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Tidal Wetlands Protection in Virginia Time for an Update

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About the Authors

Pamela Kalinowski is a candidate for Juris Doctor at William & Mary Law School and a former member of the Virginia Coastal Policy Clinic. Pam is currently Vice-President of the Alternative Dispute Resolution Team and a member of the *William & Mary Journal of Women and the Law*, with a publication forthcoming in Vol. 20, Issue 3 entitled "The Fairest of Them All: The Creative Interests of Female Fan Fiction Writers and the Fair Use Doctrine." Her most recent professional work includes serving as a legal extern for the Virginia Attorney General's Office in the Division of Commerce, Environment, and Technology, concentrating on animal and gaming law. She graduated from University of Scranton in 2006 with a B.A. in English.



Yvonne Baker is a candidate for Juris Doctor at William & Mary Law School and a former member of the VA Coastal Policy Clinic. Yvonne is currently the Editor-in-Chief of the *Environmental Law and Policy Review* and has previously been a law clerk for the Law Department at Norfolk Southern Corporation and a summer law clerk for the Honorable Raymond A. Jackson, U.S. District Judge for the Eastern District of Virginia. She graduated from Hampton University in 2011 with a B.S. Degree in Business Management.

About the Virginia Coastal Policy Clinic

The Virginia Coastal Policy Clinic (VCPC) at William & Mary Law School provides science-based legal and policy analysis of environmental and land use issues affecting the state's coastal resources and educates the Virginia policy making, non-profit, military, legal and business communities about these subjects.

Working in partnership with Virginia scientists, law students in the clinic integrate the latest science with legal and policy analysis to solve coastal resource management issues. Examining issues ranging from property rights to federalism, the clinic's activities are inherently interdisciplinary, drawing on scientific, economic, and policy expertise from across the university. VCPC has a strong partnership with the Virginia Institute of Marine Science (VIMS) and Virginia Sea Grant.

VCPC is especially grateful to Virginia Sea Grant for providing generous funding to support our work as well as to the Virginia Environmental Endowment for providing funding to establish the clinic in fall 2012.

Executive Summary

Virginia tidal wetlands protect our homes from floodwaters and prevent polluted runoff from entering creeks, rivers, and the Chesapeake Bay. Virginia's Tidal Wetlands Act ("the Act"), on paper, appears to provide a strong framework for protecting this precious natural resource, but the law, enacted more than forty years ago in 1972, is showing its age. For example, a 2012 report by the Virginia Institute of Marine Science (VIMS) revealed that out of the total 1,225 wetlands permits assessed, only 44% were submitted in some form of consistency with Virginia's *Wetland Guidelines* and 56% were submitted not consistent with the guidelines at all. Meanwhile, increasing flooding caused by sea level rise and subsidence threatens Virginia's tidal wetlands even further.

This paper provides an overview of Virginia's tidal wetlands management framework. It explains how the oversight authority of the Virginia Marine Resources Commission (VMRC) is limited and how court decisions have weakened the Tidal Wetlands Act's overall purpose to "preserve and prevent the despoliation and destruction of wetlands."¹ The following chart indicates recommendations for protecting Virginia's wetlands and provides recommendations for addressing them.

Recommendations

Improve Decision-Making at the Local Level

Because Wetlands Boards have such broad authority in Virginia, the following measures – either voluntarily by the Wetlands Boards themselves or by statutory change -- should be taken to make them more effective and accountable:

- Increasing resources for staff support provided to Wetlands Boards;
- Requiring board members to have experience with wetland management before appointment;
- Requiring board members to participate in continued educational seminars; and
- Requiring Wetlands Boards to record detailed minutes which reflect informed decision-making and an explanation of the rationale and consideration involved in the final decision, making them publically available.

Make The Wetlands Guidelines Mandatory

Virginia courts have ruled that the Wetland Guidelines are merely advisory. Wetlands Boards therefore do not need to carefully weigh the scientific data in the guidelines, even though the Act requires that the guidelines be created and provides that they "shall be considered" when reviewing permit applications.

The Act should clearly require that Wetlands Boards follow *The Wetland Guidelines*. The Virginia General Assembly should revise Section 28.2-1308(a) as follows: "A. The following standards shall apply to the use and development of wetlands and shall be [**binding**] in the determination of whether any permit required by this chapter should be granted or denied."

