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Keith Warren Davis

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# THE ROLE OF THE VIRGINIA MARINE RESOURCES COMMISSION IN REGULATING AND ZONING THE WATER BODIES OF THE COMMONWEALTH\*

KEITH WARREN DAVIS\*\*

This article explores the powers and authority of the Virginia Marine Resources Commission ("VMRC" or "Commission") to regulate the use of various water areas within the Commonwealth of Virginia. Specifically, the article examines the VMRC's authority to zone certain water areas as bathing areas, as oyster and clamming grounds, and as special fishing grounds. In surveying the VMRC's regulatory authority the article traces the evolution of the VMRC's power from its common law origins through the early days of the Commonwealth, and up to modern times. A determination of the legal basis of the VMRC's authority requires an examination of state ownership rights and state police power. Next, this article conducts an analysis of current VMRC regulatory authority to detail the Commission's actual power to zone water areas within the Commonwealth. Finally, a discussion follows regarding existing impediments to current VMRC regulatory authority, focusing on the federal navigable servitude, the rights of the citizens of Virginia to use water areas designated public and held in trust by the Commonwealth, and the ownership rights claimed by private citizens in certain waters of the Commonwealth. The article considers whether these impediments constitute barriers to the augmentation of the Commission's existing regulatory power to zone the waters of the Commonwealth.

## I. HISTORY AND LEGAL BASIS OF THE MARINE RESOURCES COMMISSION'S REGULATORY AUTHORITY

### A. *Historical development of the VMRC and its regulatory authority.*

During the 1874-1875 session, the Virginia General Assembly

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\* This research was conducted under the Virginia Marine Resources Commission's Law and Resource Management Internship Program under the direction of Professor N. Bartlett Theberge, Chairman of the Department of Ocean and Coastal Law, Virginia Institute of Marine Science, College of William and Mary.

\*\* B.A. University of South Florida, 1989; J.D. Marshall-Wythe School of Law, College of William and Mary, 1992.

approved an act creating the office of Fish Commissioner.<sup>1</sup> The commissioners' duties included keeping the watercourses within Virginia adequately stocked with the proper "food fishes."<sup>2</sup> Specifically, the three fish commissioners were to determine which fish to stock in which waters, and to determine appropriate methods for facilitating fish movement "over dams or other obstructions."<sup>3</sup> The commissioners were to implement these plans by obtaining the necessary ova, constructing suitable hatchery devices, seeing to the maturity of the young fish, and finally releasing the fish into state waters.<sup>4</sup>

The Virginia General Assembly abolished the office of Fish Commissioner twenty-two years after its creation, during the 1897-1898 session.<sup>5</sup> In its place, the Assembly established the Board of Fisheries ("Board"), transferring all of the duties of the former fish commissioners to the new board.<sup>6</sup> Additionally, the Board had authority "to see that all laws relating to oystering, planting and cultivation of oysters and clams in the waters of the state, and all laws relating to the catching and propagating of fish, crabs and terrapin in the waters of [the] state [were] faithfully observed."<sup>7</sup> The Board performed miscellaneous duties such as collecting fees, fines, and taxes; hiring personnel; and policing waters.<sup>8</sup> The creation of the Board involved the expansion of authority from actual maintenance of fish stock to regulatory powers and administrative functions as well.

Five appointees comprised the Board.<sup>9</sup> The Act mandated that the Chairman and Secretary of the Board have practical knowledge of the oyster and fish industries and be from the Tidewater area.<sup>10</sup> The legislature stated that the other three commissioners were to hail from different parts of Virginia.<sup>11</sup>

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1. 1874-1875 Va. Acts 248 (approved March 25, 1875) ("An Act to provide for the appointment of Fish Commissioners for the State of Virginia").

2. *Id.* at (2).

3. *Id.*

4. *Id.* at (3) (The office received the sum of \$2,500 per year for operations and salaries).

5. 1897-1898 Va. Acts 225 (Feb. 7, 1898) ("An Act to create the Board of Fisheries of Virginia, define its duties, and fix the salary of its members").

6. *Id.*

7. *Id.* at (5).

8. *Id.* at (6), (8), (10), (12).

9. *Id.* at (2).

10. *Id.*

11. *Id.*

In 1908, the legislature changed the Board's name to the Commission of Fisheries, but made no substantive changes to the Commission.<sup>12</sup>

In 1936, the General Assembly codified all of the laws relating to the Commission of Fisheries.<sup>13</sup> The legislators added the Virginia Code ("Code") Chapter 126 relating to the Commission and the Commissioner of Fisheries, Chapter 127 relating to fish and fishing, and Chapter 128 relating to oysters and other shellfish.<sup>14</sup> These three new chapters organized the state fish and shellfish laws around 130 sections of the Code. The Code sections relevant to this discussion were as follows: section 3146 which gave the Commission the authority to enforce all laws of the State relating to the fish and shellfish industry;<sup>15</sup> section 3148 which gave the Commission authority to establish and maintain fish hatcheries;<sup>16</sup> section 3154 which gave the Commission the authority to reestablish, relocate or remark all lines which define the location of all natural oyster beds of the Commonwealth;<sup>17</sup> section 3192 which authorized the Commission to

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12. 1908 Va. Acts 232 ("An Act to amend and re-enact an act . . . entitled: An Act to create the board of fisheries of Virginia . . . so as to change the name of said board . . .").

