheries Service and the U. S. Fish and Wildlife Service on these recommendations was also held on August 24. At that meeting the general permit concept was extensively discussed. The initial reaction of both the Corps Districts and their advisory agencies has been favorable.

Disparity Between State and Federal Permit Programs

Despite the intially favorable reaction of federal environmental agencies toward expanding the general permit program, Virginia may need to improve its programs for controlling activities in tidal waters and wetlands in order to achieve greater federal reliance on State and local programs. Federal agencies have cited certain deficiencies in State law as a major impediment to greater reliance on State programs. A recent review of permit applications received by

the Norfolk District of the Army Corps of Engineers during the period 1975 through 1977 disclosed that in only 30 per cent of the projects for which a federal permit was required did Virginia law exercise jurisdiction through its subaqueous and wetlands permit programs (Figure 1, Attachment 5). This substantial difference in authority is primarily attributable to provisions in the Virginia Code exempting private, non-commercial, open-pile piers and structures from permit requirements as well as to the limitation of the definition of wetlands to tidal marshes only. Federal law under the Federal Water Pollution Control Act Amendments and the River and Harbor Act extend permit coverage to the high tide line, or where marsh vegetation is present, to the upper limit of wetlands. Virginia law, by contrast, limits permit coverage to a substantially smaller area. The Commonwealth's subaqueous law, originally conceived to control private uses of State-owned bottoms, is limited in jurisdiction to mean low water, which in Virginia is the extent of riparian private property ownership. The Virginia wetlands law is restrictive in its permit coverage to only tidal marshes falling within the biophysical definition of "wetlands" (Figure 2, Attachment 5). Thus extensive areas of intertidal lands, which are being found to be ecologically valuable and for which federal permits are required for many activities, are beyond the purview of Virginia's present system for controlling shoreline development.

Exemptions in Virginia's Laws Governing Uses of Subaqueous Land and Wetlands

The exemption of private, non-commercial piers in both Virginia's wetlands law and its legislation governing uses of State-owned bottoms has left the Commonwealth and its subdivisions with little control over a rapidly proliferating class of structures. During the last five years there has been a steady growth in the number of private, non-commercial piers constructed in Virginia's tidal waterways as the result of a rapid expansion of waterfront development and recreational boating in both urban and rural areas. Non-commercial piers now account for nearly

35% of the most frequently performed shoreline alterations. Jurisdiction over the structures has been the sole province of the Corps of Engineers. While private, non-commercial piers are generally recognized as a legitimate exercise of riparian rights, their size, placement and use are sometimes the subject of complaints by adjacent property owners. Many of the objections registered against piers concern riparian property rights or aesthetics, particularly in the case of boathouses which are also exempt from Virgina law. Protests over these types of projects are currently resolved by employees of the Corps of Engineers. The system of local and State citizen boards used in Virginia, however, presents a number of advantages in resolving such conflicts, principally through collective decision-making.

Local Authority To Administer The State Subaqueous Permit Program

The report Alternatives for Coastal Resources Management contained a proposal to establish a process by which local governments could assume limited authority to administer the State permit program for State-owned bottomlands. The purpose of this proposal was to consolidate permit reviews for certain types of smaller projects at the local level. Under current permitting procedures projects which involve wetlands and encroach upon State bottoms must be reviewed by both a local wetlands board, where such a board exists, and the Marine Resources Commission. By delegating authority to local governments to administer the subaqueous permit program for smaller projects only one field assessment would be necessary and the entire project could be acted upon at the local level subject, of course, to a continuing State review of each decision.

Senate Joint Resolution 62 requested further study of the merits and problems of this concept. In the Interim Report on this resolution, a number of questions were outlined which required investigation prior to drawing any conclusions as to the feasibility and advisability of instituting such a system. The responses to these questions based upon research conducted during 1978 are outlined below.

The nature of the Commonwealth's interest in those lands subject to a sub-

aqueous permit program is fundamentally different from that of wetlands. Title 62.1 of the Code (Attachment 6) establishes the essential proprietary interest of the Commonwealth in subaqueous lands by declaring "(a)ll the beds of the bays, rivers, creeks and the shores of the sea within the jurisdiction of the Commonwealth, and not conveyed by special grant or compact according to law, shall continue and remain the property of the Commonwealth of Virginia . " Title 62.1 continues to declare the rights of property owners extend to mean low water and requires authority for the use of State-owned bottoms. The permit program established pursuant to this directive is clearly designed to control private uses of public property which would infringe upon the rights of the public to use these lands as a common for the purpose of fishing, fowling and taking oysters. This permit program is administered by the Marine Resources Commission.

It is clear then that the interest of the Commonwealth in subaqueous lands is proprietary and in the nature of a trust administered for the benefit of all Virginians. The wetlands permit program, by contrast, is essentially an exercise of the State's police power in protecting the health, safety and general welfare of its citizens. Since the majority of wetlands are privately owned, there is no proprietary interest in such lands, merely the public's concern that the beneficial attributes of wetlands not be needlessly compromised or destroyed. Since the exercise of police power over private property, principally through the delegated power to zone, has traditionally been the purview of local governments, the wetlands permit program was structured as enabling legislation for local governments subject to State review, override and where the local authority was not assumed, enforcement. No such authority, however, has ever been delegated regarding lands in which the Commonwealth has a proprietary interest.

One of the principal questions concerning delegation of subaqueous permit administration is then one of representation. Can a local government, representing only a limited segment of the population, adequately protect the interests of all Virginians in controlling private uses of State-owned subaqueous lands? The Coastal

Resources Management Program staff has concluded that, under certain conditions, local government can be responsive to the State's interest in administering the permit process. These conditions would consist of a limitation on the size and condition of the projects eligible for local review. Only those projects which are generally approved by the Commission and which would not normally conflict with the Commonwealth's interest would be recommended. Those classes of projects which the CRM program has recommended to the Corps of Engineers as being approrpiate for general permits are examples of such projects. Local decisions would be based upon State standards and criteria. The local board administering the permit program would be charged with the same decision-making responsibilities as the Commission, that is it would be guided in its deliberations by the provisions of Article 1 of the Constitution of Virginia and would consider, among other things, the effect of the proposed project upon the reasonable and permissible uses of State waters and State-owned bottom land and its effect on marine fisheries and wetlands of the Commonwealth. Operational policy guidance would be provided by the Marine Resources Commission. Finally, the Marine Resources Commission would review each decision and ensure compliance with State standards and criteria and would retain the right to reverse or modify any local subaqueous permit decision. The CRM program staff believes that under these conditions a workable framework for delegation could be developed.

Two alternative procedures for delegation have been investigated during the past year. Under one approach the General Assembly would enable local governments to issue subaqueous permits on behalf of the Commonwealth for certain specifically enumerated and conditioned activities as, for example, mooring pilings and buoys. The Marine Resources Commission would recommend to the General Assembly those activities and projects which it deems suitable for local review. These recommendations would be based upon those activities for which the Army Corps of Engineers had issued general permits. Any changes in these general permits would require corresponding changes in State enabling legislation. An alternate approach

would utilize a general grant of authority to all localities to exercise permit administration supplemented by a directive to the Marine Resources Commission to administratively specify those projects suitable for local review. In selecting such activities the Commission would be charged with ensuring that their recommendations be in the public interest and that they be projects which cause only minimal individual and cumulative environmental impact. This system would allow greater flexibility in responding to changes in the federal general permit process but would also vest greater discretionary authority in the Commission. The CRM Program staff has tentatively concluded that either method would be a workable approach.

The question of whether such a delegation arrangement would set a precedent for local involvement with other State-owned property was raised in the Interim Report. Delegation of the administration of State-owned property to local governments is a novel idea which appears to have no known precedents. Therefore, application of this concept to State-owned subaqueous lands would tend to set a precedent for such action. However, the intent of any delegation scheme enabled by the General Assembly would be clearly related to the simplification of the permit system in an area where state policy and standards could be relatively easily incorporated into local decision-making and could, therefore, be distinguished from calls for delegation involving other types of State-owned property such as parks, forests and government buildings.

Of crucial importance to the delegation question are the legal issues involved, some of which are affected by the questions discussed above. During the course of this investigation, the Office of the Attorney General was queried concerning possible legal impediments to the delegation concept. An informal opinion (Attachment 7) rendered by an Assistant Attorney General determined that neither the Code of Virginia nor the Constitution mandated a particular administrative entity to protect publicly owned bottoms and that it was within the discretion of the General Assembly to legislate whether administrative control should be

exercised by a instrumentality of the State or by a political subdivision of the State. The opinion concluded that the present authority of the Marine Resources Commission to manage publicly owned bottoms could be delegated to local governments within which such bottoms lie and that such a decision would in no way violate the public trust aspects of the natural oyster beds which would remain inviolable.

Subsequent to this opinion, a request was made by the Marine Resources Commission concerning legal implications of alternative methods of delegation. The responding opinion (Attachment 7) found either general method acceptable and outlined certain areas of the delegation process needing clarification.

In addition to these policy and legal questions the CRM Program staff, through the Marine Resources Commission, has studied the procedures necessary to implement limited local administration of the Commonwealth's subaqueous permit program as well as the impact such a program would have on local wetlands boards, assuming they administered the program. Such factors as the details of delegation based upon the two alternatives reviewed above, the specification of project types subject to local administration, procedures for development of policies, guidelines and other forms of State assistance to local boards and methods of enforcement have been examined to identify problem areas. Based upon this assessment the CRM Program staff has concluded that limited local administration of the subaqueous permit program could be carried out without wholesale changes in the operation either of local wetlands boards or the Marine Resources Commission staff. In many instances such a system would result in a decrease in processing time, although under some circumstances, principally appeals of local decisions, project reviews would actually be lengthened. For some localities which chose to assume jurisdiction over such projects, the impact would be significant (Attachment 8), while for others it would be moderate or negligible. Generally those localities which are presently undergoing the most rapid shoreline development would be most significantly affected.

Despite the apparent feasibility of local administration of the subaqueous permit program, the CRM staff believes that specific legislative recommendations creating a delegation scheme for consideration by the General Assembly in 1979 would be premature. Before such legislation can be drafted, additional legal questions must be examined and legislative action should be taken on the proposed amendments to Title 62.1 of the Code. The fate of proposals to expand the definition of wetlands and to delete from Virginia law exemptions for private, non-commercial piers and other open pile structures will significantly affect the need for and advisability of a delegation scheme. Further discussions also are needed between the Marine Resources Commission and local governments as to the degree of local interest and commitment of such a concept. Should the proposed amendments to Title 62.1 of the Code be enacted, further legal analysis, detailed development of administrative procedures and an in-depth assessment of local commitment to such a scheme could be conducted.

Coastal Resources Management Program Permitting Proposals

The CRM Program staff has proposed several changes to Title 62.1 of the Code which would address current problems in shoreline permit administration and would allow greater State and local leadership in environmental management along the shore. First, the definition of "wetlands" as currently contained in Virginia law should be expanded to include non-vegetated wetlands as well as currently protected tidal marshes. This amendment would not only control the filling of ecologically valuable tidal flats but would also substantially narrow the gap between State and federal permit jurisdiction. Second, the CRM Program has proposed a sunset on the "grandfather" clause currently contained in the Virginia Wetlands statute which would require certification of the grandfathered status of a project by 1980. This amendment will ensure that only those projects which had been legitimately commenced prior to July 1, 1972, are exempt from a permit requirement. Thirdly, the Program has recommended the deletion of exemptions for certain private, non-commercial piers and other open-pile structures from the wetlands and subaqueous permit

programs. Virtually all of these facilities currently require a federal permit. Deletion of these exemptions coupled with the issuance of federal general permits for these same activities would move the decision-making process for such projects closer to local governments. Finally, the CRM Program has proposed a minor amendment to the subaqueous laws of Virginia raising the dollar value of those projects which the Commission staff rather than the Commission itself would be authorized to review and either approve or deny. The current value is $10,000. The proposed amendment would raise the value to $50,000.

The changes in the Code which the CRM Program is recommending should substantially enhance the role of the Commonwealth and its subdivisions in the shoreline permitting process and lay the foundation for further improvements in environmental management along the shore beyond the administrative measures already undertaken. Additionally, these amendments will move the decision-making process closer to the applicant and allow for the eventual development of a one-stop permit process. The CRM Program staff advocates State and local control of only those activities for which federal permits are currently required. As such, these permitting recommendations should be viewed not as further controls on shoreline development, but rather as the foundation for both greater State and local involvement in coastal management and a reduction in the redundancy of present permit programs.

ATTACHMENT #1

SENATE JOINT RESOLUTION NO. 62

Expressing the support of the General Assembly for the efforts of the Secretary of Commerce and Resources to bring greater consistency to federal and State permitting activities in tidal waters and wetlands through negotiations with the United States Army Corps of Engineers; and requesting the Secretary to study certain permit programs for shoreline activities.

WHEREAS, during public hearings held on the proposed Coastal Resources Management Program concern was repeatedly expressed as to the problems inherent in the present system of obtaining local, State and federal permits for minor projects in tidal waters and wetlands; and

WHEREAS, the Secretary of Commerce and Resources has identified the duplication and overlapping of State and federal permit programs to be the reason for much of the delay and confusion in the present system; and

WHEREAS, certain administrative procedures have been initiated by the Virginia Marine Resources Commission to improve the coordination of federal, State and local permits in addition to negotiations in progress between the Secretary of Commerce and Resources and the Corps of Engineers to expedite the decision-making process for smaller projects of minimum cumulative environmental impact in hopes of greater State and local involvement; and

WHEREAS, due to the rapid growth in the coastal area there has been a proliferation of structures upon State-owned bottoms in tidal waters which is an issue of concern to the Commonwealth; now, therefore, be it

RESOLVED by the Senate, the House of Delegates concurring, That the Secretary of Commerce and Resources is requested to continue to pursue the administrative expedition of permits for smaller shoreline activities with minimal, cumulative environmental impacts in keeping with the Commonwealth's concern with respect to the increasing number of shoreline structures and continue negotiations with the Corps of Engineers and its advisory agencies concerning the issuance of federal General Permits for certain classes of activities in tidal waters and wetlands to increase State and local involvement in the process; and, be it

RESOLVED FURTHER, That the Secretary of Commerce and Resources is further requested to identify substantive and procedural differences between State and federal permit programs and make recommendations for bringing greater consistency between such programs; to examine the current permit exemptions under Title 62.1 of the Code of Virginia as relating to the proliferation of structures on State-owned bottoms and tidal wetlands; and to examine the feasibility of authorizing local governments to administer State permit programs for controlling the use of State-owned bottoms, assessing the

advantages and disadvantages of such a system and the possible effects upon local governments in Tidewater Virginia; and to report its findings to the Governor and General Assembly no later than November one, nineteen hundred seventy-eight.

All agencies of the Commonwealth and its political subdivisions shall assist the Secretary upon request.

ATTACHMENT 2

STATE AND FEDERAL REGULATORY PROGRAMS IN THE TIDAL WATERS AND ADJACENT WETLANDS OF VIRGINIA

CURRENT SHORELINE AND NEARSHORE PERMITTING PROGRAMS*

A. Federal

1. Sources of Permitting Programs

There are currently at least 18 federal acts affecting the shoreline and nearshore permitting process. These laws cover such subjects as navigation, water quality, transportation, and disposal of various materials, migratory fish, wetlands, watersheds, water resource planning, wild and scenic rivers, endangered species, marine sanctuaries, and archaeological and historic preservation.

Four main acts, however, govern most of the federal permitting process:

- The River and Harbor Act of 1899 authorizes the Corps to regulate activities and structures in navigable water to the extent of mean high water.

- The Federal Water Pollution Control Act (as amended in 1972) extends Corps authority above MHW to include wetlands insofar as the disposal of dredged and fill material is concerned. The Act also establishes EPA water quality authorities. Among these are the water quality assurance program (401) and the National Pollution Discharge Elimination System (402), involving certification and permitting of facilities and activities respectively.

- The Department of Transportation Act transfers authority for bridges and similar projects from the Corps of Engineers to the Coast Guard. (This Act is not discussed in detail.)

- Finally, the Marine Protection, Research, and Sanctuaries Act, commonly referred to as the "Ocean Dumping Act", establishes a permit program to be administered by the Secretary of the Army acting through the Corps of Engineers to regulate the dumping of dredged material in ocean waters utilizing criteria developed by the Environmental Protection Agency.

a. River and Harbor Act of 1899. Section 10 of the River and Harbor Act (R&HA) has been the mainstay of Corps of Engineers authority in navigable waters since the turn of the century. This section requires that a permit be obtained from the Corps prior to any work or construction in navigable waters. Structures such as piers, breakwaters, bulkheads, revetments, power transmission lines, and aids to navigation as well as various types of work such as dredging, stream channelization, excavation, and filling are, therefore, controlled. The Act, adopted to protect navigation and the navigable capacity of the nation's waters, allows

*Taken generally from state and federal statutes, regulations, and administrative rules as published in the Federal Register and elsewhere.

the establishment of harbor lines landward of which certain shoreline structures or work cannot be undertaken without a permit from the Army Engineers. Used extensively for some time, these bulkhead lines are now merely guidelines. Until 1968, the Corps administered the R&HA regulatory program only to protect navigation. Permit requirements were limited to waters that were presently used as highways for the transportation of interstate or foreign commerce.