Prioritize Wetlands Protection

Wetlands Boards often prioritize property protection or cost instead of protecting valuable wetlands. The following measures could help make wetlands protection a stronger priority in board decision-making:

- Ensuring, either by means of VMRC direction, increased board education, or statutory change, that Wetlands Boards must adhere to the goals of the Tidal Wetlands Act which is primarily to "preserve and protect the despoliation and destruction of wetlands while accommodating necessary economic development in a manner consistent with wetlands preservation."²
- Implementing, either voluntarily, by means of the guidelines, or by statutory change, a presumption for living shorelines before other measures such as bulk-heads and riprap revetments are considered.

Allow Wetlands Protection to Be Grounds for Challenging Wetlands Board Decisions

Certain individuals can sometimes challenge wetlands board or VMRC decisions, but can never challenge decisions solely to protect tidal wetlands. Virginia lawmakers could remedy this situation by giving Virginians the right to sue the state and/or private party to protect the state's wetlands.

Background: Valuing Virginia Wetlands

An intimate neighbor of the Chesapeake Bay and the Atlantic Ocean, Virginia is home to a substantial number of coastal communities. Although only 29 percent of Virginia's land falls within its "coastal zone," the coast is home to more than 60 percent of its population.³ Because such a large percentage of the Commonwealth's citizens have settled along the waterfront, it is important that Virginians learn to live harmoniously with the environmental habitats that thrive there. In particular, wetlands play an important role as a coastal habitat and are in desperate need of protection and preservation.

Wetlands are the critical link between water and land.⁴ Collectively, wetlands include marshes, swamps, bogs, and similar habitats found along the edges of waterways and coastlines.⁵ Wetlands are home to thousands of aquatic plants and animals, serving as a valuable source of food and nursing grounds for the species that dwell there.⁶ They also play an integral role in the absorption of excess nutrients and sediment that filter through before reaching streams, rivers, and other watersheds.⁷ Wetlands can be categorized into two types: non-tidal wetlands or tidal wetlands. The latter will be the immediate focus of this report.

Wetlands have a wide range of important functions and values which put them at a high priority for protection and preservation.⁸ "Wetlands provide many ecological and socio-economic benefits including: water quality improvement, aquatic productivity, fish and wildlife habitat, shoreline erosion control, stormwater treatment, flood protection, potable water supplies, economically valuable resources, and recreation."⁹ In addition, the location of the wetland can add value to the ecosystem, for instance, a wetland located downstream from a pollution site is essential to decreasing pollution runoff into the watershed.¹⁰ Furthermore, these ecosystems are particularly valuable to the maintenance and improvement of the Chesapeake Bay¹¹—a factor that should be at the forefront of wetlands management concerns.

The current state of Virginia's wetlands is threatened due to continued human interruption. "[Common] human threats to wetlands include drainage, dredging, filling, construction of shoreline structures, groundwater withdrawal, and impoundments."¹² A Comprehensive Wetland Program Plan (WPP) developed by the Virginia Department of Environmental Quality (DEQ) reports that since the colonial era, Virginia has lost approximately half of its original wetlands acreage.¹³ Twenty-five percent of the remaining one million acres of wetlands are tidal wetlands.¹⁴ Tidal wetlands are mainly lost to land and shoreline development, and "conversion to open water as a result of sea level rise."¹⁵

When wetlands are in danger, so are the coastal communities that surround them. If wetlands are lost and no longer able to provide their ecological functions, nearby regions will be susceptible to a number of negative effects including but not limited to increases in polluted runoff, decreases in delectable seafood, flood risks, and sea level rise. Wetlands protect life and property from flooding by serving as "natural tubs", storing flood waters.¹⁶ One acre of wetlands can store about one million gallons of water or the same area of land covered by three feet of water.¹⁷ Because of the benefits and importance of wetlands to the environment, economy, and local communities, environmental groups and legislatures worked together to develop a regulatory system aimed at the protection and preservation of these habitats.