13. 1936 Va. Acts 393 ("An Act to revise, consolidate, amend and codify the fish and shellfish laws of Virginia and the laws relating to the Commission of Fisheries . . .").

14. *Id.*

15. VA. CODE ANN. § 3146 (Michie 1936) ("The Commissioner shall see that all laws relating to fish and shellfish are enforced and observed . . . [i]t is the duty of the Commissioner of Fisheries to investigate from time to time any . . . matters affecting the seafood industry").

16. VA. CODE ANN. § 3148 (Michie 1936) ("The Commission of Fisheries is authorized to establish and maintain a hatchery or hatcheries for the propagation of fish . . .").

17. VA. CODE ANN. § 3154 (Michie 1936) ("The Commission may re-establish, [or] re-locate . . . all lines of the Baylor Survey . . . . When such grounds have been re-established, the same shall be taken and accepted as conclusive evidence . . . that the grounds so ascertained to be natural oyster rocks, beds or shoals are such, and that all grounds lying outside of such boundaries are grounds open to rental under laws of this state"). The Baylor Survey is composed of all the lines which define the location of the natural oyster beds, rocks, and shoals of the Commonwealth. The General Assembly established the Baylor Survey through an act, entitled "An Act to protect the oyster industry of the Commonwealth" and approved the act on February 29, 1892. VA. CODE ANN. § 28.1-100 (Michie 1985). *See also* VA. CONST. art. XI, § 3 (stating that all lands within the Baylor Survey are not to be leased, sold or granted, but are to be held in trust for the people of the Commonwealth).

assign oyster planting grounds to riparian owners;<sup>18</sup> and section 3197 which empowered the Commission to assign bathing grounds.<sup>19</sup>

The codification of the laws giving the Commission its authority vested substantial regulatory power in the Commission for determining the use of various water areas within the Commonwealth. This authority represented a monumental expansion of the Commission's power from a three member commission responsible for keeping the waters of the state well stocked with fish, to a five member commission utilizing numerous officers and inspectors, responsible for regulating the waters of the Commonwealth. These powers survived subsequent Code revisions throughout the 1940's until 1950 when the modern Code of Virginia was enacted.

*B. The legal basis of the regulatory authority vested in the VMRC.*

The common law distinguished between navigable and nonnavigable watercourses, with navigable identified as those with ebbing tides and nonnavigable as those with no tidal change.<sup>20</sup> The King possessed the bed and banks of all navigable watercourses and could determine and enforce their uses; the King also had the power to convey the land on the banks of such watercourses extending to the high tide mark to riparian owners.<sup>21</sup> The King possessed no rights in the nonnavigable watercourses. Rather, it was the riparian owner who owned the bed and banks.<sup>22</sup>

The Commonwealth's right to regulate the watercourses within its boundaries has its roots in the common law.<sup>23</sup> Virginia generally adhered

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18. VA. CODE ANN. § 3192 (Michie 1936) ("Any owner of land having a waterfront thereon suitable for planting oysters . . . may make application for planting ground to the inspector . . . who shall assign him such ground . . .").

19. VA. CODE ANN. § 3197 (Michie 1936) ("Any person desiring to obtain a location for bathing grounds shall apply to the oyster inspector . . . to have his location . . . assigned for the purpose aforesaid. Any such . . . assigning shall conform to the law pertaining to oyster planting grounds").

20. 20 MICHIE'S JURISPRUDENCE, VA. AND W.VA., *Waters and Watercourses* § 25 (1979).

21. *Id.*

22. *Id.*

23. *Commonwealth v. City of Newport News*, 158 Va. 521, 541, 164 S.E. 689, 695 (1932) (pointing out that when Virginia became a sovereign entity independent from the British Crown, it acquired the powers of the British Crown and received complete proprietary rights in all the lands and waters, including tidal waters and their bottoms,

to the common law, with one significant exception. The legislature established a "Land Office" for the purpose of granting all unappropriated land,<sup>24</sup> but then passed acts prohibiting the conveyance of unappropriated land on the bay, shores, rivers and creeks that had been held by the Commonwealth and used in common by its citizens.<sup>25</sup> These acts applied to all land equally, regardless of the navigability of the watercourse which the land bordered.<sup>26</sup> Even nonnavigable watercourses with a history of common usage by citizens of the Commonwealth were vested in the Commonwealth under these laws.