In December of 1968, however, the Department of the Army, reflecting the growing national concern for environmental quality, revised its policy with respect to permit application reviews and added a number of new factors in addition to navigation to be considered in the review process. Among these were fish and wildlife, conservation, pollution, aesthetics, ecology, and the general public interest. This broader "public interest review" was subsequently affirmed by the courts. The Department of the Army revised its harbor line regulation in May of 1970, clarifying the requirement that a permit be obtained for any work commenced landward of an established harbor line and directing that these applications receive a full public interest review.

On September 2, 1972, the Corps published an administrative definition of the term "navigable waters of the United States" which included all waters (1) presently used to transport interstate or foreign commerce; (2) used in the past to transport intestate or foreign commerce; (3) susceptible to use in their ordinary condition or by reasonable improvement to transport interstate or foreign commerce; and (4) subject to the ebb and flow of the tide. The landward limit of this jurisdiction for non-tidal freshwater was established as the ordinary high water mark, while shoreward limit for tidal water was set at the mean high water mark generally. In 1974, the Department of the Army made revisions to its permit regulations to incorporate a number of new environmental criteria and factors designed to account for wetlands preservation and water quality maintenance in the evaluation of permit applications.

b. The Refuse Act Permit Program. In April 1971, the Army Engineers implemented the first nationwide program to regulate the discharge of pollutants into the Nation's waters. Authority for this permit program was grounded in Section 13 of the River and Harbor Act of 1899, which prohibits the discharge of "refuse matter" into navigable waters of the United States or their tributaries or onto the banks of such waters if the refuse matter is likely to be washed into a navigable water. However, the program was enjoined by court order in December of the same year, the Court finding in a civil suit that the Corps had not fully complied

with the rigor required by the National Environmental Policy Act of 1970. Upon passage of the Federal Water Pollution Control Act Amendments of 1972, the program was subsumed to the National Pollution Discharge Elimination System (NPDES) in Section 402 of the Act.

c. The Federal Water Pollution Control Act Amendments of 1972. Adopted with the express purpose of restoring and maintaining the chemical, physical, and biological integrity of the nation's waters, this legislation has become the other major pillar of Corps of Engineers authority in controlling shoreline alterations. Section 404 establishes a permit program, administered by the Secretary of the Army, acting through the Chief of Engineers, to regulate the discharge into the "waters of the United States" of dredged material and those pollutants that comprise fill material. The authority of the Corps is tempered, however, by a provision which gives the Administrator of the Environmental Protection Agency authority, subject to certain procedural requirements, to restrict or prohibit the discharge of any dredged or fill material that may cause an unacceptable adverse effect on municipal water supplies, shellfish beds, or fishery areas.

In devising regulations to implement the exercise of its authority under Section 404 of the Act, the Corps limited its jurisdiction to the same waters being regulated pursuant to the River and Harbor Act. This interpretation was challenged by two conservation groups as being inconsistent with the intent of Congress to regulate "all waters of the United States" as expressed in the legislation's definition of "navigable waters." Concern was expressed over the need to regulate the entire aquatic system, including all the wetlands that are a part of it, rather than only those aquatic areas arbitrarily distinguished by the presence of an ordinary or mean high water mark. The plaintiffs also stressed the need to regulate activities directly affecting the many tributary streams that feed into the tidal and commercially navigable waters, since the destruction or degradation of the physical, chemical, and biological integrity of each of these waters is threatened by the unregulated discharge. On March 27, 1975, the Federal District Court of the District of Columbia ruled in favor of the suit's sponsors and ordered those parts of the Corps of Engineers regulations limiting its jurisdiction rescinded and new regulations published.

The Corps responded with a set of proposals shortly thereafter and melded the substance of this regulation with those published in 1974 to produce an interim program governing all Corps permits in July of 1975. This program extended Corps jurisdiction to virtually all the waters of the United States and established definitions for several key terms in the regulation. Also

included in these regulations were provisions for the issuance of "general permits" by the District Engineer for those categories of activities that cause only minor individual and cumulative impact to the environment.

To facilitate an orderly transition to the full exercise of its authority, the Corps announced a three-phase schedule to implement the permitting requirements of Section 404. Phase I began immediately upon publication of the regulation and included all waters subject to the ebb and flow of the tide and/or waters that are, were, or are susceptible to use for commercial navigation, plus all wetlands adjacent to these waters, thereby eliminating the artificial ordinary high water and mean high water mark distinction. Phase II, effective September 1, 1976, included primary tributaries of Phase I waters and lakes greater than five acres in surface area, plus wetlands adjacent to the waters. Phase III, requiring permits for discharges of dredged or fill material into all waters of the United States, became effective July 1, 1977.

During this phase-in period, a number of courts have had the opportunity to consider whether particular waters, including wetlands, are "waters of the United States" within the scope of the FWPCA, and each has found that federal jurisdiction, pursuant to this Act, does indeed extend to wetlands above the mean high water mark of traditional navigable waters of the United States.

A second program of significance to the shoreline permitting process contained in the Act is Section 401 of the Amendments. This section specifies that any applicant for a federal license or permit (including the construction or operation of facilities which may result in any discharge into navigable waters) must provide the licensing or permitting agency a certification from the state in which the discharge originates that such discharge complies with certain other provisions of the FWPCA. Accordingly, the Corps of Engineers requires such certification prior to the final consideration of a permit. In Virginia, the State Water Control Board has been designated to perform this function.

d. The Marine Protection Research and Sanctuaries Act of 1972 (MPR&SA). Passed only five days after the enactment of the FWPCA Amendments, the MPR&SA contains many provisions that resemble the approach taken by the FWPCA to regulate activities that can pollute or otherwise adversely affect ocean waters. Section 102 vests authority in the Administrator of the Environmental Protection Agency to issue permits, after public hearing, for the transportation from the United States of material that is intended to be dumped in ocean waters when the Agency determines that the

proposed dumping will not unreasonably degrade or endanger human health or the environment.

Section 103 of the Act, however, establishes a separate permit program to be administered by the Secretary of the Army, again acting through the Corps, to regulate ocean dumping of dredged material utilizing criteria developed by EPA pursuant to Section 102. The Act requires the Secretary to make a finding similar to that of EPA prior to issuing a permit; however, no permit may be issued to dump dredged material in the oceans if the dumping does not comply with EPA criteria. Conversely, the Corps may seek a waiver from the EPA after certifying that there is no economically feasible method or site under construction. Such waiver must be granted unless the EPA finds that the proposed dumping will result in an unacceptable adverse impact on certain aspects of the environment.

This Act attains importance in those situations where the disposal of dredged material is at issue, the removal of which is necessitated by economically important activities such as port operations and channel maintenance.

2. Sources of Advisory Opinions

The Corps of Engineers in reviewing a permit application is statutorily required to consult with several agencies prior to reaching a decision. The most important of these are the Environmental Protection Agency, U. S. Fish and Wildlife Service, and the National Marine Fisheries Service. It is these agencies that routinely review and comment upon permit applications.

a. Environmental Protection Agency. Section 404(b) of the Federal Water Pollution Control Act Amendments of 1972 directs the Environmental Protection Agency to develop guidelines for the specification of disposal sites for the discharge of dredged and fill material into the waters of the United States. The Corps may issue permits for discharges only at these sites. Additionally, under Section 404(c) of the Act, no discharge of dredged or fill materials is permitted by law at a proposed disposal site in a navigable water if the Administrator of the EPA determines, after public notice and consultation with the Secretary of the Army, that such discharge will have an unacceptable adverse effect upon municipal water supplies, shellfish beds, and fishery areas (including spawning and breeding areas), wildlife, or recreational areas. In order to make the above determinations, it is necessary for EPA to review those non-federal activities requiring a discharge permit and which, therefore, fall within the purview of the 404 permitting program. EPA has promulgated regulations to implement this program.

b. Fish and Wildlife Service. The U. S. Fish and Wildlife Service was the first federal environmental agency to become involved on a regular basis in the permit programs of the Corps of Engineers. This involvement has been mandated primarily by the Fish and Wildlife Coordination Act of 1956 (F&WCA), which requires consultation between the Service and any agency proposing or authorizing the modification of waters of any stream or other body of water for any purpose whatever. The legislation authorizes that the opinion of the Fish and Wildlife Service must be made an integral part of any government report on the project. The Service has drafted a manual guiding Service personnel in the evaluation of such projects.

c. National Marine Fisheries Service. Reorganization Plan No. 4 of 1970 which, upon the direction of the President, created the National Oceanic and Atmospheric Administration (NOAA) transferred the Bureau of Commercial Fisheries from the Department of Interior's Fish and Wildlife Service to the newly created NOAA, where the agency became the National Marine Fisheries Service. All functions vested by law in or relating to that Bureau were transferred as well. Among these functions had been a review program, pursuant to the F&WCA, of non-federal projects requiring a federal permit. Such projects were reviewed by the BCF from the point of view of commercial fisheries, their habitats, and migratory pathways. The National Marine Fisheries has interpreted the function as being included in those to be transferred, and the Corps has explicitly recognized this advisory role in its regulations governing the review of permits in navigable waters. Several other federal laws, the National Environmental Policy Act of 1970 in particular, have also supported the advisory role of the National Marine Fisheries Service.

3. Current Policies and Procedures

a. Army Corps of Engineers. On July 19, 1977, the Corps of Engineers published final rules governing all regulatory programs administered by the Corps in the waters of the United States. The regulations were designed to revise and reorganize policies and practices pertaining to Corps permit programs. Under them, the Corps of Engineers is required to conduct a public interest review of any proposed project for which it issues a permit based upon the probable impact of the proposed activity and its intended use on the public interest. No permit will be granted unless the project is found to be in the public interest. Factors included in making such a determination are:

- effects on wetlands
- effects on fish and wildlife
- effects on water quality
- effects on scenic and recreational value
- interference with adjacent properties or water resource projects
- activities in marine sanctuaries
  effects on limits of the territorial sea (changes in baselines)
- other federal, state, and local requirements
- flood plains

For each of these categories, the Corps maintains policies guiding permit application reviews. Of particular importance to this discussion are Corps policies with respect to other federal, state, or local requirements. It is now Corps policy to process an application for a Department of Army permit concurrently with the processing of other federal, state, and/or local authorizations or certifications. However, where such other authorizations or certifications have been denied, it is the policy of the Department of the Army to likewise deny authorization. In instances where official certification and/or authorization is not required by state or federal law, but a state, regional, or local agency having jurisdiction or interest over the particular activity comments on the application, the Corps considers such official views as a reflection of local factors of public interest. Also considered by the Army Engineers as local factors of the public interest are officially adopted state, regional, or local use classifications.

To deal with the problem of permit processing delays, the Corps, in its final regulations, has adopted the policy to have the District Engineer process a permit through to its conclusion if the responsible federal, state, and/or local agency fails to take definitive action to grant or deny required authorizations or to furnish comments within three months of the issuance of the public notice. To the same end, the District Engineers are now authorized to enter into agreements with states having ongoing permit programs for activities regulated by the Department of the Army to jointly process and evaluate Department of the Army and state permit applications. This may include issuance of joint public notices; the conduct of joint public hearings, if held; and the joint review and analysis of information and comments developed in response to the project during the permitting process.

A number of other important administrative guidelines and policies also influence this public interest determination. In evaluating whether a particular shoreline alteration is necessary, the District Engineer now also considers whether the proposed project is primarily dependent on being located in, or in close proximity,

to the aquatic environment and whether feasible alternative sites are available. Water quality standards must be complied with as well, and a certificate of such compliance obtained. Certification that the activity, as consistent with the federally approved coastal zone management program of the state in which the project occurs, is similarly required. Finally, no permit will be issued where certification or authorization of the proposed work is required by federal, state, and/or local laws and such certification or authorization has been denied.

These general policies and procedures governing permit review are applicable to the several permitting programs generated by the legislation discussed above. These programs are:

- permits for dams and dikes in navigable waters of the United States
- permits for structures or work in or affecting navigable waters of the United States
- permits for discharges of dredged or fill material into waters of the United States
- permits for ocean dumping of dredged material.

Of interest in this review are the permit programs for structures or work in or affecting navigable waters and for the discharge of dredged and fill material.

Permits for Activities in Navigable Waters. Operating on the basis of the new definition of navigable waters (i.e., those waters of the United States that are subject to the ebb and flow of the tide shoreward to mean high water mark and/or are presently used or have been used in the past or may be susceptible to use to transport interstate or foreign commerce), all structures (e.g., piers, wharfs, breakwaters, bulkheads, jetties, pilings) and work (e.g., dredging, excavation, filling) may only be performed with authorization by permit. Certain work and structures are automatically permitted--among them the repair, rehabilitation, or replacement of any previously built, currently serviceable structure constructed prior to the requirement for authorization where no significant alterations in the size of the structure are made. The Department of the Army requires permits for all other structures or work in or affecting navigable waters.

An important feature in the present Corps regulations is the provision for the issuance of "general permits" for certain categories of work or activities. Such permits may be issued by the District Engineer for certain clearly described categories of structures or work requiring permits. These activities must be substantially similar, cause only minimal adverse environmental

impact when performed separately, and have only a minimal adverse cumulative impact on the environment. After a general permit has been issued, individual activities falling within those categories will not require individual permit processing.

A general permit has already been issued by the Norfolk District of the Corps of Engineers for the replacement of or repairs to an existing residential property not more than two feet channelward or seaward of an existing bulkhead and which does not involve more than 250 cubic yards of material. This general permit does not, however, include any authorization for dredging. The Norfolk District is also currently developing general permits for mooring buoys and certain aids to navigation. The Baltimore District Office, which services Northern Virginia and parts of the Northern Neck, has general permits in effect for periodic maintenance dredging and certain structures for small boats. Private piers of less than 40 feet and which do not extend beyond the 5' depth contour are generally permitted under this system. No such general permit has been issued by the Norfolk District Engineer.

The Corps of Engineers has also set out in its regulations certain special policies with respect to work and structures in navigable waters. For non-federal dredging projects, the Corps now requires these activities to be conducted in the same manner as federal dredging projects with respect to such matters as turbidity, water quality, containment of material, nature and location of approved spoil disposal sites, extent and periods of dredging, and other factors relating to protection of environmental and ecological values. Permits issued for dredging of a channel, slip, or other project enhancing navigation contain authorization for maintenance dredging which must be periodically revalidated.

As a matter of policy in the absence of overriding public interest, the Corps gives favorable consideration to applications from riparian owners for permits for piers, boat docks, moorings, platforms, and similar structures for small boats. Cooperative or group development of facilities is generally encouraged by the Corps over individual use facilities, however. The connection of artificial canals to navigable waters of the United States also requires a Corps permit.

Permits for Discharges of Dredged or Fill Material into the Waters of the United States. Regulations governing general and special policies, practices, and procedures for this permit program, mandated by Section 404 of the Federal Water Pollution Control Act Amendments of 1972, have been published by the Corps. Certain activities are exempted, such as discharges into certain non-tidal

rivers, streams, and lakes and material discharged for bank stabilization. The Corps maintains basic management policies for the balance of activities requiring permits. Among these practices are the avoidance or minimization of:

- discharges or fill material into waters of the United States where practicable
- discharges during spawning seasons
- discharges which restrict or impede the movement of aquatic species
- discharges in wetlands areas
- discharges into breeding or nesting areas.

Under generally the same circumstances as with activities in navigable waters, general permits for the discharge of dredged and fill materials may be issued by the Corps.

Among the special policies in force for this permit system is a requirement for consideration of Environmental Protection Agency regulations and coordination with that agency in the review of permits under this program. Contained in these EPA regulations are guidelines for the disposal of such material in waters protected by 404. These regulations also specify that prior to the issuance of a permit, the Corps of Engineers will advise the appropriate Regional Administrator of EPA of the intent to issue the permit. If the Regional Administrator objects to the issuance, the case is forwarded to the Chief of Engineers. By Department of Army regulations, however, the report must contain an analysis of the impact on navigation and anchorage that failure to authorize the project would cause.