Wetlands and Their Management in Virginia

Tidal wetlands in Virginia are mainly governed by the Virginia Marine Resources Commission (“VMRC”), which was designated the lead agency by the state legislature. Administrative authority over tidal wetlands was enacted into statute in 1972 with the passing of the Tidal Wetlands Act.¹⁸ This act provides a local option alternative proscribed under the wetlands zoning ordinance (or “model ordinance”) for localities to form their own Wetlands Boards.¹⁹ Localities that do not elect the local option are governed by VMRC. Since the enactment of the Tidal Wetlands Act over forty years ago, 22 counties, 12 cities, and 2 towns have adopted the model ordinance and established their own local Wetlands Boards.²⁰ Once established, Wetlands Boards have the authority to regulate the uses of wetlands in the locality

Wetlands Boards are tasked with “balancing the preservation and use of tidal wetlands in order to protect the ecosystem services they provide.”²¹ To further strengthen the purpose of Wetlands Boards, Virginia implemented a no-net loss of wetlands policy whereby “if any wetlands are lost due to development or shoreline stabilization, then the resulting loss must be offset by creating a comparable amount of wetlands elsewhere.” Wetlands Boards are required to mitigate and minimize adverse ecological impacts of all permitted activities under the Tidal Wetlands Act.²² Most Boards consist of five to seven appointed members of the community who serve on a volunteer basis or are minimally compensated.²³ There are no educational requirements for volunteers as a qualification for appointment, nor are board members required to obtain any training or education about wetlands. Other than residency within a locality, individuals need not hold any special qualifications to be appointed members. Most board members serve a five-year term. **Wetland Boards are poorly staffed and have limited resources – these factors substantially contribute to the ineffectiveness of the current statutory regime that governs wetlands management in Virginia.**

A shoreline permit is required for all disruptive activities in Virginia’s wetlands, subaqueous beds, sand dunes and beaches. Permitted activities include dredging, filling, and construction of bulk-heads, riprap revetments, groins, jetties, boat ramps, and piers. The permit process begins when an applicant files a joint permit application which is processed separately through three agencies: local Wetlands Boards, VMRC, and the Army Corps of Engineers/Department of Environmental Quality. An application moves through each agency for a maximum of ninety days, after which each agency will independently decide whether or not to accept the proposed project.

To assist Wetlands Boards with their decision-making, the Tidal Wetlands Act requires that VMRC develop Wetland Guidelines (“Guidelines”).²⁴ The Wetland Guidelines, developed by the Habitat Management Division of VMRC and the Department of Wetlands Ecology at the Virginia Institute of Marine Science (“VIMS”), provide Wetlands Boards with a categorical system to help ensure that the goals of no-net loss of wetlands are met.²⁵ The Guidelines divide wetlands vegetation into categories by type and provide a summary suggesting the degree to which certain types of vegetation should be preserved.²⁶

Wetlands Boards have failed to utilize the guidance offered by the VIMS in the permit application process. A 2012 report by VIMS revealed that “out of the total

Key Point

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1,225 projects assessed; 541 projects (or 44%) were submitted *in some form of consistency* with the guidance and 684 projects (or 56%) were submitted not consistent with guidance in any form.²⁷ The Guidelines are designed to "assist local governments in making permit decisions" and provides recommendations for "strategies which incorporate the use of natural resources for shoreline protection and seek to more effectively balance public and private interests."²⁸ The guidelines are technical and scientifically based, providing sound advice concerning various types of development projects.²⁹ However, local Wetlands Boards discount this technical guidance and, instead, approve or deny permit applications based on their own opinions, knowledge, or previous practices.³⁰ Ninety percent of Wetlands Boards' decisions regarding permit applications already "not meeting the guidance in any form, were not consistent with guidance."³¹ Instead of heeding VIMS' recommendations and further the state's no-net loss wetland policy, board members are simply rubber-stamping proposals that adversely affect wetlands.

Virginia Marine Resources Commission

VMRC Must Oversee Wetlands Management Under Virginia Law

The Virginia Marine Resources Commission (VMRC) was developed to regulate and oversee Virginia's marine resources, including wetlands.³² The state legislature has charged VMRC with specific duties, including the duty to "preserve and prevent the despoliation and destruction of wetlands while accommodating necessary economic development in a manner consistent with wetlands preservation" and "assist counties, cities, and towns in regulating wetlands."³³

When localities establish local Wetlands Boards as part of Virginia's wetlands management approach, VMRC is their primary oversight authority. The Tidal Wetlands Act requires the VMRC Commissioner to exercise supervisory authority and "review all decisions of Wetlands Boards."³⁴ The entire Commission must review a wetland board decision when:

- **A permit applicant appeals to VMRC.** When a local wetlands board denies an applicant's permit, the applicant must be granted an appeal by VMRC if the applicant submits a request within ten days of the board's decision.³⁵
- **Twenty-five or more property owners in a given locality appeal to VMRC.** Twenty-five or more property owners within the county, city, or town where the proposed project is located may sign a petition requesting the appeal and submit it to VMRC. Property owners must indicate how they believe the wetlands board failed to fulfill its responsibilities under the wetlands zoning ordinance.³⁶ This must also be submitted within ten days of the board's decision.³⁷
- **The Commissioner of VMRC believes a wetlands board failed to fulfill its statutory responsibilities.**³⁸ In this case, the Commissioner must notify the local wetlands board of his decision to review the case within ten days of receiving the local wetlands board's original decision.³⁹ The Commissioner must also indicate how he or she believes the wetlands board failed to fulfill its responsibilities under the wetlands zoning ordinance.⁴⁰

When a party follows the appropriate procedure and successfully appeals a wetlands board's decision, VMRC will look to the wetlands zoning ordinance to evaluate the decision. The wetlands zoning ordinance specifies criteria for the operation and procedures of local Wetlands Boards, including factors to consider when reviewing permit applications.⁴¹ When VMRC reviews a wetlands board decision, it should look to the wetlands zoning ordinance found in the Code of Virginia and ensure that its directions and criteria were followed during the permit review process.⁴² If, upon review, VMRC finds that a wetlands board failed to fulfill its responsibilities or follow the criteria of the model ordinance, VMRC can modify, remand, or reverse the wetlands board's decision.⁴³

Under Virginia law, VMRC's oversight authority seems straightforward, meaningful, and effective—the agency must compare the actions of Wetlands Boards to actions required in the model ordinance, and, if a discrepancy exists, alter the decision or send the case back to wetlands board so it can alter the decision. Virginia courts, however, have undercut VMRC's oversight authority, making VMRC less effective and unable to correct the inadequacies of Wetlands Boards and their decisions. The following section discusses Virginia court rulings that have limited both the oversight power of VMRC and the ability to challenge wetlands board decisions at the expense of the state's wetlands.

State Courts Have Limited the Ability of Virginians to Successfully Challenge Wetlands Board Decisions and Lessened VMRC's Ability to Oversee Wetlands Boards

The Tidal Wetlands Act advances a policy to “preserve and prevent the despoliation and destruction of wetlands.”⁴⁴ However, Virginia courts have interpreted the Act narrowly, limiting the Act's overarching goal of protecting wetlands. In their decisions, state courts have severely limited the ability of citizens to successfully challenge decisions of both local Wetlands Boards and the VMRC. Further, courts have granted local Wetlands Boards considerable freedom in their decision-making process and have lessened VMRC's ability to oversee Wetlands Boards. Courts have done this by ruling on individual cases that have undergone the appeal process, with the following results:

- Courts defer to the judgments of Wetlands Boards regarding permit applications, consequently limiting VMRC's oversight authority because such a deferral undermines VMRC's role as a supervisory agency.
- Wetlands Boards do not need to carefully weigh the scientific data in VIMS' Wetland Guidelines when reviewing permit applications. VMRC has little authority to enforce adherence to VIMS' Wetland Guidelines because courts have ruled that the Guidelines are merely advisory.
- Certain individuals can sometimes challenge wetlands board or VMRC decisions, but can never challenge decisions solely on behalf of the environment

This section discusses these topics in more detail, paying special attention to how Virginia courts have ruled on these issues.

I. Courts defer to the judgments of Wetlands Boards regarding permit applications, consequently limiting VMRC's oversight authority because such a deferral undermines the Commission's role as a supervisory agency.

In many recent decisions, Virginia courts afford a generous level of deference to Wetlands Boards when reviewing permit decisions. The amount of deference varies, depending on the circumstances involved. The result of this deference usurps the Commission's oversight power and ultimately places decision-making power back into the hands of Wetlands Boards. In most cases, courts are reluctant to alter the status quo of wetlands board operations and do not force Wetlands Boards to support their decisions with scientific data.

Any challenge of a wetlands board decision brought before a Virginia court must follow the procedure articulated by the Virginia Administrative Process Act (the "APA").⁴⁵ The APA places burdens on challenges to show that the board's decision falls into one of three types of cases eligible for court review.⁴⁶ While these burdens are obstacles for a challenger, they do little to upset the wetlands regulatory framework. The generous deference given to decisions, however, make it more difficult to successfully challenge the procedural methods and decisions of Wetlands Boards.