In 1876, the United States Supreme Court, in *McCready v. Virginia*<sup>27</sup> acknowledged that each state owns the beds of all tidal waters within its jurisdiction.<sup>28</sup> The Court indicated that states actually own the tidal waters themselves, as well as the fish living in them "so far as they are capable of ownership while running."<sup>29</sup> In its ownership capacity, the state was acting for the benefit of its citizens, and the ownership actually rested with the citizens of the state. From the earliest days of the common law in the United States, therefore, the judiciary has recognized ownership rights in the waters and beds of tidal watercourses as being vested with the states. The origins of modern VMRC regulatory authority over water areas of the Commonwealth are present in the common law right of a state to own and allocate such water areas.

In more recent times, however, this "ownership theory" has weakened. In *Douglas v. Seacoast Products*,<sup>30</sup> Justice Marshall noted that the "ownership language" of cases such as *McCready* represents a 19th Century legal fiction that the state has regulatory authority over its natural resources.<sup>31</sup> He stressed that a state does not stand in the same position as a private land owner and that in no way, as *McCready* had held, can a

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within its territorial limits).

24. 10 Hening Stat. at Large, 50 (1779 Va. Acts).

25. 10 Hening Stat. at Large 226, 227 (1780 Va. Acts) (providing that all such common land east of the Blue Ridge was within state ownership and unable to be granted); 1802 Va. Acts ch. 8 (providing that all such common land west of the Blue Ridge was within state ownership and unable to be granted); *See also* Code of 1819, ch. 86 (reducing into one act the several acts concerning the granting of such common land).

26. 10 Hening Stat. at Large 226, 227 (1780 Va. Acts).

27. 94 U.S. 391 (1876).

28. *Id.* at 394.

29. *Id.*

30. 431 U.S. 265 (1977).

31. *Id.* at 284-85.

state own the fish in its waters until the fish are reduced to possession by capture.<sup>32</sup> Justice Marshall concluded that "under modern analysis, the question is simply whether the state has exercised its police power in conformity with the . . . laws and [the] Constitution."<sup>33</sup>

While *Douglas* circumscribes the broad principles of state ownership set out in *McCready*, the "ownership theory" is by no means completely defunct.<sup>34</sup> As Justice Marshall pointed out in *Douglas*, the theory of state ownership does express important ideas relating to a state's authority to regulate its natural resources, including water areas.<sup>35</sup>

Today, the VMRC's regulatory activity amounts to police power; that is, the state's promotion of public convenience, general prosperity, public health, public morals, and public safety.<sup>36</sup> The state's authority to zone its territory in a way which is not arbitrary or unreasonable represents a proper use of police power, regardless of how the zoning authority is delegated.<sup>37</sup> An example of the VMRC's unreasonable use of police power in zoning a water area would be the private allocation of submerged lands designated as natural oyster beds within the Baylor Survey.<sup>38</sup> Such an action, in essence, constitutes a taking from the citizens of the Commonwealth and a giving to one specific party, in violation of the Virginia Constitution.<sup>39</sup>

The regulatory authority of the VMRC to zone certain waters of Virginia originated in the common law concept of state ownership of such property. Today, this authority is more properly considered as the exercise of the state's police power to promote public convenience and general prosperity.

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32. *Id.*

33. *Id.*

34. See *Tangier Sound Waterman's Ass'n v. Douglas*, 541 F. Supp. 1287, 1293-94 (E.D. Va. 1982).

35. *Douglas*, 431 U.S. at 284-85.

36. *West Bros. Brick Co. v. City of Alexandria*, 192 S.E. 881, 889 (Va. 1937).

37. *Id.* See also *Andrews v. Board of Supervisors*, 107 S.E.2d 445, 447 (Va. 1959) (holding that it is not necessary to consider any question relative to the power of the Board of Supervisors to delegate ministerial authority to the Board of Zoning Appeals).

38. See VA. CONST. art. XI, §3 ("The natural oyster beds, rocks, and shoals in the waters of the Commonwealth shall not be leased, rented or sold . . ."). See discussion of Baylor Survey *supra* note 7).

39. See VA. CONST. art. XI, §3.

## II. CURRENT REGULATORY AUTHORITY OF THE VMRC TO ZONE WATER AREAS OF THE COMMONWEALTH

The authority and power of the VMRC over Virginia's watercourses can be found in Title 28.1 of the Code.<sup>40</sup> Chapter One of Title 28.1 sets forth the general structure of the VMRC by broadly explaining the Commission's duties and identifying VMRC's jurisdiction for carrying out its duties. Under Chapter One, the VMRC is charged with enforcing the fish and shellfish laws of the Commonwealth.<sup>41</sup> In doing so, the VMRC maintains jurisdiction "[extending] to the fall line of all tidal rivers and streams."<sup>42</sup> Specifically, the VMRC has jurisdiction over the marine life within the waters of the Commonwealth.<sup>43</sup>

The remaining chapters of Title 28.1 detail the fish and shellfish laws of Virginia and the VMRC's rights and duties pertaining to these laws.<sup>44</sup> Many of these code sections give the VMRC considerable power to zone certain water areas for special uses including oystering or bathing.<sup>45</sup> Chapter Two of Title 28.1 grants the Commission authority to create any regulations it deems necessary to promote the marine resources of the Commonwealth.<sup>46</sup> Chapter Two also sets forth a "Fishery Management Policy" that the VMRC enforces.<sup>47</sup> This policy statement furthers Virginia's goal of maintaining its marine resources for years to come.<sup>48</sup> These two sections of Chapter Two, taken together, provide the VMRC with the authority to implement whatever regulations it finds necessary, including zoning regulations, in order to promote and preserve the marine resources of Virginia.