Specific processing guidelines are also established by these regulations. Public notice will be issued within fifteen days of receipt of all required information from the applicant. The period of receipt of comments will be not to extend beyond thirty days from the date of notice. The District Engineer will either send notice of denial to the applicant, issue the draft permit, or forward the application to higher authority within thirty days of the latest occurrence of the closing of the public comment period when no objections are received; receipt of notice of withdrawal of objections; closing of the record for public hearings; or expiration of the waiting period following the filing of the final Environmental Impact Statement with the Council on Environmental Quality.

b. Environmental Protection Agency. Pursuant to Section 404(b) of the FWPCA Amendments of 1972, the Environmental Protection Agency has prepared guidelines to be used in evaluating proposed discharges of dredged or fill material in navigable waters. These guidelines provide procedures for evaluating such discharges, present general approaches for technical evaluation of such discharges, specify objectives and considerations of evaluating proposed sites, provide guidance on the use of general permits for certain categories of discharge activities with only minimal effect on the environment, and, finally, encourage advanced study of aquatic areas to identify those areas of critical ecological concern. The importance of these guidelines stems from the provision in Section 404(c) of the Amendments preventing the Department of the Army from issuing a permit if the Administrator of EPA determines, after notice and opportunity for a public hearing and consultation with the Secretary of the Army, that such discharge will have an unacceptable adverse effect on municipal water supplies, shellfish beds, and fishery areas, wildlife, or recreational areas.

The EPA has two general approaches for technical evaluation. These are:

- physical effects
- chemical-biological interactive effects

In evaluating physical effects, EPA examines the project for potential destruction of wetlands, impairment of the water column, and the covering of benthic (bottom) communities. Other physical effects include changes in bottom geometry and substrate composition that may cause subsequent alterations in water circulation, salinity gradients, and the exchange of constituents between sediments and overlying waters. It is important to note that the guiding principle of EPA with respect to wetlands is that the destruction of highly productive wetlands may represent an irreversible loss of a valuable aquatic resource.

EPA also considers the chemical-biological interactive effects of certain types of dredged and fill material which is likely to cause significant environmental impact. These studies include chemical and biological changes in the water column and the effects of the proposed project on the benthic bottom fauna. Water quality considerations are also included based upon prevailing water quality standards.

Many of the EPA's considerations in evaluating a permit are similar to those of the Corps. They include the effects of the proposed activity on:

- municipal water supply intakes
- shellfish
- other fisheries
- wildlife
- recreational activities
- threatened or endangered species
- benthic life
- wetlands
- submerged vegetation

U. S. Fish and Wildlife Service. The Fish and Wildlife Service has published a Navigable Waters Handbook specifying the agency's policies for activities in navigable waters and outlining fish and wildlife considerations in the review of permit applications. The practices and procedures to be followed in reviewing applications are also established. The F&WS Ecological Services Division performs these functions.

The Service distinguishes its role in the permitting process from the actual regulatory agency, in this case, the Corps of Engineers. As an advisory agency, the Service is required to consider only a narrow range of interests. Unlike the Corps which must perform a full public interest review considering many factors, the Fish and Wildlife Service is obligated to examine only the potential impacts of the project on fish and wildlife and habitats.

The objectives of the Fish and Wildlife Service are to protect and preserve fish and wildlife habitat, conserve fish and wildlife resources, and protect public trust rights of use and enjoyment in and associated with navigable and other waters of the United States. The Service strives to meet these objectives by encouraging developers to use every possible means, method, and alternative to prevent harmful environmental impacts and degradations to restore habitat and increase opportunities for public use through proper development and land use control. More specific policies, however, are set forth in the guidebook. Among these policies are:

- the discouragement of the occupation by water dependent works of biologically productive wetlands and shallows
- the recommendation of denial of permits for non-water-dependent works where biologically productive wetlands are involved and alternative upland sites are available
- the discouragement of exclusionary occupation of navigable waters and their shorelines by riparian owners or by anchored boats
- requests for guarantees that authorized work is actually carried out as promised and as required by

conditions of the permit and by provision of law or agreements formalized in writing. In appropriate cases, a performance bond may be requested from a private permittee.

In reviewing non-federal proposals, the Service takes the position that the burden of proof is on the applicant to demonstrate the environmental soundness and public interest merit of the proposal. Accordingly, the Service feels the applicant must arrange for any detailed field investigations that are needed. In evaluating permits, the F&WS will occasionally find it necessary to perform detailed studies to support its position. However, in conducting inspections, E. S. field representatives are allowed to arrange joint reconnaisance of the project site with the applicant and appropriate state and federal agencies.

The F&WS utilizes a number of policy guidelines for reviewing specific impact aspects of the project. For new projects these factors include:

- encroachments into navigable waters
- compliance with applicable comprehensive regional and statewide plans for land use and/or shoreline development
- the cumulative impacts of this and other developments the water dependency of the project
- effects on wetlands
- the degree to which the applicant has sought to avoid preventable significant damages to fish, wildlife, and/or other environmental values.

Specific policy guidelines have now been developed for the following facilities:

- docks, moorages, piers, and platform structures
- marinas and port facilities
- bulkheads and seawalls
- cables and pipelines
- jetties, groins, and breakwaters
- lagoons and impoundments
- navigation channels and access channels
- drainage canals and ditches
- filling and disposition of spoil and refuse materials

In reviewing these permit applications, the Service encourages coordination with other state and federal officials.

Possibly the most important procedure followed by the Service in this regard is that established by an agreement between the Departments of the Army and Interior. Negotiated in July 1967, this agreement established a policy of full coordination and cooperation between the Departments at all levels. Specifically, the agreement calls for coordination between District Engineers of the U. S. Army Corps of Engineers and the Regional Directors of several agencies of the Department of the Interior, among them the Fish and Wildlife Service.

It is the mechanism for resolving disputes under this agreement, however, that is of interest here. The agreement directs that when the Regional Director (generally of the F&WS) advises the District Engineer that the proposed activity will impair water quality or natural resources, the District Engineer must seek to gain the voluntary compliance of the applicant. Where such compliance is not obtained, the permit application is forwarded (through the Division Engineer) to headquarters of the appropriate agency in Washington for resolution. When the Chief of Engineers and the appropriate Undersecretary are unable to reach an agreement, the matter is finally referred to the respective secretaries for consultation.

As noted above, coastal Virginia is serviced by two Corps of Engineers District Offices--a District Engineer residing in Norfolk and another in Baltimore. The Fish and Wildlife Service maintains a field office in Annapolis, Maryland, which services coastal Virginia primarily through a field agent located in Virginia. The Regional Director, however, is located in Boston, Massachusetts. Accordingly, issues referred to the Regional Director by field office personnel are decided in Boston to be decided.

d. National Marine Fisheries Service. The National Marine Fisheries Service to date has not published guidelines for policies and procedures concerning the evaluation of permit applications for projects in tidal waters. The Service's primary concerns in this area, however, are not dissimilar from those of the Fish and Wildlife, being: preservation of estuarine and marine habitats and nutrient sources, protection of water quality, and protection of migratory pathways.

The Corps of Engineers regularly includes the Service in its distribution of applications, whereupon the Service screens the applications and inspects those projects which it deems to be of interest. Generally, the Service will conduct a field inspection of those applications proposing significant alterations in wetlands or the removal of large quantities of dredged material.

B. State

1. Sources of Permitting Programs

Title 62.1 of the Code of Virginia governing waters of the state, ports, and harbors establishes several permitting or certification programs controlling activities in or adjacent to state waters and bottoms.

- Section 62.1-3 directs the Marine Resources Commission to control all non-exempted uses of state-owned bottoms through the issuance of permits

- Section 62.1-13.9 directs that no person shall conduct any non-exempted activity in legally protected wetlands except as provided by a permit from the Marine Resources Commission or a local wetlands board

- Section 62.1-44.5 requires a State Water Control Board certification prior to the discharge of any wastes, noxious, or deleterious substances into the waters of the states

- Sections 62.1-44.16 and 44.17 govern the discharges of industrial and sewage wastes, respectively, and establish permitting programs through the State Water Control Board for each.

a. Subaqueous Permit Program. Chapter 1 of Title 62.1 limits the extent of private property rights on Virginia's bays, rivers, creeks, and shores of the sea to mean low water and declares all other subaqueous land not granted according to compact or special grant to be the property of the Commonwealth. Section 62.1-3 directs that proper authority is necessary for any trespass or encroachment upon state bottoms and assigns the Marine Resources Commission the duty to issue permits for all reasonable activities on state bottoms not otherwise exempted. Such uses include many activities for which federal authorization is required, such as the taking and use of material (dredging, mining), the placement of wharves, bulkheads, and dredging and fill by owners of riparian lands in the waters opposite such riparian lands.

Among the activities exempted from the necessity for authorization are: the erection of properly authorized dams; uses of subaqueous beds for commercial fishing purposes; uses incident to the construction and maintenance of approved navigation and flood control projects; fills by riparian owners opposite their property for which a water quality assurance certificate has been issued prior to July 1, 1972; and, the placement of certain private piers for non-commercial purposes by owners of riparian lands. To facilitate the exercise of this authority, the Marine Resources Commission

was authorized to establish bulkhead and lawful private pier lines; however, the Commission has never established such lines.

In granting or denying a permit, the Commission is to consider a number of factors which collectively are not dissimilar from the public interest review conducted by the Army Corps of Engineers for federal permits. These factors include:

- consideration of the environmental quality goals contained in Article XI of the State Constitution
- the effects of the proposed project on reasonable and permissible uses of state waters and state-owned bottom lands
- the effects upon marine and fisheries resources of the Commonwealth
- the effects upon wetlands of the Commonwealth
- effects upon adjacent or nearby properties
- water quality standards established by the State Water Control Board
- anticipated public and private benefits

Prior to granting or denying any permit for a boatyard or marina for commercial use, however, the owner or other applicant must present a plan for sewage treatment or disposal facilities which is approved by the State Department of Health.

b. The Virginia Wetlands Act Permit Program. In recognition of the valuable and irreplaceable nature of Virginia's wetlands and because of concern over their continued destruction and despoliation, the Virginia General Assembly placed certain coastal wetlands of the Commonwealth under protective management in 1972. The Virginia Wetlands Law now directs that no person conduct any regulated activity in wetlands without a proper permit. Legally, protected wetlands are defined as those lands lying between and contiguous to mean low water and 1.5 times the mean tidal range and upon which certain specified vegetation grows. The jurisdiction of this law is limited to those localities comprising "Tidewater Virginia" as well as the Back Bay and its tributaries.

A unique feature of this law is the authority it passes to localities to manage wetlands. This authority may be implemented at the option of the local government through the adoption of a specified zoning ordinance which provides for appointment of a wetlands board to administer the permit program. The duties and responsibilities of these boards are specified in both the ordinance and the Act. To insure local decisions adequately achieve the policies and standards of the Act and follow reasonable procedures, the Commissioner of the Marine Resources Commission is directed

to review all decisions and notify the Commission of any decision which, in his opinion, it should review. The Commission may modify, remand, or reverse any decision upon specified grounds.

In those localities where the ordinance has not been adopted, and, therefore, no wetlands board has been formed, the Commission regulates wetlands uses directly through a state permit program. Appeals procedures through both the Commission and the Court are also provided for.

c. State Water Control Laws. Chapter 3.1 of Title 62.1 establishes several permitting programs that affect to some degree activities adjacent to or in state waters. In addition, the State Water Control Board performs an administrative function in the issuance of another certificate which is tantamount to a permit.

i. Industrial Discharge Permit Program. While not frequently invoked for the type of proposals received from private non-commercial riparian property owners, the requirement for a permit to discharge industrial wastes contained in Section 62.1-44.16 of the Code is a permit program which does affect some shoreline activities. Under this program, any owner taking an action which would result in a potential or actual discharge of industrial or other wastes to state waters must first provide facilities approved by the Board for the treatment or control of such wastes. The law specifies that such application will be made to the Water Control Board which must then process the applciation according to a statutorily mandated timetable, reaching a decision within four months. Upon approval of the application, the Board will grant a certificate allowing the treatment facility to operate.

ii. Permits for Other Wastes. Section 62.1-44.17 directs that any owner who is involved in the handling, storage, or production of other wastes* shall, upon request of the Board, install facilities or adopt measures approved by the Board to prevent the escape or discharge of such substances into state waters. Any owner so requested must apply to the SWCB for a certificate. The Board is again required to rule on such an application within four months.

iii. Regulation of Sewage Discharge. In conjunction with the state policy regarding waste discharges in the waters of the state which states that such discharges should take place only pursuant to a proper certificate, Article 4 of Title 62.1 places all sewage systems and sewage treatment works under

*Defined as decayed wood, sawdust, shavings, bark, lime, garbage, refuse, ashes, offal, tar, oil, chemicals, and other substances, except industrial wastes and sewage.

the general supervision of the State Department of Health and State Water Control Board jointly. The article also grants the State Water Control Board authority to issue permits prescribing the terms and conditions upon which the discharge of sewage, industrial wastes, or other wastes may be made into a sewerage system or treatment works.

iv. Water Quality Assurance. Although the above permit programs are invoked in many industrial and commercial permit applications, the requirement most frequently encountered by private non-commercial applicants is the water quality assurance "401" certificate. The certificate issued pursuant to the Federal Water Pollution Control Act Amendments of 1972 certifies that the proposed activity will be conducted in compliance with applicable state water quality control laws. Issued by the State Water Control Board to the applicant, this certificate is tantamount to a permit, since the Army Corps of Engineers who requires the certification is statutorily prevented from issuing a federal permit in the absence of this certification. This 401 certification is required, however, only for those proposals which would result in discharges into navigable waters.

2. Sources of Advisory Opinions

a. Virginia Institute of Marine Science. Section 62.1-3 governing the use of subaqueous beds directs that the Marine Resources Commission consult with interested state agencies, including the Virginia Institute of Marine Science, whenever the decision of the Commission affects the Institute. Section 62.1-13.5, specifying the model wetlands ordinance to be adopted, directs that the Institute of Marine Science be notified by the local board of all wetlands applications received by the locality. Since the Marine Resources Commission is bound by the same administrative procedures, it, too, must notify VIMS.

In reviewing permit applications, the Institute frequently conducts site visits during which advice is often rendered to the applicant on the advisability of the project and suggested modifications. The primary concern of the Institute is the effect of the project on the marine and estuarine environments. The role of the Institute is, however, strictly advisory. It neither issues permits, nor is the Commission legally bound to do any more than consider its advice. While the Commission does give significant weight to the Institute's appraisal of the project, there are no administrative agreements governing the force of VIMS' determination. Both agencies see their functions as separate, and the Commission considers the Institute's appraisal as one of a number of factors to be considered in the overall public interest determination. The Institute encourages persons contemplating shoreline works to consult with it prior to submitting an application.

b. State Department of Health. The State Department of Health, Division of Sanitary Engineering and Bureau of Shellfish Sanitation, generally comment on both subaqueous and wetlands projects under the same statutes as cited above for the Institute of Marine Science. Section 62.1-3 specifically states, however, that no permit for a marina or boatyard for commercial use shall be granted unless the owner or other applicant, prior to issue, presents a plan for sewage treatment or disposal facilities which is approved by the State Department of Health. It is the Department's Division of Sanitary Engineering which generally performs this function. The primary concern of the Bureau of Shellfish Sanitation is the effect of the proposed project on private and commercial shellfish grounds, and the Bureau will generally review an application and comment from this point of view.

The role of the State Health Department, like that of VIMS, is strictly advisory; however, as noted above, the Commission is statutorily prohibited from issuing a permit prior to certification of facilities.

c. State Water Control Board. The Marine Resources Commission is statutorily obligated to consult with the Water Control Board in the review of applications for uses of subaqueous lands. It is during this consultation that the Commission receives notification of the 401 certification.

3. Current Policies and Procedures

a. The Marine Resources Commission. Aside from the environmental quality goals set forth in Article XI, Section 1, of the Virginia Constitution, the Marine Resources Commission and local wetlands boards operate under the general state policy guidance established by Virginia Wetlands Law which states that:

- wetlands of primary ecological significance shall not be altered so that the ecological systems in wetlands are unreasonably disturbed.

- development in Tidewater Virginia, to the maximum extent possible, shall be concentrated in wetlands of lesser ecological significance, in wetlands which have been irreversibly disturbed before July 1, 1972, and in areas of Tidewater apart from wetlands.

Other than establishing state ownership of subaqueous lands, no comparable policy statement exists for these lands in the Virginia Code.

To amplify state policy, the Commission has developed both wetlands and subaqueous guidelines to assist waterfront property owners and wetlands boards in designing and evaluating projects. These guidelines are included in this appendix.

Many of the general policies and procedures which the Commission follows for wetlands permits are detailed in the Wetlands Statute. These procedures governing the review of permits by both wetlands boards and the Commission are summarized below:

- A public hearing must be held within 60 days of application.
- Notice of the hearing must be given to certain parties and agencies at least 20 days prior to the hearing.
- Publication of notice of the hearing once a week for two weeks prior to the hearing.
- The decision must be rendered within 30 days after the hearing.
- The decision must be communicated to the applicant (and Commission) within 48 hours.
- An appeal of local decision by other than the Commissioner must be made within 10 days of the date of decision.
- An appeal of local decision by the Commissioner must be made within 10 days of the date of receipt of the decision.
- The Commission must hear the appeal within 45 days of receipt of notice of appeal.
- The decision in an appeal must be communicated to the parties within 48 hours.

No such statutory procedures are described for the review of subaqueous projects, although the Commission staff endeavors to process applications for such projects as expeditiously as possible and generally within 60 days of receipt of a completed application.