Courts will grant a generous amount of deference to a board decision if the decision falls within the board's specialized area of expertise. Whether to issue a permit, for example, is considered "within the specialized area" of both Wetlands Boards and, where there is no local wetlands board, VMRC.⁴⁷ In this type of case, a court will only reverse a decision "if that decision was arbitrary and capricious."⁴⁸ "Arbitrary and capricious" is a term that describes a decision that has no credible evidence in the board's record to support it.⁴⁹ Consequently, if a court reviews the board's record as a whole and finds no credible evidence in that record to support the board's decision, it can reverse the board's decision.⁵⁰

This very deferential standard allows Wetlands Boards to grant permits allowing development in wetland areas as long as the board can support its decision with any credible evidence. This evidence does not need to be technical or scientific. It can be layman's testimony in support of the permit or, as in one Norfolk case, a conclusion based on what the board "believed to be the least detrimental alternative."⁵¹ This leaves a wetlands board with considerable freedom during its decision-making process; a board can either approve or deny a permit application with nearly any rationale, even if that rationale is outdated or based on incorrect information. Since Wetlands Boards are held to such a low bar and not asked to support their decisions with anything more than an applicant's testimony, there is little left for VMRC to actually oversee. This leaves VMRC with little power to ensure that Wetlands Boards support their decisions with objective, scientific evidence that supports the state wetlands preservation policy.

Courts also allow Wetlands Boards to hear or "consider" evidence that satisfies the criteria of the wetlands zoning ordinance, but then dismiss it in favor of their own personal views or poor but precedented shoreline practices. The next Section discusses this problem more in-depth, assessing the "consideration" wetland boards must give to VIMS' Wetland Guidelines.

II. Wetlands Boards do not need to carefully weigh the scientific data in VIMS' Wetland Guidelines, even though the Code of Virginia directs them to do so. VMRC has little authority to enforce adherence to the VIMS' Wetland Guidelines, given the court's conclusion that the Guidelines are merely advisory.

The Wetland Guidelines were created by the VIMS Department of Wetlands Ecology to assist Wetlands Boards in consideration of accepting or declining a permit application for development in wetland areas.⁵² They ultimately aid VMRC and local Wetlands Boards in carrying out the preservation policy of the Tidal Wetlands Act.⁵³ The Guidelines contain extensive criteria for evaluating alterations of wetlands and discuss strategies for projects that regularly come before Wetlands Boards during the permit process, including dredging, channeling, developing marinas, and installing bulkheads.⁵⁴ The guidelines offer scientifically-based and technical rationales for each recommendation or strategy.⁵⁵

The Code of Virginia provides specifically for their development of the guidelines and mandates their use.⁵⁶ The text of this Code section, referred to as the Tidal Wetlands Act, provides specific instructions to Wetlands Boards and states “the guidelines *“shall be considered”* in applying the standards [used in the determination of permit issuance].”⁵⁷

A Virginia court, however, has interpreted “shall be considered” to mean that the Guidelines are essentially advisory in nature and do not have to be followed. The court reached this conclusion in a 2001 case concerning a permit that had been approved by the Norfolk Wetlands Board (NWB).⁵⁸ The permit involved building a bulkhead that would impact about 300 square feet of wetlands.⁵⁹ After the NWB approved the permit, an affected neighbor followed proper procedure and appealed to VMRC.⁶⁰ VMRC attempted to exercise what it believed to be its appropriate oversight authority and returned the case to the NWB with directions for the NWB to further consider the VIMS recommendation.⁶¹ When the NWB “reconsidered” the permit application, board members “looked at” the alternatives and suggestions offered by the VIMS recommendation and later rejected them, again approving the permit.⁶²

According to the court, the wetlands board fulfilled its requirements under the Tidal Wetlands Act with regard to the VIMS Guidelines because the NWB only needed to *reconsider* alternatives contained in the VIMS recommendation—they were not *bound* by them.⁶³ The court focused its attention on the scope of a wetlands board’s responsibility, focusing on the meaning of “consider.” While the court acknowledged that Guidelines “shall be considered,” it found only a minimal obligation in the word “considered” and ignored the imperative “shall.” The court failed to require true consideration as defined by a dictionary—that is, failed to require that the board members “think carefully about” the substance of the Guidelines.⁶⁴ “Consideration” requires at least proof of “careful thought.” Had the wetlands board dedicated evaluative, careful thought to the Guidelines, the board would have likely denied the permit.