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40. VA. CODE ANN. § 28.1 (Michie 1985 & Supp. 1991).

41. VA. CODE ANN. §§ 28.1-9, 28.1-13 (Michie 1985). Chapter One also explains operational aspects of the Commission such as membership (VA. CODE ANN. § 28.1-4), the compensation of its members (VA. CODE ANN. § 28.1-8), and the Commission's authority to purchase the equipment it needs to function (VA. CODE ANN. § 28.1-14).

42. VA. CODE ANN. § 28.1-3 (Michie 1985).

43. *Id.*

44. VA. CODE ANN. §§ 28.1-36 - 28.1-239 (Michie 1985 & Supp. 1991).

45. *See, e.g.*, VA. CODE ANN. §§ 28.1-100 - 28.1-108, § 28.1-118.1 (Michie 1985 & Supp. 1991).

46. VA. CODE ANN. § 28.1-23 (Michie 1985).

47. *Id.* § 28.1-23.1 (Michie 1985).

48. *Id.* ("The marine resources of the Commonwealth shall be managed for their maximum benefit and long term use by present and future generations").



Chapter Four of Title 28.1 focuses exclusively on fish and fishing.<sup>49</sup> This part of the Code regulates methods of fishing for certain fishes in particular waters.<sup>50</sup> The VMRC lacks power to regulate the zoning of water areas for fishing; the legislature maintains that authority through writing the statutes. The only real authority of the Commission under this chapter involves the issuing of individual licenses,<sup>51</sup> and the collecting of fees and taxes.<sup>52</sup>

Chapter Five of Title 28.1 concerns oysters and clams.<sup>53</sup> Like Chapter Four, Chapter Five is very detailed and contains numerous sections involving harvesting seasons,<sup>54</sup> license taxes,<sup>55</sup> and permissible harvesting methods.<sup>56</sup> Unlike Chapter Four, this chapter contains several sections giving the VMRC specific authority to regulate the use of tidal water areas.<sup>57</sup>

Code section 28.1-100 regards the Baylor Survey which defines the location of all natural oyster beds of the Commonwealth.<sup>58</sup> This section gives the Commission authority to resurvey any oyster grounds and reestablish any lines of the Baylor Survey.<sup>59</sup> Code section 28.1-101 grants the Commission the authority to relocate the lines of the Baylor Survey. This section is crucial to the VMRC's regulatory power because it grants the Commission power to designate additional natural oyster beds. According to the Virginia Constitution, land designated as a natural oyster

49. VA. CODE ANN. §§ 28.1-47 - 28.1-81.1 (Michie 1985).

50. *See generally* VA. CODE ANN. § 28.1-49.1 (Michie 1985) (regulating the size of fish that may be caught); VA. CODE ANN. § 28.1-51.1 (Michie 1985) (regulating the use of certain fishing devices in certain waters, prohibiting the use of snatch hooks for taking fish from the Rappahannock River from January 1 until March 15); and VA. CODE ANN. § 28.1-67 (Michie 1985) (regulating the use of trawl nets in the waters of the Commonwealth).

51. VA. CODE ANN. §§ 28.1-47, 28.1-61 (Michie 1985).

52. *Id.* §§ 28.1-48, 28.1-70 (Michie 1985 & Supp. 1991).

53. *Id.* §§ 28.1-47 - 28.1-164 (Michie 1985).

54. *Id.* § 28.1-82 (Michie 1985) ("Season for taking oysters from public rocks").

55. *Id.* § 28.1-119 (Michie 1985) ("Tax on handling bivalves"). *Id.* § 28.1-93 (Michie Supp. 1991) ("Tax on oysters taken from public rocks").

56. *Id.* §§ 28.1-128, 28.1-129, 28.1-130, 28.1-131, 28.1-132, 28.1-133, 28.1-134, 28.1-135 (Michie 1985 & Supp. 1991).

57. *See supra* text accompanying notes 47-56 (enumerating and explaining the authority of the VMRC to regulate the use of tidal water areas under VA. CODE ANN. § 28.1, Ch. 5).

58. *See supra* note 17 (discussing enactment of the Baylor survey and its effect on the VMRC).