An important procedural feature of the current wetlands permit system is state overview of local decisions. Section 62.1-13.11 directs the Commissioner to review all decisions of the wetlands boards and notify the Commission of any decision which, in his opinion, should be reviewed by the Commission. Should the circumstances warrant, the Commission may modify, remand, or reverse local decisions where appropriate. Although the Commissioner has reviewed hundreds of local decisions since the institution of this permit program, few have needed to be referred to the Commission,

and fewer still have warranted remanding modification or reversal.

Several other procedural features are followed by the Commission in the issuance of permits. Section 62.1-3.01 allows the Commissioner of Marine Resources to approve permits for encroachment on state bottoms when such proposals are not protested by any citizen or objected to by any state agency, when the project's value does not exceed $10,000, and when the project does not require another MRC permit. Under substantially the same conditions, the Commissioner may approve such permits without notice to or approval by other state agencies, except that the Institute of Marine Science must be notified of such projects.

Another procedural feature of the subaqueous permit program is the requirement that the Attorney General and the Governor approve the terms and conditions set by the Marine Resources Commission in the assessment of royalties for the removal of bottom material belonging to the Commonwealth.

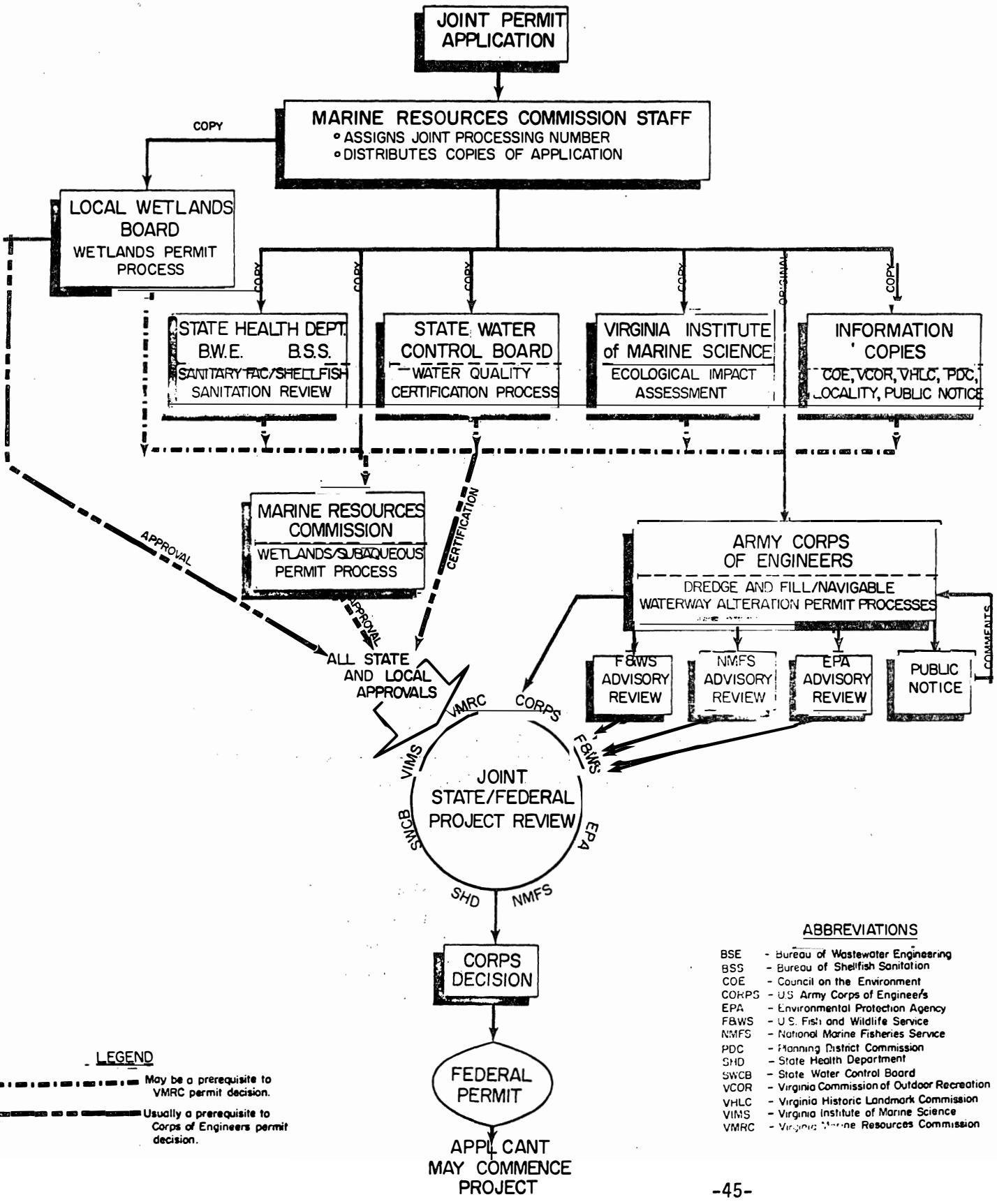
b. Other State Agencies. The policies and procedures of other state advisory agencies with respect to wetlands, subaqueous lands, and water quality are generally along the lines of the respective agencies' legislative mandates. The State Water Control Board, both in its advisory and regulatory capacity, is guided by the State Water Control Law and the National Pollution Discharge Elimination System created under the FWPCA Amendments of 1972.

The Bureau of Shellfish Sanitation, following the mandates of Chapter 7, Title 28.1 containing health provisions for state waters, will generally react negatively to projects necessitating the condemnation of shellfishing areas either through direct pollution or because of the establishment of buffer zones around effluent outfalls and such facilities as marinas.

As noted above, the Virginia Institute of Marine Science is primarily concerned with alteration of marine and estuarine habitats and the effects of proposed projects on water quality. As such, it provides technical assistance to the various agencies, commissions, and boards, as requested.

Each of these agencies, in the performance of their duties, will conduct regular or occasional site visits where necessary.

GENERALIZED DIAGRAM OF SHORELINE PERMIT APPLICATION REVIEW PROCEDURES INCLUDING JOINT STATE/FEDERAL PROJECT REVIEW



LEGEND

May be a prerequisite to VMRC permit decision.

Usually a prerequisite to Corps of Engineers permit decision.

ABBREVIATIONS

BSE	- Bureau of Wastewater Engineering
BSS	- Bureau of Shellfish Sanitation
COE	- Council on the Environment
CORPS	- U.S. Army Corps of Engineers
EPA	- Environmental Protection Agency
F&WS	- U.S. Fish and Wildlife Service
NMFS	- National Marine Fisheries Service
PDC	- Planning District Commission
SHD	- State Health Department
SWCB	- State Water Control Board
VCOR	- Virginia Commission of Outdoor Recreation
VHLC	- Virginia Historic Landmark Commission
VIMS	- Virginia Institute of Marine Science
VMRC	- Virginia Marine Resources Commission

ATTACHMENT 3

STATISTICAL PROFILE OF PRIVATE NON-COMMERCIAL ACTIVITIES IN VIRGINIA TIDAL WATERS AND ADJACENT WETLANDS PERMITTED BY THE U. S. ARMY CORPS OF ENGINEERS 1-73 TO 3-77

The following table summarizes information on the types of private, non-commercial projects in tidal waters and adjacent wetlands most frequently requested by permit applicants.

STATISTICAL PROFILE BY

PROJECT TYPE: U.S. Army Corps of Engineers (Norfolk and Baltimore Districts)

PERMITS ISSUED: JANUARY 1973 - MARCH 1977

INDIVIDUAL ACTIVITY	CUMULATIVE BY PARAMETER****								Total Permits / Total Structures	Proj. Type % of Total Permits *
	50%	75%	90%	95%	Min.	Max.	Mean / %	Median / %		
Building (ft^2)	475	920	1430	1600	8	7500	806 / 70	513 / 59	48	3.5
Bulkhead (ft)	120	220	320	525	15	1250	179 / 69	124 / 74	291	21.0
Dredging (yd^3)	200	435	1000	1475	12	3685	410 / 72	212 / 54	82	5.9
Fill (yd^3)	140	350	620	980	9	39,500	619 / 91	190 / 58	113	8.1
Jetty (ft) °°	57	62	64	70	12	217	56 / 49	62 / 75	124	9.0
Pier (ft) °	60	110	170	210	7	380	90 / 66	74 / 58	512 / 537	37.0
Piling (ft) °°°	60	102	152	187	1	600	83 / 62	67 / 70	181	13.1
Spoil Disposal (yd^3)	200	390	640	770	35	3500	366 / 73	210 / 51	32	2.3
								TOTAL	1383	99.9

° Feet from shore.

°° Per cent column for jetties represents per cent of total jetties.

°°° Maximum extent channelward.

°°°° Dimension below which stated percentage of total number of projects fall.

* Per cent of total number of discrete activities reviewed by above categories (1383), not all activities issued by Corps for period (2177). Each permit may authorize several discrete activities such as a bulkhead, pier and dredging.

SOURCE: Research and Management System
Johns Hopkins University

PREPARED BY: Virginia Institute of Marine Science
Virginia Marine Resources Commission

ATTACHMENT 4

June 8, 1978

Colonel Newman W. Howard
District Engineer, Norfolk District
U. S. Army Corps of Engineers
Fort Norfolk, 803 Front Street
Norfolk, Virginia 23510

Dear Colonel Howard:

During the past year our respective staffs have, on several occasions, discussed the possibility of expanding the District's general permit program as a means of both alleviating your workload for smaller, non-controversial projects of minimum cumulative environmental impact and of enhancing the Commonwealth's involvement in the regulation of activities in tidal waters and adjacent wetlands. In November, former Secretary of Commerce and Resources Shiflet convened a meeting to discuss the Coastal Resources Management Program and explain the program's shoreline permitting proposals. As a result of that and subsequent meetings with your staff we realized it was encumbent upon the State to recommend those activities which we feel are appropriate for inclusion in the general permit program. Accordingly, my staff and that of the Institute of Marine Science have conducted a thorough review of the types of activities which have received Corps authorization during the last several years. On the basis of such information we have developed a summary list of activities (Attachment I) which, under the special conditions listed, we believe are appropriate subjects for general permits. This list is submitted for your review. We recommend that general permits for the activities listed be issued for the Chesapeake and Atlantic coast bays and their tidal tributaries in Virginia subject to the "general conditions" usually attached to such permits.

In developing Attachment I we have sought first to identify activities which we feel fall within the general permit criteria as reflected in the most recent Corps of Engineers regulations. We have also considered the need to standardize general permit conditions between the Norfolk and Baltimore Districts in order to have greater uniformity in permitting programs throughout Virginia's tidal waters. Finally we have considered the size and frequency of activities currently receiving federal authorization as well as general permits issued by other Atlantic and Gulf Coast Corps districts.

Since you will likely have some questions concerning these recommendations I have asked my staff to be available and prepared to meet with representatives of your District regarding the specifics of Attachment I and, where appropriate, develop more specific language leading to the issuance of a general permit. Understanding the environmental assessment which must accompany each general permit it may also be possible to devote a limited amount of the Commission's staff time to assisting in the preparation of the assessment.

In conjunction with the recommended expansion of the general permit program legislation which would amend the Virginia Wetlands Statute to enhance the Commonwealth's ability to control development along the shore has been introduced into the General Assembly and is currently under study. This legislation and the accompanying expansion of the general permit program are important components of Virginia's coastal zone management effort.

I know that you will be leaving the District soon and I would like to take this opportunity to express my personal appreciation for the interest you have shown in this matter in the past. I hope that you will bring our efforts in this area to the attention of your successor.

With warm personal regards, I am

Sincerely,

James E. Douglas, Jr.
Commissioner

JED:KAD:dw
EV
Enclosure
CC: Dr. William J. Hargis, Jr.
Mr. George Dawes
Mr. Don Budlong
Mr. Ray Bowles

June 8, 1978

Colonel G. K. Withers
District Enginner, Baltimore District
U. S. Army Corps of Engineers
Post Office Box 1715
Baltimore, Maryland 21203

Dear Colonel Withers:

During the past year our respective staffs have, on several occasions, discussed the possibility of expanding the District's general permit program as a means of both alleviating your workload for smaller, non-controversial projects of minimum cumulative environmental impact and of enhancing the Commonwealth's involvement in the regulation of activities in tidal waters and adjacent wetlands. In November, former Secretary of Commerce and Resources Shiflet convened a meeting to discuss the Coastal Resources Management Program and explain the program's shoreline permitting proposals. As a result of that and subsequent meetings with your staff we realized it was encumbent upon the State to recommend those activities which we feel are appropriate for inclusion in the general permit program. Accordingly, my staff and that of the Institute of Marine Science have conducted a thorough review of the types of activities which have received Corps authorization during the last several years. On the basis of such information we have developed a summary list of activities (Attachment I) which, under the special conditions listed, we believe are appropriate subjects for general permits. This list is submitted for your review. We recommend that general permits for the activities listed be issued for the Chesapeake and Atlantic coast bays and their tidal tributaries in Virginia subject to the "general conditions" usually attached to such permits.

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Sincerely,

James E. Douglas, Jr.
Commissioner

JED:KAD:dw
EV
Enclosure
CC: Dr. William J. Hargis, Jr.
Mr. George Dawes
Mr. Don Budlong
Mr. Ray Bowles

APPENDIX A

Special Conditions In Proposed General Permits

A. RIPARIAN ACCESS PROJECTS

1. Mooring Pilings and Piers (Proposed for Norfolk District)

a. The general permit should be available only to private waterfront property owners for non-commercial use.

b. The general permit should authorize new construction, replacement, and maintenance.

c. The general permit should authorize only one pier and a maximum of eight mooring pilings.

d. Piers must meet certain design and material specifications (as contained in Baltimore District general permit #2). Piers must be open-pile construction.

e. Neither piers nor mooring pilings may extend more than 100' channelward, (measured from MHW) or more than 25% of the waterway width (measured form MHW on each bank) whichever is least. Piers may not be more than 6' wide. "T" or "L" heads on piers may not exceed 20' in length or 10' in width.

f. Piers and/or mooring piles shall not extend into any navigable channel.

g. For any pier or mooring piling proposed to be constructed within 25' of a property line the applicant must obtain a letter of no objection from the affected adjacent property owner. Such requirement also applies for any boat which is moored to a pier or a mooring piling and which may cross a property line extended.

h. All state and local laws and regulations pertaining to the construction, installation, and maintenance of piers and pilings must be complied with. Where applicable, a permit shall be obtained from the Virginia Marine Resources Commission prior to commencement of projects in Virginia.

i. Project sponsors must notify the appropriate U.S. Army Corps of Engineers District Engineer of his intent in writing not later than 30 days prior to commencement. Such notice shall supply the Corps with appropriate information on the project (as specified in Baltimore District G.P. #2, special condition #8) together with a signed statement pledging the sponsor's compliance with the general permit conditions.

j. No dredging or filling is authorized under this general permit but may be pursued in conjunction with projects authorized herein if specifically authorized by another general permit.

k. Piers may be constructed in or over marsh areas providing the vegetation is not disturbed.

l. No pier and/or piling may be installed under this permit if another pier and/or mooring pile already exists on the same property unless the proposed work is an extension to an existing pier and the total resulting structure does not exceed the limits of this general permit.

m. No pump or petroleum dispensing apparatus should be placed or stored on the pier.

n. No human habitation should be permitted on the pier.

o. Structures should be removed when they no longer serve their designed functions.

p. No public or private shellfish grounds should be infringed upon by the proposed work.

q. Auxilliary structures such as boathouses or boat hoists should not be authorized by this permit.

r. Mooring piles authorized by this general permit should be used only for the purpose of mooring vessels by residential water-front property owners.

s. Sponsor should contact the Coast Guard to insure compliance with 33 CFR Subpart 67 30-5(c) concerning navigation rights where applicable.

t. This general permit does not authorize work in Scenic Rivers, within 1000' of specified historic, cultural or archaelogical sites or within 1000' of a National Wildlife Refuge.

2. Docks and Wharfs (mooring structures contiguous to a bulkhead or artificially stabilized shoreline) (Proposed for the Norfolk and Baltimore Districts)

a. The general permit should be available only to private water-front property owners for non-commercial use.

b. The general permit should apply to construction, replacement and maintenance of docks.

c. The docks and wharfs must be open-pile construction.

d. A dock or a wharf may only be constructed under this permit where a previously authorized bulkhead already exists.

e. Bulkheads may not extend more than 10' channelward of existing bulkhead including appurtenances such as stairways and walkways or be more than 300 ft^2 in area.

f. Docks must meet certain design and material specifications similar to those for piers.

g. No dock may be used for human habitation.

h. Conditions 1(f) through 1(t) of "Mooring Pilings and Piers" above apply to docks.