This decision left Wetlands Boards free to merely “look at” and briefly discuss the Guidelines before dismissing them. More than half of permit applications submitted to local Wetlands Boards are not consistent with VIMS Wetland Guidelines in any

Key Point

While Virginia law requires that VMRC develop Wetland Guidelines, Virginia courts have concluded that Wetlands Boards are not bound to follow the guidelines.

form.⁶⁵ Unfortunately, Wetlands Boards rarely take any action to improve a proposed project's consistency with Guidelines.⁶⁶ Instead, boards approve most of these projects as they are; only 10.6% of proposed projects were modified by board decisions to better meet VIMS Guidelines.⁶⁷ Indeed, the discussion among most boards is "minimal to absent" at permit hearings, with board members overriding VIMS recommendations with harmful and scientifically incorrect "personal opinions . . . and past precedence of action" during "discussions."⁶⁸

Further, the court's ruling effectively strips VMRC of its oversight authority to enforce the VIMS Guidelines and, on a larger scale, to enforce compliance with procedural criteria in the wetlands zoning ordinance. VMRC, in other words, cannot demand that a local wetlands board take the Guidelines into account beyond a "look at." VMRC has little power, then, even on an appeal, to ask a wetlands board to analyze a VIMS recommendation or "think carefully" about it.⁶⁹ This drastically limits the force and effect of the VIMS Guidelines, undermines the policy in the Tidal Wetlands Act to preserve and protect wetlands, and undercuts the VMRC's oversight authority to enforce the Guidelines themselves.

III. Certain individuals can sometimes challenge wetlands board or VMRC decisions, but can never challenge decisions solely to protect tidal wetlands.

When VMRC allows landowners to develop in wetland areas, neighbors may be able to challenge VMRC's decision. Anyone—a neighbor or otherwise—who wants to challenge a VMRC action must be "aggrieved."⁷⁰ Virginia courts allow individuals to challenge VMRC decisions if those individuals have a "direct interest in the matter" or that they were "denied a personal or property right."⁷¹ Personal or property rights include using the water flowing past their land and enjoying land for recreational or aesthetic purposes.⁷² People cannot, however, challenge VMRC decisions if they are only concerned about environmental harm. In other words, if VMRC approves the construction of a golf course, a woman living fifty miles away cannot challenge this decision, even if she knows that construction will harm wetlands. She has no "direct interest in the matter" relating to her personal or property rights. Likewise, a fisher who visits a nearby park to fish in water that may be negatively affected by the golf course also cannot challenge the decision for the same reason.⁷³

Consider the following example.⁷⁴ In January 2007, VMRC approved the permit application of a boat storage facility known as "the Boatel" to expand its business. The Boatel requested to build new piers and dredge the water in the process of expanding the business. This expansion and the resulting rise in boat activity, however, caused more water to wash onto a neighbor's shoreline. Consequently, the neighbors could not use their land as they once did. They could not picnic on their shoreline or launch their kayak as they did before. Boats using the Boatel came closer to the shoreline, making it more dangerous for the neighbors to swim, fish, and crab.

Case Study

These neighbors challenged VMRC's approval of this expansion in court. They were ultimately able to challenge VMRC's actions because they met certain criteria.

- They had a direct interest in the Boatel's expansion, because the expansion was harming their personal or property rights. For example, their right to use their land and the water flowing past it to boat, swim, and fish.
- They were not merely advancing a public right. They were not, for instance, merely saying that the expansion would harm the environment.

Since these neighbors were "aggrieved" by VMRC actions, they could challenge those actions in court.

This example shows that some citizens can succeed in challenging VMRC decisions. This can impact wetlands preservation on a small scale. If a property owner has wetlands on his property that serve an aesthetic or recreational purpose, but are being harmed as the result of a VMRC decision, that property owner will likely be able to challenge VMRC's decision in court.

Because the state court requires that the challenger must have a direct interest in the matter that affects a personal or property right, nobody but the property owner can challenge the decision.⁷⁶ Challengers—even when they're next door neighbors—must state precisely how they or their property has been harmed by the decision.⁷⁷ A general disagreement with a project or its cost, or environmental concerns, such as the proper flow of water, will not allow an individual to challenge a VMRC decision. This limits the ability of citizens who care about wetlands preservation to challenge VMRC decisions. Virginia lawmakers could remedy this situation by giving Virginians the right to sue the state and/or private party to protect the state's tidal wetlands. According to the State Environmental Resource Center, sixteen states have what are known as “environmental citizen suit statutes.”⁷⁸

Recommendations

The original purpose of the Tidal Wetlands Act was to preserve and protect Virginia tidal wetlands while accommodating necessary economic development. This purpose has become diluted over the years, however. The following recommendations serve to fill the gaps in the current regulatory scheme and re-align wetlands management with the original purpose of the statute.