59. VA. CODE ANN. § 28.1-100(2) (Michie 1985).

bed is deemed to be public land held in trust by the Commonwealth for its people.<sup>60</sup> Such land cannot be leased or otherwise assigned.<sup>61</sup>

Code section 28.1-108 governs the assignment of oyster planting grounds to riparian owners.<sup>62</sup> The statute allows the owner of riparian land in oyster growing areas, subject to certain restrictions,<sup>63</sup> to apply to the Commission for authorization to use such grounds. This section of the Code allows the VMRC to allocate water areas to the applicant for personal use as oyster planting grounds.<sup>64</sup> Like sections 100 and 101, this Code section gives the VMRC the authority to zone certain water areas, but by designating them private oyster planting grounds for the sole use of the applicant. The rights of landowners to erect wharves or bulkheads in front of their land, or to open channels to reach navigable water supersede the private use of riparian land for oyster planting.<sup>65</sup>

Under Code section 28.1-118.1 the Commission has authority to zone certain water areas as bathing areas upon the application of any person.<sup>66</sup> Such designations must conform with regulations concerning oyster planting grounds,<sup>67</sup> and can be for public or commercial use only.<sup>68</sup>

Finally, Code section 28.1-162 delegates to the VMRC the power to designate certain water areas as public clamming or scalloping grounds upon application of interested individuals.<sup>69</sup> Additionally, this section gives the VMRC authority to classify certain water areas as public clamming or scalloping grounds on its own initiative without

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60. VA. CONST. art. XI § 3.

61. *Id.*

62. VA. CODE ANN. § 28.1-108 (Michie Supp. 1991).

63. The riparian owner's shorefront must measure at least 205 feet at the low water mark, and the owner cannot have more than one half acre already so assigned. *Id.*

64. VA. CODE ANN. § 28.1-109 (Michie Supp. 1991) (restricting the Commission's authority to allocate such a water area to a riparian owner only to water areas not already assigned to a riparian owner, not within the limits of a navigation project, and not within the Baylor Survey).

65. VA. CODE ANN. § 28.1-118 (Michie 1985).

66. VA. CODE ANN. § 28.1-118.1 (Michie 1985).

67. *See supra* notes 45, 53, 62 and 64 and *infra* notes 121 and 126; VA. CODE ANN. §§ 28.1-108, 28.1-109 (Michie Supp. 1991).

68. VA. CODE ANN. § 28.1-118.1 (Michie 1985).

69. This Code section allows the Commission, on application of twenty or more people, to dedicate specified land, not already assigned for planting or bathing purposes, as public clamming or scalloping grounds. VA. CODE ANN. § 28.1-162 (Michie 1985).

applications.<sup>70</sup>

In addition to Title 28.1, Title 62.1 of the Code contains a number of provisions which give the VMRC some authority to zone the watercourses of the Commonwealth. Section 62.1-3 gives the Commission the authority to issue permits for any reasonable use of state owned bottomlands.<sup>71</sup> Section 62.1-4 allows the VMRC to grant easements in and to lease the beds of waters of the Commonwealth not within the Baylor Survey.<sup>72</sup> Such easements may not interfere with the rights of the citizens of the Commonwealth to the common use of state owned property for fishing, fowling or oystering.<sup>73</sup> Although these grants of authority to the VMRC are less like true zoning authority than the grants in Title 28.1, they do allow the Commission to dictate the use of certain watercourses by individuals. Such regulatory power is better classified as temporary zoning, or restricted zoning, because authorization to use water areas based on Title 62.1 can not interfere with citizens' rights of common use of the same property.

The VMRC is vested with considerable power to dictate the use of the Commonwealth's watercourses. The VMRC's power is especially great with respect to waters used as oyster planting and harvesting grounds, as well as waters used as bathing areas. The Commission, moreover, may issue permits and leases for the individual use of certain state owned water areas.<sup>74</sup> This authority to classify watercourses for specific uses, though never officially designated as such, constitutes zoning power.

### III. EXISTING IMPEDIMENTS TO THE VMRC'S AUTHORITY TO ZONE WATER AREAS OF THE COMMONWEALTH

#### A. *Impediments to current VMRC zoning authority.*

##### (1) *The federal navigable servitude.*

The federal navigable servitude is a "dominant" or "superior

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70. *Id.*

71. For example, the Commission can issue permits for the taking of minerals or the placement of wharves and bulkheads in state owned waters. VA. CODE ANN. §62.1-3 (Michie Supp. 1991).

72. VA. CODE ANN. § 62.1-4 (Michie 1987). *See supra* note 17 for discussion of the Baylor Survey.

73. VA. CODE ANN. § 62.1-4 (Michie 1987).

74. *Id.*

navigation easement."<sup>75</sup> It is the power of the federal government to control and regulate navigable waters in the interest of commerce.<sup>76</sup> All state laws and regulations with respect to navigable waters are subject to this federal power.<sup>77</sup> Consequently the state cannot obtain ownership of the flow of a navigable stream.<sup>78</sup> The federal navigable servitude's primary limitation is its exclusive application to the furtherance of navigation and commerce on navigable waters. The servitude encompasses only the stream of the watercourse itself and the land beneath the stream up to the high water mark.<sup>79</sup> The servitude does not apply to any land above the high water mark, and the state must compensate land owners for any taking of that land.<sup>80</sup> For example, when the United States, in connection with the construction of a dam on a navigable river, acquired by condemnation a tract of land above the high tide mark, the United States was required to compensate the owner for the land's value.<sup>81</sup>