3. Buildings (principally boathouses) (Proposed for Norfolk and Baltimore Districts)

a. The general permit should be available only to private, waterfront property owners for private non-commercial recreational use.

b. The permit should apply to new construction, replacement and maintenance of boathouses.

c. Boathouses must be of open-pile construction.

d. The general permit should authorize one structure per waterfront property owner.

e. Boathouses (excluding pier) should not have a floor area in excess of 600 ft^2.

f. Boathouses may not extend more than 100' channelward (measured from MHW) or 25% of the waterway width (measured from MHW on each bank) whichever is least.

g. Boathouses must meet certain design and material specifications.

h. Conditions 1(f) through 1(t) of "Mooring Pilings and Piers" above apply.

4. Dredging for Boat Slips or Boat Ramps (Proposed for Norfolk and Baltimore Districts)

a. The general permit should be available only to private, waterfront property owners for non-commercial recreational use.

b. Both new dredging and maintenance dredging should be authorized by the general permit.

c. New dredging shall not exceed 400 yds^3 nor shall it exceed 1' in depth to ambient (average channel) depth adjacent to the project site. Boat slips shall not exceed 50' in any direction. Maintenance dredging to the authorized depth shall not exceed 4000 yds^3.

d. The general permit should allow only upland disposal of material. No dredged material may be placed in adjacent waters or wetlands. All upland disposal sites must be self-contained in a manner so as

to prevent spoil from being carried back into adjacent waters and wetlands, except where spoil is to be placed behind an existing bulkhead constructed for shoreline erosion control purposes

e. Dredged material must be relatively free of pollutants which would pose a water quality hazard. Any dredging which is likely to produce an adverse effect on water quality will not be authorized under this permit. A water quality certification from the State Water Control Board will be required.

f. Conditions 1 h, i, p, and t for "Mooring Pilings and Piers" above will apply.

5. Fill for Boat Ramps (Proposed for Norfolk and Baltimore Districts)

a. The general permit should be available only to private waterfront property owners for non-commercial recreational use.

b. The general permit should cover new construction, replacement, maintenance.

c. Boat ramps may be no wider than 15' nor extend more than 30' channelward of mean high water. Fill material may not exceed 100 cu. yds.

d. All fill material shall be obtained from an upland site and be free of debris and contaminants.

e. A water quality certification from the State must be submitted with the letter of notification.

f. No wetlands vegetation will be altered or destroyed by the project.

g. Conditions 1 g, h, i, o, p, s, and t of "Mooring Pilings and Piers" above apply.

B. SHORELINE STABILIZATION PROJECTS

1. Rip-rap Revetments, Sand Bags, Gabions (Proposed for Norfolk District)

a. The general permit should be available only to private waterfront property owners for the protection of a naturally eroding shoreline or an existing bulkhead or seawall.

b. The general permit should authorize placement and maintenance of rip-rap.

c. Rip-rap and sand bag distance should not exceed 500' in length.

d. Rip-rap, sandbags and gabions must be placed abutting an eroding bank or failing structure, extend channelward not more than 10' from MHW on a slope not steeper than two horizontal units to one vertical unit.

e. This permit should not authorize rip-rap projects in which 10% of the area to be occupied by the project supports rooted aquatic or marsh vegetation.

f. Rip-rap projects should not isolate, occlude or otherwise interfere with the normal hydraulic processes of any wetland.

g. Suitable material will be used for fill. Certain material/design specifications are required.

h. Project sponsors must obtain a letter of no objection from all adjacent property owners.

i. Conditions (1)h, i, p, s, and t of "Mooring Pilings and Piers" above apply.

2. Bulkheads (both existing General Permits for bulkhead replacement and maintenance in Baltimore and Norfolk Districts should be amended to be consistent with the following special conditions)

a. The general permit should be available to all waterfront property owners.

b. The general permit should authorize the construction, maintenance and replacement of bulkheads for the purposes of shoreline protection only where erosion exists.

c. The general permit should authorize for timber, steel, aluminum or reinforced concrete bulkheads.

d. Replacement bulkhead may not be more than 2' channelward from existing bulkhead.

e. Replacement bulkhead may not require more than 3/4 cu. yd. per linear foot of fill.

f. New bulkheads may not be below mean low water nor extend laterally more than 200 feet.

g. All projects must meet certain material and design specifications.

h. Project sponsors must obtain a letter of no objection from all adjacent property owners.

i. No bulkhead may be placed channelward of wetlands vegetation.

j. Conditions (1)h, i, p, and t of "Mooring Pilings and Piers" above apply.

ATTACHMENT 5

STATE/FEDERAL PERMIT REQUIREMENT COMPARISON

The following summarizes permit applications reviewed by the U. S. Army Corps of Engineers in the tidal waters and adjacent wetlands of Virginia for a three year period and compares them to applications reviewed by the Virginia Marine Resources Commission and local wetlands boards.

The table shows nearly 70% of all project applications received by the Corps of Engineers were exempt or otherwise beyond the jurisdiction of the Commonwealth.

FIGURE 1

STATE/FEDERAL PERMIT REQUIREMENT COMPARISON
WETLANDS AND SUBAQUEOUS
(NORFOLK DISTRICT)

YEAR	NUMBER OF PERMITS							
	Issued	Denied	No Permit Necessary	Withdrawn	General Permit	No State File on Application	Total Corps Permit Application	State Rqmt./Federal Rqmt. (%)*
1975	360 / 102	2	236	3		21	362	29
1976	455 / 140	9 / 1	4 / 298	52 / 22	5	64	525	31
1977	426 / 143	6 / 2	29 / 296	89 / 15	42	125	592	28
TOTAL	1241 / 385	17 / 3	33 / 830	141 / 40	47	210	1479	29.6 —AVG.

EXAMPLE
CORPS 23 / 45 STATE

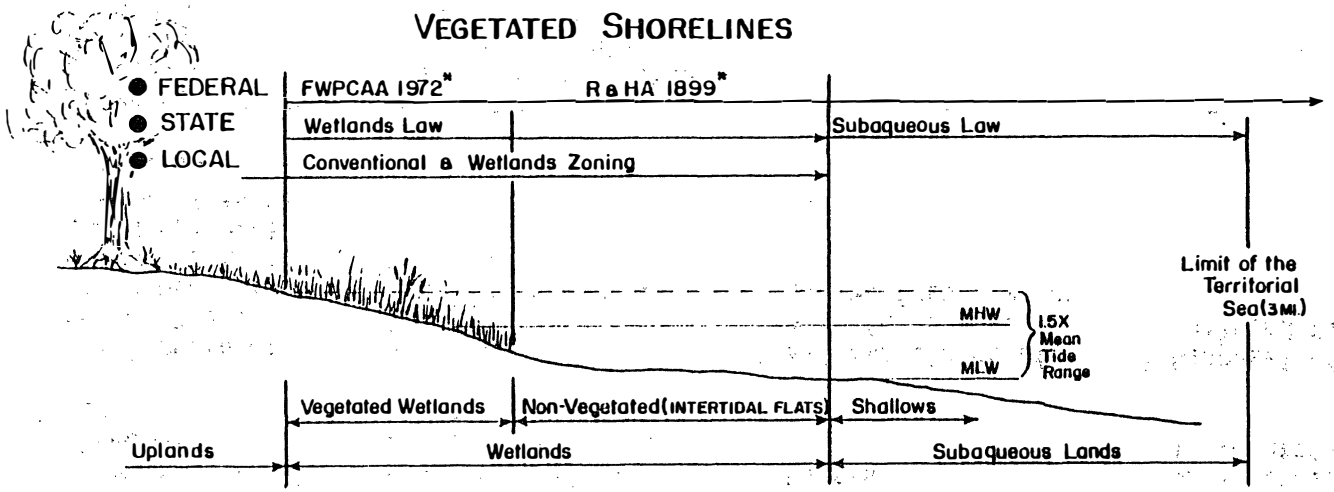
* STATE RQMT./FEDERAL RQMT. — Determined by $\frac{\text{STATE (Issued + Denied + Withdrawn)}}{\text{FEDERAL (Issued + Denied + Withdrawn + General Permit)}}$

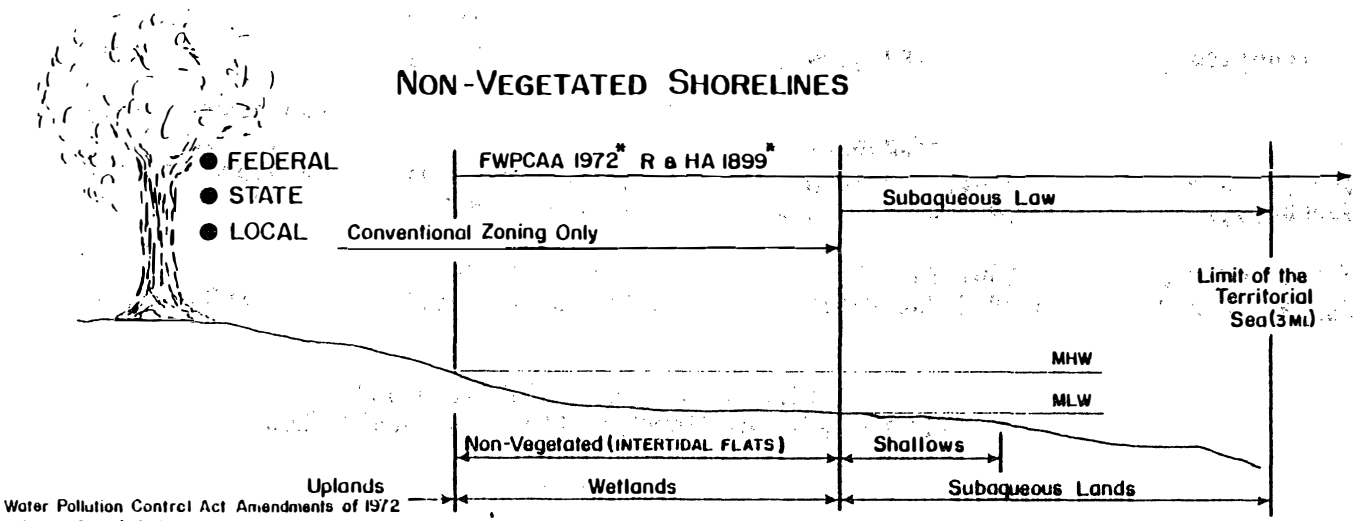
SOURCE: Monthly Corps of Engineers Permit Summaries, 1975-1977

PREPARED BY: Virginia Marine Resources Commission

FIGURE 2

PERMIT JURISDICTION IN TIDAL WATERS





* Federal Water Pollution Control Act Amendments of 1972
River and Harbor Act of 1899

FIGURE 3

COMPARISON OF PERMIT PROGRAMS IN TIDAL WATERS
AND WETLANDS OF COASTAL VIRGINIA

FACTOR	SUBAQUEOUS LAW	VIRGINIA WETLANDS ACT OF 1972	RIVER AND HARBOR ACT OF 1899	FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS
PRIMARY PURPOSE OF ENACTMENT	° Protection of Public Property ° Protection of Marine Resources	° Preservation of Vegetated Wetlands	° Maintenance of Navigability of Waterways	° Maintenance and Enhancement of Water Quality
SCOPE	° State	° State ° Local	° National	° National
JURISDICTION				
Geographic Extent	° All State-Owned Bottom Lands Below Mean Low Water To Three Miles Seaward	° Mean Low Water to 1.5 Times Mean Tide Range Only Where Certain Vegetation Grows	° Mean High Water Mark in Navigable Waters	° High Tide Line in Non-Vegetated Wetlands. Upper Limit of Vegetation in Vegetated Wetlands.
Activities Controlled	° All Structural Encroachments On or Over State Bottoms and All Non-Structural Bottom Disturbing Activities	° All Activities Disturbing Legally Protected Wetlands	° All Structures of Work in or Affecting Navigable Waters	° Disposal of Dredge and Polluted Fill Material
Notable Exemptions/ Restrictions of Jurisdiction	° Private, Non-Commercial Piers Publicly Authorized Dams Public Water-Access Facilities	° Non-Commercial Open-pile Structures ° Additions to All Private or Public Facility ° Restricted to Vegetated Wetlands Only		

FIGURE 3 (Continued)

FACTOR	SUBAQUEOUS LAW	VIRGINIA WETLANDS ACT OF 1972	RIVER AND HARBOR ACT OF 1899	FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS
INSTITUTIONAL ARRANGEMENTS				
Permit Authority	° State Management Commission Issues Permits For Projects Over $10,000. Staff Issues Permits for Projects Under $10,000. ° All Protests reviewed by Commission ° Further Appeals to Court	° Local Wetlands Board or State Management Commission Issues Permit ° Appeal of Local Decisions To State Management Commission ° Further Appeals to Court	° District Engineer Issues Permit ° Appeal to Courts	° District Engineer Issues Permit ° Appeal to Courts
Advisory Opinions	° No Permit May Be Granted Unless Health Department Approves Sewage Treatment or Disposal Facilities ° VMRC Must Consult with VIMS, SWCB on Permit Applications	° VIMS, SWCB Must Receive Copies of All Applications and May Advise on Permit Application	° Fish & Wildlife Service, National Marine Fisheries Service and Environmental Protection Agency Are Principal Advisors ° District Engineer Must Refer a Case to Higher Authority under Certain Conditions	° Fish & Wildlife Service, National Marine Fisheries Service and Environmental Protection Agency Are Principal Advisors ° District Engineer Must Refer a Case to Higher Authority Under Certain Conditions
ADMINISTRATIVE PROCEDURES	° No Time Limit On Processing ° Public Hearing Conducted In All Protested Cases and for Projects over $10,000	° Statutorily Directed Time Limitations On Processing ° Public Hearing Required On All Cases By Law	° Administrative Guidelines for Time Limitations on Permit Processing ° Corps May Issue General, Nationwide Permits ° EIS Required on Some Projects ° Public Hearings at District Engineer's Discretion According to Corps Regulations	° Administrative Guidelines for Time Limitations on Permit Processing ° Corps May Issue General, Nationwide Permits ° EIS Required on Some Projects ° Public Hearings at District Engineer's Discretion According to Corps Regulations

FIGURE 4

		EXISTING AUTHORITIES			STATE ACTION
A. SUBAQUEOUS LANDS (below MLW)					
1. State Owned		°Title 62.1 CH.1 °Most Structural Activities Dredge and Fill Operations °Certain Exemptions °401 Certification/SHD Certification of Facilities	°Rivers and Harbor Act 1899 °FWPCA Amendments 1972 °All Structural and Dredge and Fill Activities	°Delete State Exemption for Open Pile Piers Beyond MLW Privately Owned and Non-Commercial	°State Review and Override of Local Option Programs (MRC) °State Appelate Review (MRC) °Direct State Management Absent Local Program
2. Privately Owned	Zoning?		°As Above		
B. TIDAL WETLANDS					
1. Vegetated a. Contiguous (MLW - 1.5 X MTR)	Wetlands Ordinance	°Title 62.1 CH.2 °Most Structural, Dredge or Fill Activities °Certain Exemptions °401 Certification/SHD Certification of Facilities	°As above	°Delete Exemption for Private Non-Commercial Open Pile Piers	°State Review and Override of Local Option Program Including State Appelate Review, Direct State Management Absent Local Program
b. Non-Contiguous			°FWPCA Amendments 1972 Discharge of Dredge and Fill Material		
2. Non-Vegetated (MLW -HiTide Line)	Zoning?		°River and Harbor Act 1899 (To MHW) °FWPCA Amendment 1972 °(MHW - HiTide Line)	°Amend Definition of Wetlands to Include Non-Vegetated Wetlands (MLW - MHW) °Possible Amendment to HiTide Line	°State Review and Override of Local Option Program Decisions, Including State Appelate Review. Direct State Management Absent Local Program
C. NON-TIDAL WETLANDS					
1. Non-Tidal Drainage Swamps - Freshwater	Zoning?		°FWPCA Amendments 1972 Dredge and Fill Discharge		
2. Perched Wetlands	Zoning?		°FWPCA Amendments 1972 Dredge and Fill Discharge		
D. BEACHES					
1. MLW to HiTide Line	Zoning?		°River and Harbor Act 1899 °FWPCA Amendments 1972 Dredge and Fill	See Non-Vegetated Wetlands Proposals	
2. Above HiTide Line	Zoning?			See Dune Proposal Below	
E. DUNES					
Primary Row	Zoning?			Mandate Local Dune Protection Programs	°Local Directive to Develop Program. State Development of Program Where No Local Program Adopted and Acceptable State Certification of Program State Review of Local Appeals ??State Review and Override of Local Decision W/O Local Appeal

ATTACHMENT 6

PRINCIPAL VIRGINIA LAWS GOVERNING

ACTIVITIES IN TIDAL WATERS AND ADJACENT WETLANDS

Title 62.1.

Waters of the State, Ports and Harbors.

CHAPTER 1.

WATERCOURSES GENERALLY.