Improve Decision-Making at the Local Level

Because Wetlands Boards have such broad authority in Virginia, the following measures – either voluntarily by the Wetlands Boards themselves or by statutory change -- should be taken to make them more effective and accountable:

- Increasing resources for staff support provided to Wetlands Boards;
- Requiring board members to have experience with wetland management before appointment;
- Requiring board members to participate in continued educational seminars which keep them abreast of recent economic and environmental reports surrounding the status of wetlands; and
- Requiring Wetlands Boards to record detailed minutes which reflect informed decision-making and an explanation of the rationale and consideration involved in the final decision, making them publically available.

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The Act should clearly require that Wetlands Boards follow *The Wetland Guidelines*. The Virginia General Assembly should revise Section 28.2-1308(a) as follows: “A. The following standards shall apply to the use and development of wetlands and shall be *[binding]* in the determination of whether any permit required by this chapter should be granted or denied.”

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- Implementing, either voluntarily, by means of the Guidelines, or by statutory change, a presumption for living shorelines before other measures such as bulkheads and riprap revetments are considered.

Allow Wetlands Protection to Be Grounds for Challenging Wetlands Board Decisions

Certain individuals can sometimes challenge wetlands board or VMRC decisions, but can never challenge decisions solely to protect tidal wetlands. Virginia lawmakers could remedy this situation by giving Virginians the right to sue the state and/or private party to protect the state’s wetlands.

Notes

- 1 VA. CODE ANN. § 28.2-1301(B).
- 2 VA. CODE ANN. § 28.2-1301 (emphasis added).
- 3 *What is the Virginia Coastal Zone Management Program?*, VA. DEP’T OF ENVTL. QUALITY, <http://www.deq.virginia.gov/Programs/CoastalZoneManagement/DescriptionBoundary.aspx> (last visited Nov. 15, 2013).
- 4 STACEY MOULDS ET AL., *THE ALLIANCE FOR THE CHESAPEAKE BAY AND THE VA. DEP’T OF ENVTL. QUALITY, RESTORING VIRGINIA’S WETLANDS: A CITIZEN’S TOOLKIT 2* (2005).
- 5 *Id.*
- 6 *Id.*
- 7 *Id.* See *infra* note 6, at 4 (defining watershed as “all the area that drains by surface or subsurface flow into the water body being considered.”).
- 8 Maryann Wohlgemuth, *Wetlands Functions and Values*, Self-Taught Education Unit 3.
- 9 *Id.*
- 10 *Id.*
- 11 *Id.* at 4.
- 12 *Id.* at 18.
- 13 COMPREHENSIVE WETLANDS PROGRAM PLAN: COMMONWEALTH OF VIRGINIA (2011-2015), VA. DEPT OF ENVTL. QUALITY (2011), available at http://water.epa.gov/type/wetlands/upload/virginia_wpp.pdf.
- 14 *Id.*
- 15 *Id.*
- 16 WETLANDS: PROTECTING LIFE AND PROPERTY FROM FLOODING, EPA 1 (2006), available at <http://water.epa.gov/type/wetlands/upload/flooding.pdf>.
- 17 *Id.*
- 18 VA. CODE §§ 28.2-1300-1315 (1972).
- 19 Wohlgemuth, *supra* note 6, at 19.

20 William L. Roberts, Ph.D., *Coastal Resources and the Permit Process: Definitions and Jurisdictions*, Self Taught Education Unit 1.

21 REGULATORY FIDELITY TO GUIDANCE IN VIRGINIA'S TIDAL WETLANDS PROGRAM, CTR. FOR COASTAL RES. MGMT, VA INST. OF MARINE SCI. iv (2012) [hereinafter REGULATORY FIDELITY STUDY].

22 *Tidal Wetlands Mitigation-Compensation Policy*, Reg. 4 VAC 20-390-10 et seq. (2013).

23 REGULATORY FIDELITY STUDY, *supra* note 19, at 2.

24 VA. CODE ANN. § 28.2-1301
 In order to perform its duties under this section and to assist counties, cities, and towns in regulating wetlands, the Commission shall promulgate and periodically update guidelines which scientifically evaluate vegetated and non-vegetated wetlands by type and describe the consequences of use of these wetlands types. The Virginia Institute of Marine Science shall provide advice and assistance to the Commission in developing these guidelines by evaluating wetlands by type and continuously maintaining and updating an inventory of vegetated wetlands.