The servitude does not apply to nonnavigable waters or to rights which may attach to them.<sup>82</sup> Whether a watercourse is navigable is a question of fact. A watercourse becomes navigable in fact when it is used, or is susceptible to being used as a means to conduct trade or travel.<sup>83</sup> This determination must take into consideration the nearly countless uses to which a watercourse can be put.<sup>84</sup> Watercourses which are navigable in fact are navigable at law. In *Loving v. Alexander*,<sup>85</sup> riparian landowners challenged the Army Corps of Engineers' determination that portions of the Jackson River in Northwest Virginia were navigable, and argued that plans for public access amounted to a taking of their property without compensation.<sup>86</sup> The court held that the river was navigable at

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75. *United States v. Virginia Elec. & Power Co.*, 365 U.S. 624, 627 (1961).

76. *Id.* at 627-28.

77. *Id.*

78. *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 424 (1940).

79. *Virginia Elec. and Power Co.*, 365 U.S. at 628.

80. *Id.*

81. *Id.* See also *United States v. Commodore Park, Inc.*, 324 U.S. 386 (1945) (stating that a riparian landowner was not entitled to compensation from the United States for diminution in value of land located below the high tide mark caused by operations by the United States for the improvement of navigation).

82. See, e.g., *United States v. Appalachian Elec. Power Co.*, 311 U.S. at 405.

83. *The Daniel Ball*, 77 U.S. 557, 563 (1870).

84. *Appalachian Elec. Power Co.*, 311 U.S. at 405 (stating that acceptable commercial usage ranges from the carriage of ocean liners to the floating of logs).

85. 745 F.2d 861 (4th Cir. 1984).

86. *Id.* at 863.

law and based its ruling on the fact that in the past, the portion of the river in dispute had been used as a means for floating logs.<sup>87</sup> The court ruled that the designation of navigability did not entitle the landowners to compensation.<sup>88</sup>

The federal right to control navigable waters limits all regulatory action that the VMRC takes in any navigable watercourse of the Commonwealth. If, for example, the Commission designates certain water areas as public bathing grounds or oyster grounds, the federal government can intervene in the name of interstate commerce and nullify such a designation if it finds that the Commission's action had the effect of interfering with navigation and therefore with commerce.<sup>89</sup> Specifically, the Commission has the authority to establish pier lines on or over bays, rivers, creeks, streams and the shores of the ocean within the jurisdiction of the Commonwealth.<sup>90</sup> The VMRC may not exercise this authority, however, if to do so would conflict with the United States Corps of Army Engineers, which has the authority to enforce the federal navigable servitude.<sup>91</sup>

(2) *Public rights to water areas held in common by the Commonwealth.*

Section 62.1-1 of the Code extends a use right to all citizens of Virginia in any water areas of the Commonwealth not privately owned.<sup>92</sup> This section prohibits the Commonwealth's conveyance of such areas to private owners.<sup>93</sup> Additionally, section 62.1-1 prohibits the Commonwealth from conveying any estate or interest in the natural oyster

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87. *Id.* at 865.

88. *Id.* at 867.

89. *See generally* United States v. Appalachian Elec. Power Co., 311 U.S. 377, 405 (1940) (citing St. Anthony Flaas Water Power Co. v. Water Comm'r, 168 U.S. 349, 366 (1897)) (explaining that states have control of the waters within their borders subject to the federal government's right to regulate commerce on navigable waters).

90. VA. CODE ANN. § 62.1-3 (Michie Supp. 1991).

91. *Id.*

92. *Id.* (stating that the beds of all bays, rivers, and creeks in the Commonwealth that have not been conveyed "by special grant or compact according to law" will remain in the possession of the Commonwealth to be used in common by all its citizens "for the purpose of fishing and fowling, and of taking and catching oysters and other shellfish").

93. *Id.*

beds of Virginia, permanent or temporary, to anyone.<sup>94</sup>

As discussed above,<sup>95</sup> from the earliest days of the common law courts have held that the states are vested with ownership rights in the bottomlands of their tidal waters.<sup>96</sup> This right, however, is by no means absolute. Some cases have placed limits on state ownership rights. In *Tangier Sound Waterman's Association v. Douglas*,<sup>97</sup> a group of Maryland commercial fishermen challenged the VMRC's policy of refusing to permit nonresident commercial fishermen access to waters within Virginia's borders.<sup>98</sup> Virginia argued that the Maryland fishermen had no right to invade the Commonwealth's bay bottomlands without permission because the Commonwealth was the owner of all bottomlands of navigable watercourses within its boundaries.<sup>99</sup> The State contended that it possessed the same rights as any private landowner with regard to these bottomlands, and therefore could sell, lease, or grant use of these lands as it saw fit.<sup>100</sup> In support of its arguments, the Maryland fisherman's association relied on language from *McCready v. Virginia*,<sup>101</sup> stating that "each State owns the beds of all tidewaters within its jurisdiction . . ."<sup>102</sup> Rejecting Virginia's arguments, the District Court held that although a state's ownership rights to its watercourses are valid, they are limited because the State has the right only to preserve or regulate the exploitation of this resource.<sup>103</sup> Code section 62.1-1 states essentially

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94. *Id.* (stating that no interest of the Commonwealth in any "natural oyster bed, rock, or shoal" shall be issued).