§ 62.1-1. Ungranted beds of bays, rivers, creeks and shores of the sea to remain in common. — All the beds of the bays, rivers, creeks and the shores of the sea within the jurisdiction of this Commonwealth, and not conveyed by special grant or compact according to law, shall continue and remain the property of the Commonwealth of Virginia, and may be used as a common by all the people of the State for the purpose of fishing and fowling, and of taking and catching oysters and other shellfish, subject to the provisions of Title 28.1, and any future laws that may be passed by the General Assembly. And no grant shall hereafter be issued by the State Librarian to pass any estate or interest of the Commonwealth in any natural oyster bed, rock, or shoal, whether the bed, rock or shoal shall ebb bare or not. (Code 1950, § 62-1; 1960, c. 533; c. 659.)

§ 62.1-2. Rights of owners to extend to mean low-water mark. — Subject to the provisions of the preceding section (§ 62.1-1) the limits or bounds of the several tracts of land lying on such bays, rivers, creeks and shores, and the rights and privileges of the owners of such lands, shall extend to the mean low-water mark, but no farther, unless where a creek or river, or some part thereof, is comprised within the limits of a lawful survey.

For the purposes of this section "lawful survey" shall mean the boundaries of any land, including submerged lands, held under a special grant or compact as required by § 62.1-1 whenever such boundaries shall have been determined by generally accepted surveying methods and procedures and evidenced by a plat or map thereof recorded in the clerk's office of the court wherein deeds are recorded in the county or city wherein such land lies. (Code 1950, § 62-2; 1968, c. 659; 1972, c. 865.)

§ 62.1-3. Authority required for use of subaqueous beds. — It shall be unlawful and constitute a Class 1 misdemeanor for anyone to build, dump, or otherwise trespass upon or over or encroach upon or take or use any materials from the beds of the bays and ocean, rivers, streams, creeks, which are the property of the Commonwealth, unless such act is pursuant to statutory authority or a permit by the Marine Resources Commission. Statutory authority is hereby conferred for the doing of such acts as are necessary for (1) the erection of dams, the construction of which has been authorized by proper authority, (2) the uses of subaqueous beds authorized under the provisions of Title 28.1 of the Code, (3) the construction and maintenance of congressionally approved navigation and flood-control projects undertaken by the United States Army Corps of Engineers, United States Coast Guard, or other federal agency authorized by Congress to regulate navigation, navigable waters, or flood control, (6) fills by riparian owners opposite their property to any lawfully established bulkhead line, provided that such owners have been granted, prior to July one, nineteen hundred seventy-two, a certificate of assurance from the State Water Control Board pursuant to § 21(b) of the Water Quality Improvement Act of 1970, (9) piers, docks, marine terminals and port facilities owned or leased by or to the Commonwealth or a political subdivision thereof, (10) the placement of private piers for noncommercial purposes by owners of the riparian lands in the waters opposite such riparian lands; provided, however, such private piers shall not extend beyond the navigation line or lawful private pier lines established by proper authority, and (11) causing the removal of silt and other waste material inside any lawfully established bulkhead line by riparian owners opposite their property incident to the construction and use of any graving dock, drydock or other shipbuilding facilities, where such owners have obtained prior to July one, nineteen hundred seventy-two, a certificate of assurance from the State Water Control Board pursuant to § 21 (b) of the Water Control Improvement Act of 1970.

The Marine Resources Commission shall have the authority to issue permits for all other reasonable uses of state-owned bottom lands, including but not limited to, the taking and use of material, the placement of wharves, bulkheads, dredging and fill, by owners of riparian lands, in the waters opposite such riparian lands; provided, however, that such wharves, bulkheads and fill shall not extend beyond any lawfully established bulkhead line.

The Marine Resources Commission is hereby authorized and empowered, but not in conflict with the United States Corps of Army Engineers, to establish bulkhead lines and lawful private pier lines on or over bays, rivers, creeks, streams and the shores of the ocean, to the extent owned by or subject to the jurisdiction of the Commonwealth for that purpose, and to issue and publish maps and plats showing such lines.

The Marine Resources Commission shall have the authority to issue permits for recovery of underwater historic property pursuant to this section and § 10-145.9 of the Code of Virginia.

The permits issued by the Marine Resources Commission shall be in writing and shall specify such conditions, terms and royalties as the Marine Resources Commission deems appropriate.

In granting or denying any permit for the use of state-owned bottom lands, the Commission shall be guided in its deliberations by the provisions of § 1 of Article XI of the Constitution of Virginia, and shall consider, among other things, the effect of the proposed project upon other reasonable and permissible uses of State waters and state-owned bottom lands, its effect upon the marine and fisheries resources of the Commonwealth, its effect 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.) of this title, and its effect upon adjacent or nearby properties, its anticipated public and private benefits, and, in addition thereto, the Commission shall give due consideration to standards of water quality as established by the State Water Control Board.

No permit for a marina or boatyard for commercial use shall be granted unless the owner or other applicant prior to issue presents a plan for sewage treatment or disposal facilities which is approved by the State Department of Health. The Marine Resources Commission shall consult with any State agency, including the Virginia Institute of Marine Science, the Water Control Board, the State Highway Department and the State Corporation Commission whenever the decision of the Marine Resources Commission on an application for a permit relates to or affects the particular concerns or activities of other State agencies.

A fee of twenty-five dollars shall be paid for issuing each such permit as charge for such permit, but if the cost for the project or facility is to be more than ten thousand dollars, the fee paid shall be one hundred dollars. A fee of twenty-five dollars shall be paid for issuing each permit for recovery of underwater historic property. When the activity or project for which a permit is requested involves the removal of bottom material, the application shall so state and the Marine Resources Commission shall specify in each such permit issued a royalty of not less than ten cents per cubic yard for new removal, provided, however, that no royalty for the removal of bottom material shall exceed the amount of thirty cents per cubic yard of material removed. In fixing the amount of royalty to be paid for removal of bottom material, the Commission shall consider, among other things, the primary and secondary purposes of the removal of bottom material, whether the material has any commercial value and whether it will be used for any commercial purpose, the use to be made thereof and any public benefit or any adverse effect upon the public in connection with the removal or disposal, the physical characteristics of the material removed, and the expense of its removal and disposal. Nothing contained herein shall preclude the imposition of additional assessments not to exceed an amount treble the normal permit fee and royalties provided above where it appears that the project or facility for which an application for permit is made has been completed or work thereon already commenced at the time such application is made. Bottom material removed attendant to maintenance dredging shall be exempt from any royalty. Any agreement or contract made by the Marine Resources Commission respecting the amount, terms and conditions on which such royalties are paid or payable shall be subject to the approval of the Attorney General, as to form, with the consent and approval of the Governor.

The Virginia Department of Highways and Transportation shall be exempt from all such fees and royalties otherwise assessable pursuant to this section.

All counties, cities and towns of the Commonwealth shall be exempt from permit fees and royalties other than the permit issuing fee; provided that a permit as required under this section be issued prior to the commencement of any of the work to be accomplished under said permit.

All royalties or funds that are collected from such agreements or contracts shall be paid into the State treasury to the credit of the Special Public Oyster Rock Replenishment Fund for the purposes of such fund. Expenditures and disbursements of all sums from such fund shall be made by the State Treasurer on warrant of the Comptroller issued on vouchers signed by such person or persons as shall be so authorized and designated by the Marine Resources Commission.

All permits heretofore issued pursuant to this section or prior § 62-2.1 are hereby ratified, validated and confirmed.

Any person aggrieved by a decision of the Marine Resources Commission pursuant to this section shall have the right to judicial review of said decision as provided in § 28.1-33 of the Code of Virginia. (Code 1950 (Suppl.), § 62-2.1; 1960, c. 600; 1962, c. 637; 1966, c. 641; 1968, c. 659; 1970, c. 621; 1972, c. 866; 1973, cc. 23, 361; 1974, cc. 92, 385; 1975, c. 431; 1976, c. 579.)

§ 62.1-3.01. When Commissioner may approve permit for encroachment on subaqueous beds. — Any application for a permit to trespass upon or over or encroach upon the subaqueous beds which are the property of the Commonwealth, which meets all the requirements of § 62.1-3 and meets the following criteria, may be approved by the Commissioner:

(a) The total value of the project does not exceed ten thousand dollars;

(b) Is not protested by any citizen nor objected to by any State agency; and

(c) Is not a part of any project that will involve another Marine Resources Commission permit. (1972, c. 398.)

§ 62.1-3.02. When Commissioner may approve permit for encroachment on subaqueous beds without notice to or approval by other State agency. — Any application for a permit to trespass upon or over or encroach upon the subaqueous beds which are the property of the Commonwealth, which meets all of the following criteria may be approved by the Commissioner without notice to or approval by any other State agency, except that notice only shall have been given to Virginia Institute of Marine Science:

(a) The total cost of the project does not exceed ten thousand dollars;

(b) The application is not protested by any citizen nor objected to by any State agency;

(c) The project is not a part of any project that will involve another Marine Resources Commission permit; and

(d) The project constitutes a shore erosion control project recommended by the Soil and Water Conservation District in which the project is located. (1973, c. 350.)

§ 62.1-3.03. Maintenance or removal of structures erected upon or over state-owned subaqueous bottoms. — Any person, firm, or corporation, constructing or erecting any structure upon or over state-owned subaqueous bottoms, shall be responsible for the maintenance or removal of such structure upon its abandonment or its falling into a state of disrepair except that public service corporations may abandon cables, conduit and pipes upon prior approval of the Marine Resources Commission. This responsibility is hereby imposed upon grantees or assignees for value of those persons, firms, or corporations which erect or construct such structure. (1974, c. 274.)

§ 62.1-3.1. Injunction against violation of § 62.1-3. — Upon application of the Marine Resources Commission to a court of record of the city or county wherein any act is done or facility or project is found, which is unlawful under the provision of § 62.1-3 of the Code and upon reasonable notice and after hearing, the court shall have the authority to enjoin any further unlawful act and to direct the person guilty thereof or the Marine Resources Commission, at the costs of the person found to have acted unlawfully, to remove, tear down or otherwise take such steps as are necessary to protect and preserve the subject property of the Commonwealth. (1970, c. 621.)

§ 62.1-4. Granting easements in, and leasing of, the beds of certain waters. — The Marine Resources Commission, with the approval of the Attorney General and the Governor, may grant easements in, and may lease, the beds of the water of the State, without the Baylor Survey. Every such easement or lease may be for a period not exceeding five years, may include the right to renew the same for an additional period not exceeding five years each and shall specify the rent royalties and such other terms deemed expedient and proper. Such easements and leases may, in addition to any other rights, authorize the grantees and lessees to prospect for and take from the bottoms covered thereby, oil, gas, and such other minerals and mineral substances as are therein specified; provided, that no such easement or lease shall in any way affect or interfere with the rights vouchsafed to the people of the State concerning fishing, fowling, and the catching and taking of oysters and other shellfish, in and from the bottoms so leased, and the waters covering the same. All easements granted and leases made under the authority granted by this section, shall be executed in the name and for and on behalf of the State, by the Attorney General, and shall be countersigned by the Governor. All rents or royalties collected from such easements or leases shall be paid into the State treasury to the credit of the Special Public Oyster Rock Replenishment Fund for the purposes of such fund. Expenditures and disbursements of all sums from such fund shall be made as provided in § 62.1-3. The Commissioner of Marine Resources and the Attorney General shall make reports to the General Assembly of all such easements granted or leases so made, such reports to be made on or before the first day of December preceding the convening of each regular session thereof. (Code 1950, § 62-3; 1958, c. 290; 1962, c. 637; 1968, c. 659.)

CHAPTER 2.1.

WETLANDS.

§ 62.1-13.1. Declaration of policy. — The Commonwealth of Virginia hereby recognizes the unique character of the wetlands, an irreplaceable natural resource which, in its natural state, is essential to the ecological systems of the tidal rivers, bays and estuaries of the Commonwealth. This resource is essential for the production of marine and inland wildlife, waterfowl, finfish, shellfish and flora; is valuable as a protective barrier against floods, tidal storms and erosion of the shores and soil within the Commonwealth; is important for the absorption of silt and of pollutants; and is important for recreational and aesthetic enjoyment of the people for the promotion of tourism, navigation and commerce.

Continued destruction of Virginia's coastal wetlands will greatly contribute to the pollution of the Commonwealth's rivers, bays and estuaries; will diminish the abundance of Virginia's marine and inland animals and waterfowl, finfish, shellfish and flora as sources of food, employment and recreation for the people of Virginia; will increase costs and hazards associated with floods and tidal storms; and will accelerate erosion and the loss of lands productive to the economy and the well-being of our citizens.

—Therefore, in order to protect the public interest, promote the public health, safety and the economic and general welfare of the Commonwealth, and to protect public and private property, wildlife, marine fisheries and the natural environment, it is declared to be the public policy of this Commonwealth to preserve the wetlands and to prevent their despoliation and destruction and to accommodate necessary economic development in a manner consistent with wetlands preservation. (1972, c. 711.)

§ 62.1-13.2. **Definitions.** — For the purposes of this chapter, the following words shall have the meanings respectively ascribed to them:

(a) *"Commission"* means the Virginia Marine Resources Commission.

(b) *"Commissioner"* means the Commissioner of Marine Resources.

(c) *"Person"* means any corporation, association, or partnership, one or more individuals, or any unit of government or agency thereof.

(d) *"Tidewater Virginia"* means the following counties: Accomack, Arlington, Caroline, Charles City, Chesterfield, Essex, Fairfax, Gloucester, Hanover, Henrico, Isle of Wight, James City, King George, King and Queen, King William, Lancaster, Mathews, Middlesex, New Kent, Northampton, Northumberland, Prince George, Prince William, Richmond, Southampton, Spotsylvania, Stafford, Surry, Sussex, Westmoreland, and York; and the cities of Alexandria, Chesapeake, Colonial Heights, Fairfax, Falls Church, Fredericksburg, Hampton, Hopewell, Newport News, Norfolk, Petersburg, Portsmouth, Richmond, Suffolk, Virginia Beach and Williamsburg.

(e) *"Governmental services"* means any or all of the services provided by a county, city or town to its citizens for the purpose of maintaining such county, city or town and shall include but shall not be limited to such services as constructing, repairing and maintaining roads, sewage facilities, supplying and treating water, street lights, and construction of public buildings.

(f) *"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 the county, city or town in question; and upon which is growing on July one, nineteen hundred seventy-two or grows thereon subsequent thereto, any one or more of the following: saltmarsh cordgrass (Spartina alterniflora), saltmeadow hay (Spartina patens), saltgrass (Distichlis spicata), black needlerush (Juncus roemerianus), saltwort (Salicornia spp.), sea lavender (Limonium spp.), marsh elder (Iva frutescens), groundsel bush (Baccharis halimifolia), wax myrtle (Myrica sp.), sea oxeye (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 ecentula), southern wildrice (Zizaniopsis miliacea), cattails (typha spp.), threesquares (Scirpus spp.), button bush (Cephalanthus occidentalis), bald cypress (Taxodium distichum), black gum (Nyssa sylvatica), tupelo (Nyssa aquatica), dock (Rumex spp.), yellow pond lily (Nuphar spp.), marsh fleabane (Pluchea purpurascens), royal fern (Osmunda regalis), marsh hibiscus (Hibiscus moscheutos), beggar's ticks (Bidens sp.), smartweeds (Polygonum sp.), arrowhead (Sagittaria spp.), sweet flag (Acorus calamus), and switch grass (panicum virgatum).

The wetlands of Back Bay and its tributaries and the wetlands of the North Landing river and its tributaries shall mean all marshes subject to regular or occasional flooding by tides, including wind tides, provided this shall not include hurricane or tropical storm tides and upon which one or more of the following vegetation species are growing or grows thereon subsequent to the passage of this amendment: saltwater [saltmarsh] cordgrass (Spartina alterniflora), saltmeadow hay (Spartina patens), black needlerush (Juncus roemerianus), marsh elder (Iva frutescens), groundsel bush (Baccharis halimifolia), wax myrtle (Myrica sp.), arrow arum (Peltandra virginica), pickerelweed (Pontederia cordata), big cordgrass (Spartina cynosuroides), rice cutgrass (Leersia oryzoides), wildrice (Zizania aquatica), bulrush (Scirpus validus), spikerush (Eleocharis sp.), cattails (Typha spp.), three-squares (Scirpus spp.), dock (Rumex sp.), smartweeds (Polygonum sp.), yellow pond lily (Nuphar spp.), royal fern (Osmunda regalis), marsh hibiscus (Hibiscus moscheutos), beggar's ticks (Bidens sp.), arrowhead (Sagittaria spp.), water hemp (Amaranthus cannabinus), reed grass (Phragmites communis) and switch grass (Panicum virgatum).