25 WETLAND GUIDELINES, VA MARINE RES. COMM'N, 1 (1993).

26 *See id.*

27 WETLAND GUIDELINES, *supra* note 23, at iv.

28 *Id.*

29 *Id.*; WETLAND GUIDELINES, *supra* note 23.

30 *Id.* at v.

31 *Id.*

32 *See* VA. CODE ANN. §§ 28.2-1300-1315, which gives the VMRC its authority.

33 *Id.* 28.2-1301.

34 *Id.* 28.2-1310.

35 *Id.* 28.2-1311.

36 *Id.* at 28.2-3010, 3011. Other people may appeal a wetlands board decision to VMRC, but these individuals will not receive automatic review, even if they request an appeal in the proper timeframe and assert a failure to fulfill responsibilities of the model ordinance. See section below (specify section label) for more discussion of what parties may seek review of Wetlands Boards and VMRC decisions.

37 *Id.* at 28.2-1311.

38 *Id.* at 28.2-1311.

39 *Id.* at 28.2-1311.

40 *Id.* at 28.2-3010, 3011. Other people may appeal a wetlands board decision to VMRC, but these individuals will not receive automatic review, even if they request an appeal in the proper timeframe and assert a failure to fulfill responsibilities of the model ordinance. See the following section for more discussion of what parties may seek review of Wetlands Boards and VMRC decisions.

41 *Id.* at 28.2-1302.

42 *See* VA. CODE ANN. § 28.2-1302 for the wetlands zoning ordinance.

43 *Id.* at 28.2-1313.

44 *Id.* at 28.2-1301(B).

45 *Id.* at 28.2-1315, 2.2-4000 et seq.

46 These types include: whether the agency acted in accordance with law, whether the agency made a procedural error which was not harmless error, and whether the agency had sufficient evidential support for its findings of fact. *Johnston-Willis, Ltd. v. Kenley*, 6 Va. App. 231, 242 (1988).

47 *Palmer v. Com. Marine Resources Com'n*, 48 Va.App. 78 (2006).

48 *Johnston-Willis, Ltd.*, 6 Va.App. 231, 246 (1988); *Va. Marine Res. Comm'n v. Chincoteague Inn*, 61 Va. App. 371 (2013).

49 *Palmer*, 48 Va.App. 78 (2006).

50 *Id.*

51 *Stearns v. Va. Marine Res. Comm'n*, 57 Va. Cir. 213 (2001).

52 These Guidelines were developed pursuant to Section 28.2-1301. See WETLAND GUIDELINES, *supra* note 23.

53 WETLAND GUIDELINES, *supra* note 23.

54 *Id.*

55 *Id.*

56 VA. CODE ANN. § 28.2-1301, 1308.

57 *Id.* (emphasis added).

58 *Stearns v. Va. Marine Res. Comm'n*, 57 Va. Cir. 213 (2001).

59 *Id.*

60 This appeal process is regulated by the Tidal Wetlands Act and the Administrative Process Act. (Code sections here.)

61 *Stearns*, 57 Va. Cir. 213 (2001).

62 *Id.*

63 *Id.*

64 The Oxford Dictionary defines "consider" as: "think careful about (something), typically before making a decision."

65 REGULATORY FIDELITY STUDY, *supra* note 19, at 11.

66 *Id.*

67 *Id.* at 12, 13.

68 *Id.* at 21.

69 VMRC tried to return a case to a local wetlands board with the directions to consider the guidelines further. The court denied them the ability to do this.

70 *Biddison v. Va. Marine Res. Comm'n*, 54 Va. App. 521 (2009).

71 *Id.*

72 *State Water Control Bd. v. Crutchfield*, 265 Va. 416, 427–28 (2003).

73 *Wills v. Virginia Marine Resources Com'n*, 59 Va. App. 168 (2011).

74 *Biddison*, 54 Va. App. 521 (2009).

75 *Virginia Marine Resources Com'n v. Clark*, 281 Va. 679 (2011).

76 *Id.*

77 *Id.*

78 State Environmental Resource Center, *available at* <http://www.serconline.org/citizensuits/stateactivity.html>.

79 VA. CODE ANN. § 28.2-1301 (emphasis added).

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