95. *See supra* text accompanying notes 16-22 (discussing the common law origins of the VMRC's regulatory power and the distinction between navigable and nonnavigable watercourses).

96. *Commonwealth v. City of Newport News*, 164 S.E. 689, 695 (Va. 1932).

97. 541 F. Supp. 1287 (E.D. Va. 1982).

98. *Id.* at 1290-91. (arguing that the residency requirement violated the Privileges and Immunities Clause, U.S. CONST. art. IV, § 2, cl. 1; the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3; and the Equal Protection Clause, U.S. CONST. amend. XIV, § 1).

99. *Id.* at 1292.

100. *Id.* (wherein Virginia conceded, however, that it could not interfere with the federal navigable servitude).

101. 94 U.S. 391 (1877).

102. *Tangier Sound Waterman's Ass'n*, 541 F. Supp. at 1292 (quoting *McCready*, 94 U.S. at 394).

103. *Tangier Sound Waterman's Ass'n*, 541 F. Supp. at 1293 (stating that the present issue is whether the State has exercised its police power within the bounds of federal law and the United States Constitution). The Court ultimately held the Virginia residency requirement violated the Privileges and Immunities Clause. *Id.* at 1301. *See also supra* text accompanying notes 20-29 (discussing *McCready* and the evolution of state ownership

the same principle.<sup>104</sup> By retaining possession of the non-conveyed waters of the Commonwealth, and by limiting their use by citizens to fishing, fowling and oystering, Virginia has effectively preserved these parts of the Commonwealth and protected them from serious degradation and commercial exploitation.

The statute only slightly constrains current VMRC regulatory authority to zone the watercourses of the Commonwealth. Presently, the VMRC lacks authority to zone any waters for purposes other than those for which common land can be used under section 62.1-1. In fact, the Commission's power as a zoning authority now is essentially limited to designating water areas as oystering or clamming grounds, or as bathing grounds.<sup>105</sup> These functions fit quite comfortably within the restrictions of section 62.1-1 on the use of common water areas of Virginia.

(3) *Private rights to certain water areas in the Commonwealth.*

Code section 62.1-1 prohibits the transfer of presently unconveyed watercourse bottomlands to private owners and requires that such land remain in the possession of the Commonwealth for the use of its citizens.<sup>106</sup> However, this section also recognizes that the holder of the compact or grant, rather than the Commonwealth, owns any parcel of water area "conveyed by special grant or compact according to law."<sup>107</sup>

*Commonwealth of Virginia v. Morgan*<sup>108</sup> confirmed the ability of an individual to maintain private ownership of watercourse bottomlands. Morgan claimed to be the lawful owner of a parcel of highland as well as the connecting water area and tidal bottomland of Carter's Cove, Virginia.<sup>109</sup> She was able to point to a deed of record conveying the highland and the submerged bottomland, and she claimed that the unbroken chain of title could be traced back to a grant from Sir William Berkeley, Knight Governor of Virginia in 1642.<sup>110</sup> Morgan challenged

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of the watercourses within its jurisdiction).

104. VA. CODE ANN. § 62.1-1 (Michie 1987).

105. See generally VA. CODE ANN. § 28.1 (Michie 1985) (governing the authority of the VMRC over Virginia's watercourses). See also *supra* text accompanying notes 40-44 (discussing in general terms the VMRC's authority to zone the watercourses of Virginia for specific uses).

106. VA. CODE ANN. § 62.1-1 (Michie 1987).

107. *Id.*

108. 303 S.E.2d 899 (Va. 1983).

109. *Id.* at 899-900.

110. *Id.*

both the State's claim of ownership and the VMRC's attempt to assess taxes against her for existing oyster shell piles and bulkheads extending beyond the low water mark.<sup>111</sup> The court held that Morgan possessed valid title to all of the land in question stating, "The King had the power, acting through the royal governors, to grant the bed[s] of [watercourses] to private persons."<sup>112</sup>

The original grant at issue in *Morgan* was made in 1642.<sup>113</sup> In 1780, the Virginia General Assembly passed an act declaring that unappropriated land on the bay, shores, rivers and creeks which had been in common use would remain in the possession of the state for the common use of its citizens and would not be granted to individuals.<sup>114</sup> Thus, a valid claim to private possession of tidal bottomlands required the support of a grant made prior to 1780.