(k) *"North Landing river and its tributaries"* means the following as based on United States Geological Survey Quadrangle Sheets for Pleasant Ridge, Creeds, and Fentress: The North Landing river from the Virginia-North Carolina line to Virginia Highway 165 at North Landing Bridge; the Chesapeake and Albemarle canal from Virginia Highway 165 at North Landing Bridge to the locks at Great Bridge; all named and unnamed streams, creeks and rivers flowing into the North Landing river and the Chesapeake and Albemarle canal except the following: West Neck creek north of Indian River Road; Pocaty river west of Blackwater Road; Blackwater river west of its forks located at a point approximately 6400 feet due west of the point where the Blackwater Road crosses the Blackwater river at the village of Blackwater; Millbank creek west of Blackwater Road. (1972, c. 711; 1973, c. 388; 1974, c. 297; 1975, c. 268.)

(g) *"Wetlands board"* or *"board"* means a board created as provided in § 62.1-13.6.

(h) *"Wetlands zoning ordinance"* means that ordinance set forth in § 62.1-13.5.

(i) *"County, city or town"* shall mean the governing body of such county, city or town.

(j) *"Back Bay and its tributaries"* means the following as shown on the U.S. Geological Survey Quadrangle Sheets for Virginia Beach, North Bay, and Knotts Island: Back Bay north of the Virginia-North Carolina State Line; Capsies creek north of the Virginia-North Carolina State Line; Deal creek; Devil creek; Nawney creek; Redhead Bay, Sand Bay, Shipps Bay, North Bay, and the waters connecting them; Beggars Bridge creek; Muddy creek; Ashville Bridge creek; Hells Point creek; Black Gut; and all coves, ponds and natural waterways adjacent to or connecting with the above-named bodies of water. (1972, c. 711; 1973, c. 388; 1974, c. 297.)

§ 62.1-13.3. Standards for use and development of wetlands. — The following standards shall apply 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) Development in Tidewater Virginia, to the maximum extent possible, shall be concentrated in wetlands of lesser ecological significance, in wetlands which have been irreversibly disturbed before July one, nineteen hundred seventy-two, and in areas of Tidewater Virginia apart from the wetlands. (1972, c. 711.)

§ 62.1-13.4. Marine Resources Commission to develop guidelines. — In order to implement the policy set forth in § 62.1-13.1 and to assist counties, cities or towns in regulation of wetlands, the Commission shall, with the advice and assistance of the Virginia Institute of Marine Science, which will evaluate wetlands by type and maintain a continuing inventory of those wetlands, from time to time promulgate guidelines which scientifically evaluate wetlands by type and which set forth the consequences of use of these wetlands types. In developing guidelines, the Commission is empowered to consult with any governmental agency. (1972, c. 711.)

§ 62.1-13.5. Counties, cities and towns authorized to adopt wetlands zoning ordinance; terms of ordinance. — Any county, city or town may adopt the following ordinance:

Wetlands Zoning Ordinance

§ 1. The governing body of ....., acting pursuant to chapter 2.1 of Title 62.1 of the Code of Virginia, for purposes of fulfilling the policy standards set forth in such chapter, adopts this ordinance regulating the use and development of wetlands.

§ 2. *Definitions.* — For the purposes of this ordinance:

(a) "Commission" means the Virginia Marine Resources Commission.

(b) "Commissioner" means the Commissioner of Marine Resources.

(c) "Person" means any corporation, association or partnership, one or more individuals, or any unit of government or agency thereof.

(d) "Governmental services" means any or all of the services provided by this.....to its citizens for the purpose of maintaining this.....and shall include but shall not be limited to such services as constructing, repairing and maintaining roads, sewage facilities, supplying and treating water, street lights and construction of public buildings.

(e) "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.....; and upon which is growing on the effective date of this act or grown thereon subsequent thereto, any one or more of the following: saltmarsh cordgrass (Spartina alterniflora), saltmeadow hay (Spartina patens), saltgrass (Distichlis spicata), black needlerush (Juncus roemerianus), saltwort (Salicornia spp.), sea lavender (Limonium spp.), marsh elder (Iva frutescens), groundsel bush (Baccharis halimifolia), wax myrtle (Myrica sp.), sea oxeye (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 ecentula), southern wildrice (Zizaniopsis miliacea), cattails (Typha spp.), three-squares (Scirpus spp.), buttonbush (Cephalanthus occidentalis), bald cypress (Taxodium distichum), black gum (Nyssa sylvatica), tupelo (Nyssa aquatica), dock (Rumex spp.), yellow pond lily (Nuphar spp.), marsh fleabane (Pluchea purpurascens), royal fern (Osmunda regalis), marsh hibiscus (Hibiscus moscheutos), beggar's ticks (Bidens sp.), smartweeds (Polygonum sp.), arrowhead (Sagittaria spp.), sweet flag (Acorus calamus), water hemp (Amaranthus cannabinus), reed grass (Phragmites communis), and switch grass (Panicum virgatum).

The wetlands of Back Bay and its tributaries and the wetlands of the North Landing river and its tributaries shall mean all marshes subject to regular or occasional flooding by tides, including wind tides, provided this shall not include hurricane or tropical storm tides, and upon which one or more of the following vegetation species are growing or grows thereon subsequent to the passage of this amendment: saltwater [saltmarsh] cordgrass (Spartina alterniflora), saltmeadow hay (Spartina patens), black needlerush (Juncus reomerianus), marsh elder (Iva frutescens), groundsel bush (Baccharis halimifolia), wax myrtle (Myrica sp.), arrow arum (Peltandra virginica), pickerelweed (Pontederia cordata), big cordgrass (Spartina cynosuroides), rice cutgrass (Leersia oryzoides), wildrice (Zizania aquatica), bulrush (Scirpus validus), spikerush (Eleocharis sp.), cattails (Typha spp.), three-squares (Scirpus spp.), dock (Rumex sp.), smartweeds (Polygonum sp.), yellow pond lily (Nuphar spp.), royal fern (Osmunda regalis), marsh hibiscus (Hibiscus moscheutos), beggar's ticks (Bidens sp.), arrowhead (Sagittaria spp.), water hemp (Amaranthus cannabinus), reed grass (Phragmites communis), and switch grass (Panicum virgatum).

(f) "Wetlands board" or "board" means a board created as provided in § 62.1-13.6 of the Code of Virginia.

(g) "Back Bay and its tributaries" means the following as shown on the U.S. Geological Survey Quadrangle Sheets for Virginia Beach, North Bay, and Knotts Island: Back Bay north of the Virginia-North Carolina State Line; Capsies creek north of the Virginia-North Carolina State Line; Deal creek; Devil creek; Nawney creek; Redhead Bay, Sand Bay, Shipps Bay, North Bay, and the waters connecting them; Beggars Bridge creek; Muddy creek; Ashville Bridge creek; Hells Point creek; Black Gut; and all coves, ponds and natural waterways adjacent to or connecting with the above-named bodies of water.

§ 62.1-13.6. Appointment, terms, etc., of local wetlands boards; jurisdiction of county wetlands board over wetlands in town. — (a) In and for any county, city or town which has enacted or enacts a wetlands zoning ordinance pursuant to this chapter, there shall be created a wetlands board, which shall consist of five residents of the county, city or town appointed by the governing body of the county, city or town. Provided, however, the wetlands board of the city of Poquoson shall consist of seven residents appointed by the governing body of such city. Their terms of office shall be for five years each except that original appointments shall be made for such terms that the term of one member shall expire each year. The chairman of the board shall notify the governing body at least thirty days in advance of the expiration of any term of office, and shall also notify the governing body promptly if any vacancy occurs. Appointments to fill vacancies shall be only for the unexpired portion of the term. Members may serve successive terms. Members of the board shall hold no other public office in the county or city except that they may be members of the local planning or zoning commission, directors of soil and water conservation boards, or local erosion commissions, or of the local board of zoning appeals. A member whose term expires shall continue to serve until his successor is appointed and qualified.

(b) If a town 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. (1972, c. 711; 1977, c. 15; 1978, c. 585.)

§ 62.1-13.7. Officers, meetings, rules, etc., of wetlands boards; records and reports. — The board shall elect from its membership a chairman and such other officers as it deems necessary who shall serve one-year terms as such and may succeed themselves. For the conduct of any hearing and the taking of any action, a quorum shall be not less than three members of the board. Provided, however, that in the city of Poquoson a quorum shall consist of not less than four board members. 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. The board shall keep a full public record of its proceedings and shall submit a report of its activities to the governing body at least once each year, and a copy of its report to the Commission. (1972, c. 711; 1977, c. 15.)

§ 62.1-13.8. Local governing body to supply meeting space and services for wetlands board; removal of board member. — The governing body of the county, city or town creating a wetlands board shall supply reasonable meeting space for the use of the board and such reasonable secretarial, clerical, legal and consulting services as may be needed by the board. The local governing body is authorized to expend the necessary public funds. Any board member may be removed for malfeasance, misfeasance or nonfeasance in office, or for other just cause, by the governing body which appointed him, after hearing held after at least fifteen days' notice. (1972, c. 711.)

§ 62.1-13.9. Permits required for certain activities; issuance of permits by Commission. — No person shall conduct any activity which would require a permit under a wetlands zoning ordinance unless he has a permit therefor. Until such time as the county, city or town in which a person proposes to conduct an activity which would require a permit under a wetlands zoning ordinance adopts the wetlands zoning ordinance such person shall apply for a permit directly to the Commission except as provided in § 62.1-13.6 (b). If an

applicant desires to use or develop wetlands owned by the Commonwealth, he shall apply for a permit directly to the Commission and in addition to the application fee required by the wetlands zoning ordinance, he shall pay such fees and royalties as provided in § 62.1-3.

The Commission shall process such application in accordance with the provisions of the wetlands zoning ordinance and the Commissioner shall sign such permit; provided, however, that the Commission shall have the authority to designate one or more hearing officers who may, in lieu of the Commission, conduct public hearings as required in § 62.1-13.5, and thereafter report such findings and recommendations to the Commission. (1972, c. 711.)

§ 62.1-13.10. Commissioner of Marine Resources to review all decisions of wetlands boards. — The Commissioner shall review all decisions of the wetlands board and notify the Commission of any decision which in his opinion should be reviewed by the Commission. (1972, c. 711.)

§ 62.1-13.11. When Commission to review decision of wetlands board. — The Commission shall review a decision of a wetlands board made under a wetlands zoning ordinance when:

(1) An appeal is taken from such decision by the applicant for a permit or by the county, city or town where the wetlands are located; or

(2) The Commissioner requests such review. The Commissioner shall request such review only when he reasonably believes that the policy and standards of this chapter have not been adequately achieved or that any guidelines which may have been promulgated by the Commission have not been reasonably accommodated. In order to make such a request, the Commissioner must notify the board and the applicant and the county, city or town where the wetlands are located within ten days of receipt of notice to the Commissioner of the decision of the board.

(3) Twenty-five or more freeholders of property within the county, city or town in which the proposed project is located sign and submit a petition to the Commission, provided, such petition must include a statement of particulars setting forth those specific instances wherein the petitioners do allege that the board did fail to follow the policy, standards or guidelines of this chapter.

(4) Where not otherwise provided, the foregoing requests for review or appeal shall be made within ten days from date of initial determination by the board; and provided that the Commission shall hear and decide such review or appeal within forty-five days after notice of such review or appeal is received a continuance may be granted by the Commission on a motion of the applicant or the freeholders as specified in § 62.1-13.11 (3) or the county, city or town where the wetlands are located. (1972, c. 711.)

§ 62.1-13.12. Procedure for review. — (a) The Commissioner shall cause notice of the review or appeal to be given to the board, to the applicant, to the freeholders specified in § 62.1-13.11 (3) and to the county, city or town where the wetlands are located.

(b) The Commission shall hear the appeal or conduct the review on the record transmitted by the board to the Commissioner 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. (1972, c. 711.)

§ 62.1-13.13. When Commission to modify or reverse decision of wetlands board. — The Commission shall modify 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. (1972, c. 711.)

§ 62.1-13.14. Notice of Commission's decision. — The Commission shall notify the parties of its determination within forty-eight hours after the appeal or review. (1972, c. 711.)

§ 62.1-13.14:1. Time for issuance of permit. — No permit shall be issued until the time within which a request for review or an appeal to the Commission may be made has expired; and, if any such request for review or appeal is made, no activity for which such permit is required shall be commenced until the Commission has notified the parties of its determination. (1973, c. 65.)

§ 62.1-13.15. Appeals to courts. — (1) An appeal from any decision of the Commission concerning an application for a permit granted or denied directly by the Commission, or from any decision of the Commission on review of or appeal from a decision of the board may be taken by the applicant, any of the freeholders as set forth in § 62.1-13.11 (3), or by the county, city or town where the wetlands are located, within thirty days after the rendering of such decision of the Commission, to the circuit court or corporation court having jurisdiction in the governmental subdivision in which the wetlands involved in the decision are located.

(2) Judicial review shall be in accord with the provisions of § 9-6.13, except that the circuit court or corporation court shall modify or reverse the decision of the Commission or remand the case for further proceedings:

(a) If the decision of the Commission 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; or

(b) If the substantial rights of the appellant have been prejudiced because of findings, conclusions or decisions are

(1) In violation of constitutional provisions; or

(2) In excess of statutory authority or jurisdiction of the Commission; or

(3) Made upon unlawful procedure; or

(4) Affected by other error of law; or

(5) Unsupported by the evidence on the record considered as a whole; or

(6) Arbitrary, capricious, or an abuse of discretion.

(c) From the final decision of the circuit court or corporation court an appeal shall lie to the Supreme Court in the manner provided by law for appeals in civil cases. (1972, c. 711.)

§ 62.1-13.16. **Investigations and prosecutions.** — The Commission shall have the authority to investigate all projects whether proposed or ongoing which alter wetlands. The Commission shall have the power to prosecute all violations of any order, rule, or regulation of the Commission or of a wetlands board, or violation of any provision of this chapter. Wetlands boards shall have the authority to investigate all projects whether proposed or ongoing which alter wetlands located within the city, town or county establishing such wetlands board. Wetlands boards shall have the power to prosecute all violations of any order of such boards, or any violation of any provision of the wetlands zoning ordinance contained in § 62.1-13.5. (1972, c. 711; 1975, c. 467.)

§ 62.1-13.17. **Commission may receive gifts, etc.** — The Commission may receive gifts, grants, bequests, and devises of wetlands and of money which shall be taken and held for the uses prescribed by the donor, grantor, or testator and in accord with the purposes of this chapter. The Commission shall manage such wetlands in such a way as to maximize their ecological value and in accord with the purposes of this chapter. (1972, c. 711.)

§ 62.1-13.18. **Violation of orders, rules and regulations.** — (a) Any person who knowingly, intentionally, negligently or continually violates any order, rule or regulation of the Commission or of a wetlands board established pursuant to this chapter or 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 Commission pursuant to this chapter shall be guilty of a misdemeanor. Following a conviction, every day the violation continues shall be deemed a separate offense. (1972, c. 711.)

§ 62.1-13.18:1. Injunctions. — In addition to and notwithstanding the provisions of § 62.1-13.18, upon petition of the Commission or a wetlands board to the court of record having jurisdiction in the city or county wherein any act is done or is threatened to be done which is unlawful under the provisions of this chapter, the court may enjoin such unlawful act and may order the person so acting unlawfully to take such steps as are necessary to restore, protect and preserve the wetlands involved. (1973, c. 65.)

§ 62.1-13.19. **Jurisdiction of Commission not affected.** — Nothing in this chapter shall affect the Commission's sole jurisdiction over areas and activities as defined by Title 28.1 or § 62.1-3 of this Code. (1972, c. 711.)

§ 62.1-13.20. Exemptions. — Nothing in this chapter shall affect (1) any project commenced prior to July one, nineteen hundred seventy-two; provided, however, that this section shall not be deemed to exclude from regulation under this chapter any activity which expands or enlarges upon a project already in existence or under construction at the time of such date, except for those activities exempted under § 62.1-13.5 § 3 (h); (2) any project or development as to which, prior to July one, nineteen hundred seventy-two; a plan or plan of development thereof has been filed pursuant to ordinance or other lawful enactment with either an agency of the federal or State government, or with either the planning commission, board of supervisors, or city council of the jurisdiction in which the project or development is located; and (3) any project or development, whether or not commenced prior to July one, nineteen hundred seventy-two; if located or to be located in whole or in part on ground or in an area an interest in which was authorized by the General Assembly to be conveyed prior to July one, nineteen hundred seventy-two.

For the North Landing river and its tributaries exemptions (1) and (2) above shall take effect July one, nineteen hundred seventy-five. (1972, c. 711; 1975, c. 268.)

ATTACHMENT 7

OPINIONS OF THE ATTORNEY GENERAL'S OFFICE

REGARDING DELEGATION OF SUBAQUEOUS PERMIT AUTHORITY

Commonwealth of Virginia

OFFICE OF THE ATTORNEY GENERAL
SUPREME COURT BUILDING
1101 EAST BROAD STREET
RICHMOND, VIRGINIA 23219
804-786-2071

MARSHALL COLEMAN
ATTORNEY GENERAL

March 3, 1978

Mr. Donald W. Budlong
Office of the Secretary of Commerce
and Resources
Fifth Floor, Ninth Street Office Building
Richmond, Virginia 23219

Dear Don:

This is in reply to your inquiry whether the Commonwealth may delegate authority to regulate the use of subaqueous bottoms to localities. Your letter references correspondence to the effect that State-owned bottoms are held in "public trust" and their administration cannot be delegated to localities.

Article XI, Section 3, of the Constitution of Virginia (1971), provides that the natural oyster beds, rocks, and shoals of the Commonwealth are to be "held in trust for the benefit of the people of the Commonwealth." The public trust thus extends only to natural oyster beds, all other subaqueous bottoms are held for the public benefit pursuant to legislative act and not constitutional mandate.

Section 62.1-1 of the Code of Virginia (1950), as amended, provides that all ungranted bottoms "shall continue and remain the property of the Commonwealth of Virginia, and may be used as a common by all the people of the State for the purpose of fishing and fouling, and of taking and catching oysters and other shellfish, subject to the provisions of Title 28.1, and any future laws that may be passed by the General Assembly...." The General Assembly thus has authority to legislate to enact measures establishing the procedures under which control of subaqueous bottoms should be governed. Section 62.1-3 provides that, withing certain specified exceptions, a permit from the Virginia Marine Resources Commission is required prior to the use of beds which are the property of

the Commonwealth.

There is no constitutional mandate that the ungranted bottoms of the Commonwealth must be managed solely by a State instrumentality. It is within the discretion of the General Assembly to legislate whether administrative control over these commonly held land areas should be exercised by an instrumentality of the State government (the Virginia Marine Resources Commission) or may be exercised by a political subdivision of the State, in this case a local government.

Since all political subdivisions of the Commonwealth have as the source of their authority the State itself, they can take no action which has not been specifically delegated to them. Furthermore, when they act they do, in a sense, by speaking for the Commonwealth. I therefore believe that it would be proper for the commonly held bottoms to be managed by whatever public entity the General Assembly, in its wisdom, felt was proper. The present authority for the Marine Resources Commission to manage these areas could be delegated to the local governments within which these publicly owned bottoms lie. Such a decision would in no way violate the public trust aspect of the natural oyster beds which would, of course, remain inviolable. Neither the Constituiton nor Code mandate a particular administrative entity to protect these publicly owned areas. The crucial point is, of course, that they be protected and held in common for the use of all the people of the Commonwealth.

With best wishes, I remain

Sincerely yours,

Tom

Maston T. Jacks
Assistant Attorney General

MTJ/100F16

Commonwealth of Virginia

OFFICE OF THE ATTORNEY GENERAL
SUPREME COURT BUILDING
1101 EAST BROAD STREET
RICHMOND, VIRGINIA 23219
804-786-2071

MARSHALL COLEMAN
ATTORNEY GENERAL

September 5, 1978

Mr. Norman E. Larsen
Assistant Commissioner for
Environmental Affairs
Marine Resources Commission
P. O. Box 756
Newport News, Virginia 23607

Dear Norm:

This is in reply to your recent letter concerning the authority of the State to permit local governments to administer a permit program for controlling uses of publicly owned subaqueous bottoms.

You ask that I reconfirm my correspondence to Don Budlong on this subject, dated March 3, 1978. I reconfirm that correspondence.

You also request that I provide "an outline of alternatives regarding the actual delegation process." The range of alternatives available to you is not capable of specific limitation, therefore I cannot provide a "list" of alternative methods of delegating this authority. I can, however, comment on legal issues which must be addressed in any delegation alternative.

Should the General Assembly so desire, it could grant to localities general permit authority of the nature possessed by the Marine Resources Commission pursuant to § 62.1-3 of the Code. That grant of authority could be very broad (over all encroachments on publicly owned subaqueous bottoms) or more specific (over only those bottoms, or only those projects, specifically defined by statute, or by administrative regulation at the Marine Resources Commission). The Commission could be authorized by the General Assembly to specifically define (with respect to project size) the jurisdiction of the locality over certain uses. In other words, MRC could

retain permit authority over most projects, but those within certain specific statutory or regulatory guidelines could be regulated by localities. I would prefer that local authority be based on statutory guidelines rather than MRC regulations. The use of administrative regulations clouds the process of delegation.

The delegation must be as specific as possible in regard to the following matters: 1. the authority of the Commonwealth (through MRC) to permit encroachments on publicly owned subaqueous bottoms (see § 62.1-3), 2. the authority of localities to regulate such encroachments (see next paragraph, below), 3. the specific types of encroachments subject to State or local regulation (should the jurisdiction over encroachments be shared by these two levels of government), and 4. whether statutory or regulatory power will serve as the basis for localities to act.

Since local governments may not take action for which they do not possess specific authorization pursuant to a delegation of power from the General Assembly, no locality may regulate encroachments on subaqueous bottoms without specific statutory authority. It is thus essential that any statute specifically articulate local permit authority in as clear a manner as possible.

In order to insure that the interests of all Virginians are protected in using State bottoms, I suggest that § 62.1-1 of the Code of Virginia be referenced in any statute authorizing permit authority by local governments to manage encroachments on local bottoms.

The responsibility of choosing which legislative alternative to follow is yours. Once you have done so, should you have questions regarding the appropriate mechanisms necessary to articulate your choice, I would be pleased to advise you.

With best wishes, I remain

Sincerely yours,

Tom

Maston T. Jacks
Assistant Attorney General

4:31/135M10

ATTACHMENT 8

ASSESSMENT OF THE IMPACT OF CRM PERMITTING PROPOSAL ON LOCAL GOVERNMENTS IN COASTAL VIRGINIA

ASSESSMENT OF THE IMPACT OF CRM SHORELINE PERMITTING PROPOSALS ON LOCAL GOVERNMENT IN TIDEWATER, VIRGINIA

General Comments

During the fall of 1977, public hearings were held throughout coastal Virginia on the proposals contained in the document Alternatives for Coastal Resources Management. A number of local governments, commenting on the shoreline permitting chapter, questioned the CRM staff on what additional workload suggested changes in Virginia law might generate for local permit boards. Specifically, local officials were concerned about whether additional administrative assistance would be needed for local permitting boards and who would bear the cost of such assistance. This paper summarizes the expected impact of the following proposals.

- to expand the definition of wetlands to include "non-vegetated" wetlands lying between mean low water and mean high water
- to delete from Title 62.1 of the Code of Virginia permit exemptions for certain non-commercial structures (principally piers and boathouses)
- to offer local governments the authority to administer the State permit program for use of State-owned bottoms for certain types of activities

The CRM Program staff has attempted to project the impact of the proposals on local governments by calculating their effect on past permitting activity. This retrospective assessment has considered the resulting increase in permit applications as an indicator of the effect of the proposals on future permit activity.

Several factors, however, temper these projections and will modify the actual workload each locality would experience by implementing these proposals. First, the assumption of subaqueous permitting authority is at the option of the locality. The present wetlands ordinance is also adopted at the option of the locality, although it is assumed that those local governments which have adopted the wetlands ordinance would also amend their ordinance to reflect changes in State law. The proposed changes to the wetlands and subaqueous laws may offer sufficient inducement to some localities to form wetlands boards where they have not previously considered it justified.

Wetlands boards are administratively supported to some degree by local governments since board members themselves are unpaid volunteers and the law requires such support. Support varies from part-time secretarial help provided on an "as-needed" basis to project investigators who spend a portion of their time reviewing project plans and inspecting proposed shoreline construction sites. Thus the impact of a particular increase in permit activity can best be put in perspective by considering the ability of the locality to handle the additional workload. Local boards which receive substantial administrative support may be better able to absorb the additional workload than boards which depend principally on board members to process permit applications and inspect sites. Local governments providing administrative support may feel the impact through an increased demand on secretarial and engineering services.

Several other factors should be considered in assessing the impact of the proposals. Those projects taking place on state bottoms for which local governments would have authority to issue permits have been selected by virtue of their minimal environmental impact. It is expected that few of these projects would generate controversy on

environmental grounds. Therefore, additional permits could probably be processed in a routine fashion. Moreover, the Marine Resources Commission staff expects to assist in the preparation of supporting information for presentation to local boards for their action. This will be necessary because some of the information, e.g., shellfish leaseholds and the location of public shellfish grounds, is only available at that agency. It should also be noted that many wetlands projects which would be subject to a permit requirement under the proposals may have, in the past, received a "no permit necessary" determination from local boards. Since it is often necessary to visit the site of a proposed project to determine that no permit is needed, for some projects there may be only minimal additional effort required to actually authorize the activity by issuing a permit. Finally, local authority to administer the state permit program for encroachment on State-owned bottom is proposed to be tied to the issuance of Army Corps of Engineers general permits. Failure of the Corps to issue all those general permits recommended by the CRM program will decrease the impact on local governments accordingly.

Methodology

A data base supplied by the Research and Management System (RAMS) of the Johns Hopkins University containing a listing of Corps of Engineers permits issued from January 1974 through December 1976 in Coastal Virginia was used to calculate additional local permit application reviews. The table attached summarizes this information. Column 1 indicates whether a local wetlands board has been formed. The number of applications reviewed by board as indicated by Virginia Marine Resources Commission files is contained in Column 2. This information for some localities is suspected to be incomplete. Columns 3 through 7 review Corps permits issued during the period for each locality. Since a single permit application frequently contains a request to conduct one or more activities (pier, bulkhead, dredging) and because of the organization of the RAMS data bank, tabulations of discrete "activities" were also maintained (Column 4). For example, the table indicates 47 Corps permits authorizing 95 discrete activities or structures were issued in Accomack County during the study period. Because of the nature of the proposed changes to the shoreline permit laws of Virginia, it was important to know whether activities were included or exempt under present State law. Columns 5-7 represent a classification of these activities found useful to the impact assessment and are provided for information.

The additional numbers of permit applications generated by the proposals are contained in Columns 8 through 14. Column 8 contains the number of additional wetlands applications by locality which would be generated by the proposals. The same information for subaqueous permit applications is presented in Column 9. Each of these totals assumes that present exemptions for non-commercial piers in Virginia's shoreline permit laws will be deleted. Frequently shoreline projects require both wetlands and subaqueous permits but are submitted on the same application. In order that these projects not be counted twice, the number of projects affected by both new wetlands and subaqueous requirements was maintained in Column 10.

Of the past projects affected by the proposals some were found, through cross-checking of VMRC records, to have been reviewed by local boards. These are presented in Column 11 and along with Column 10 were subtracted from the totals of Column 8 and 9 to yield the total number of additional projects which would be subject to local review under the proposals (Column 12). Since some projects involve both activities which are subject to a State or local permit requirement and others which are not, a record of such projects previously reviewed under State or local permit programs but for which additional activities would now be subject to a permit requirement was maintained in Column 13. This is a representation of a partial increas in local effort in reviewing a project.

The RAMS data base contained only permits issued rather than applications received. Since some projects are withdrawn, denied, or otherwise do not reach fruition, during any given year more applications are received than projects actually permitted. The best indicator of effort on the part of local boards is considered to be the number of applications received rather than projects approved since contested and denied projects can involve a great deal of time and effort by the board. Therefore, a standard ratio of applications received to projects authorized was developed (1.2) based on permit records to translate the data generated on permits issued to estimates of applications reviewed. Accordingly, Column 14 represents Column 12 multiplied by 1.2. Column 15 contains the toal number of applications reviewed by the local board compared to the total it is calculated they would have reviewed during the three year period had the proposed changes to Virginia law been in effect. For some localities no federal permit data was available through the Research and Management System, while in others data was incomplete. These localities have been indicated on the table.

Assessment

Many variables currently determine the effort expended and costs incurred by local governments in administering the wetlands system. Professional assistance, overhead costs, salaries and the effort expended in examining applications varies from locality to locality. Accordingly, the CRM staff cannot determine the financial cost of the proposed changes to Virginia's wetlands and subaqueous laws. Rather each locality must assess the projected number of new permit applications contained in Column 15 against operating costs where wetlands boards currently exist.

It is obvious, however, that those localities which are presently undergoing the most rapid development along the shore would be most impacted, in terms of the number of new permit applications generated. Many localities which review only a few permit applications per year will likely feel only a moderate impact or little effect at all, while those which do not have wetlands boards would likely feel no impact at all.

A comparison of State and federal permit programs reveals that bringing private, non-commercial piers under a permit requirement would generate the greatest number of applications while the inclusion of non-vegetated wetlands would account for a substantial portion of the remainder of the additional applications generated.

ASSESSMENT OF THE IMPACT OF CRM PERMITTING PROPOSALS ON LOCAL GOVERNMENTS IN COASTAL VIRGINIA*

	LOCAL ACTIONS		FEDERAL PERMITS ISSUED					ADDITIONAL REVIEW ACTIONS GENERATED							IMPACT ASSESSMEI
	Local Wetlands Boards	Local Applications Reviewed	Total Corps Permits Issued	Total Activities Authorized	Public Activities	Commercial Activities	Private Non-commercial Activities	Additional Wetlands Applications	Additional Subaqueous Applications	Permits Affected by both Proposals	Permits Reviewed by Local Wetlands Boards	Total Additional Reviews	Additional Partial Reviews	Estimated Additional Applications	Past Workload/ Estimated Workloo
	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15
Accomack Co.	X	25	47	95	18	50	26	14	12	6	6	20	6	24	25/49
Alexandria °			2	2	0	2	0	1	0	0	1	1	0	0	(75,76)
Caroline Co.°			2	7	6	1	0	1	0	0	0	1	0	0	(76)
Charles City Co.	X														No RAMS data available
Chesterfield °			6	10	2	4	0	4	0	0	0	4	0	5	(74,75)
Chesapeake	X	11	24	44	2	24	18	8	3	1	0	10	0	12	11/23
Essex Co.	X	2	28	40	5	1	34	20	4	3	0	21	0	25	2/27
Fairfax Co.			12	24	2	7	15	7	4	4		7	0	8	
Gloucester Co.	X	16	40	61	9	2	50	27	16	15	3	25	3	30	16/46
Hampton °	X	12	10	14	0	7	7	6	2	2	1	5	1	6	12/18 (74,75)
Hopewell	X														No RAMS data available
Isle of Wight Co.	X	3	7	11	2	2	7	2	2	1	1	2	1	3	3/6
James City Co.°	X	2	19	26	0	0	16	12	3	2	1	12	1	14	2/16 (74,75)
King George Co.°	X	1	4	10	1	6	3	1	0	0	0	1	1	1	1/2 (74,75)
King and Queen Co.			2	3	0	1	2	0	0	0	0	0	0	0	
King William Co.	X	3	4	7	2	3	2	0	0	0	0	0	0	0	3/3
Lancaster Co.	X	68	136	227	0	21	206	120	80	72	18	110	18	132	68/200
Mathews Co.	X	17	50	83	3	11	69	29	23	18	4	30	4	36	17/53
Middlesex Co.	X	12	85	145	0	8	137	71	46	36	3	78	3	94	12/106
New Kent Co.	X	3	2	2	0	2	0	0	0	0	0	0	0	0	3/3
Newport News °	X	1	14	24	8	9	7	5	0	0	0	5	0	6	1/7 (74,75
Norfolk			79	127	22	35	70	35	21	13		43	0	52	
Northampton Co.	X	15	21	31	16	3	12	8	2	2	1	7	1	8	15/23
Northumberland Co.	X	38	107	149	1	14	134	78	46	27	11	86	11	103	38/141
Poquoson	X	4	1	5	0	0	5	1	1	1	0	1	0	1	4/5
Portsmouth °			3	4	4	0	0	0	0	0	0	0	0	0	(75)
Prince George Co.°			4	6	0	4	2	5	1	1	0	5	0	5	(74,
Prince William Co.	X	1	8	14	1	12	1	4	1	0	0	5	0	6	1/7
Richmond Co.	X	3	19	28	3	9	16	13	5	5	2	11	2	13	3/16
Stafford Co.°	X	0	2	4	0	0	4	2	1	1	0	2	0	3	0/3 (74,75)
Suffolk	X	0	9	14	2	1	11	6	7	2	0	11	0	13	0/13
Surry Co.°			4	7	0	0	7	3	2	1	0	4	0	5	(75)
Virginia Beach	X	78	145	251	14	17	220	107	58	49	14	102	14	122	78/200
Westmoreland Co.	X	2	37	77	2	13	62	31	13	13	1	30	1	36	2/38
Williamsburg	X														No RAMS data available
York Co.	X	31	54	84	20	5	29	34	19	19	4	30	4	36	31/67

* Data obtained from Research and Management System (RAMS) Johns Hopkins University, Corps of Engineers (Norfolk and Baltimore Districts) and Virginia Marine Resources Commission permit files for the period 1 January 1974 - 31 December 1976. No RAMS data is available for the counties of Arlington, Charles City, Fairfax, Hanover, Henrico, Southampton, Spotsylvania or Sussex nor for the cities of Colonial Heights, Falls Church, Fredericksburg, Hopewell, Petersburg, Richmond or Williamsburg.

° Denotes incomplete RAMS data. Data available only for years noted in column 15.