Recent case law demonstrates that courts continue to limit VMRC authority over the rights of riparian landowners. In *Zappulla v. Crown*,<sup>115</sup> the VMRC granted the owner of a marina a permit to build additional boat slips, wharves, and piers.<sup>116</sup> Zappulla, an adjoining riparian landowner, argued that such expansion would encroach upon the underwater flats to which he was entitled.<sup>117</sup> Zappulla sued the VMRC and the owner of the marina, contending that the VMRC permit was void as it related to his riparian rights.<sup>118</sup> The court held that although the VMRC was authorized to determine the rights of a riparian landowner vis-a-vis the state it lacked the authority to determine the rights of riparian landowners suing each other.<sup>119</sup>

A valid claim to private ownership of bottomlands represents an operative restriction on the VMRC's present authority to zone the waters of the Commonwealth. The VMRC cannot designate riparian land as

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111. *Id.* at 900.

112. *Id.* at 901.

113. *Id.* at 900.

114. 10 Hening Stat. at Large 226, 227 (1780 Va. Acts) (declaring that the state owned all such common land east of the Blue Ridge and could not grant the land to others). A similar act of 1802 provided that all such common land west of the Blue Ridge was within state ownership and could not be granted. 1802 Va. Acts ch. 8.

115. 391 S.E.2d 65 (Va. 1990).

116. *Id.* at 66.

117. *Id.*

118. *Id.*

119. *Id.* at 68.



public bathing grounds.<sup>120</sup> The Commission also cannot classify privately held riparian land as public or individual oystering or shellfishing grounds, although it can so classify watercourses under state control.<sup>121</sup> Additionally, the VMRC lacks power to settle property disputes between riparian landowners.<sup>122</sup>

*B. Impediments to future VMRC grants of zoning authority.*

The impediments discussed above presently restrict VMRC regulatory authority at present. Furthermore, they would restrict any future grants of regulatory authority to the Commission. A hypothetical situation illustrates the confines of the VMRC's power. If, for example, the General Assembly grants authority to the VMRC to zone water areas for aquacultural purposes, then the VMRC's ability to zone the area remains limited. In zoning a watercourse for aquacultural use, the Commission cannot interfere with the navigable quality of the watercourse. If it attempts to do so, the federal government will intervene in the name of interstate commerce and invalidate the VMRC's action as a hinderance to navigation and commerce.<sup>123</sup>

Code section 62.1-1 places additional severe restrictions on the Commission's authority to zone watercourses for aquacultural use.<sup>124</sup> Declaring that all state owned bottomlands are held in common for the use of the citizens of Virginia to fish, fowl, and take oysters and shellfish, section 62.1-1 effectively prohibits the use of these waters for aquaculture purposes.<sup>125</sup> An efficient aquaculture operation would not be an individual undertaking, but would be a commercial one. By authorizing aquacultural activity in the common waters of the Commonwealth, the Commission would be allowing commercial industry to use these waters for a purpose not contemplated by section 62.1-1.<sup>126</sup> The Commission, therefore, would directly violate the Code through such zoning activity. Similarly, just as statutes prohibit the VMRC from designating privately owned bottomlands as bathing or oystering grounds, they also prohibit the

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120. See VA. CODE ANN. § 28.1-118.1 (Michie 1985).

121. See VA. CODE ANN. §§ 28.1-108, 109 (Michie Supp. 1991).

122. *E.g.*, Zappulla v. Crown, 391 S.E.2d 65 (Va. 1990).

123. See *supra* text accompanying notes 76-92 (discussing the Federal navigable servitude as an impediment to VMRC regulatory authority).

124. See VA. CODE ANN. § 62.1-1 (Michie 1987).

125. *Id.*

126. *Id.*

VMRC from designating such privately owned bottomlands as aquaculture grounds.<sup>127</sup>

The impediments to the VMRC's ability to zone for aquacultural activities apply equally to the VMRC's authority to zone land for activities such as recreational fishing.<sup>128</sup> Although Code section 62.1-1 affects the VMRC's ability to zone areas as aquacultural grounds, the Code does not alter the VMRC's right to zone water areas as recreational fishing grounds. The statute provides for the use of state owned watercourses for fishing, but not aquacultural purposes.

### CONCLUSION

Since the early days of the Commonwealth, the Virginia Marine Resources Commission has evolved dramatically. The Commission began as a small organization responsible for stocking the waters of Virginia with fish. Today the Commission exists as a major regulatory agency with vast responsibilities that range from collecting taxes and fees to zoning. The Commission can designate watercourses as areas for public or commercial bathing, public or private oystering, or public clamming and scalloping. The Commission likewise has authority to lease certain state owned bottomlands for a number of purposes, including mineral extraction. The regulatory power which the Commission enjoys is subject to a number of superior rights including federal rights to navigation and commerce, public rights in the use of watercourses held in common by the Commonwealth, and private claims to certain bottomlands. As much power as the VMRC has in its capacity to zone the water areas of Virginia, a legislative enactment could expand this power. Of course, any expansion of the Commission's power would remain susceptible to the same impediments that limit the Commission's current zoning power.

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127. See VA. CODE ANN. §§ 28.1-108, 28.1-109, 28.1-118.1 (Michie 1985 & Supp. 1991).

128. *Id.*