

1 **TIDAL WETLANDS ACT**
Legal Framework for Local Boards

CYNTHIA B. HALL
 NORFOLK DEPUTY CITY ATTORNEY
CYNTHIA.HALL@NORFOLK.GOV
 757-664-4214

2 **LOCAL WETLANDS BOARDS**
Va. Code Sec. 28.2-1303

- 5 or 7 member boards are permitted
- 5 year terms
- Successive terms are permitted and member shall continue to serve if term expires until successor appointed
- 1-3 alternates "shall" be appointed by locality "to serve in place of the absent" regular member
- Member may be removed for just cause after 15 days' notice and hearing
- Member may be removed for missing meetings (3 in a row or 4 over 12 month period)---no hearing or notice required

3 **LOCAL WETLANDS BOARDS**
Va. Code Sec. 28.2-1304

- Chairman elected annually for 1 year term
- Other officers elected as deemed necessary
- Quorum needed for the taking of "any action"
- Board may make rules and procedures and develop forms (use of alternates, on site meetings, permit extensions, completeness of applications, etc.)

4 **WETLANDS PERMIT**
Va. Code 28.2-1302

- Permit must be obtained to "use or develop any wetland" unless activity is specifically exempted
- Permit must contain detailed and specific information including "such additional materials and documentation" as the Board requires
- Permit fee must be paid as set by the locality
- Public hearing must be held within 60 days of "complete application" after notice by mail and publication---time period can be waived by applicant
- Chairman can administer oaths and compel attendance of witnesses
- Witnesses at the hearing can provide "concise written statement" or testimony

5 **WETLANDS PERMIT****Va. Code Sec. 28.2-1302**

- Board must "act" (take a vote) on application within 30 days of the public hearing. If not, application deemed approved
- Application is approved on affirmative vote of 3 members of 5 member board or 4 members of 7 person board. If not enough votes, the application is denied but can be resubmitted in modified form
- Permit must have an expiration date---extensions are permitted
- Board may require bond or letter of credit to secure compliance
- Board may require mitigation or compensation for wetlands loss

6 **LEGAL RESPONSIBILITY OF LOCAL BOARD****Va. Code Sec. 28.2-1302 (9)**

The Board shall preserve and prevent the despoliation and destruction of wetlands within its jurisdiction while accommodating necessary economic development in a manner consistent with wetlands preservation

7 **LEGAL STANDARDS****Va. Code Sec. 28.2-1308**

- Wetlands of primary ecological significance shall not be altered so that ecological systems in wetlands are altered
- Development in Tidewater Virginia to the maximum extent practical shall be concentrated in wetlands of lesser significance, in areas previously irreversibly disturbed, or outside of wetlands
- Guidelines developed by VMRC must be considered in applying standards

8 **ITEMS BOARD MUST CONSIDER IN DECIDING PERMIT REQUEST****Va. Code Sec. 28.2-1302 (10)(A)**

- Testimony of persons in support or opposition
- Impact of proposal on public health, safety and welfare
- Conformance with legal standards and guidelines

9 **CRITERIA WHICH MUST BE MET TO GRANT PERMIT****Va. Code Sec. 28.2-1302 (10)(B)**

- The anticipated public and private benefit of proposal exceeds its public and private detriment
- The proposal conforms to the standards and guidelines
- The proposal does not violate the spirit and intent of Title 28.2 of the Virginia Code and the local wetlands ordinance

IF ANY OF THE CRITERIA ARE NOT MET, THE APPLICATION MUST BE DENIED BY BOARD

10 **KEY POINTS TO REMEMBER**

- Keep good records and maintain all documents
- Allow input and comments
- Articulate rationale for vote on the record either in the format of the motion or in the board discussion

11 **APPEALS TO VMRC****Va. Code Sec. 28.2-1311**

- Applicant or locality can appeal
- Commissioner can request review
- 25 or more freeholders of property in locality can appeal and must specify how Board failed to fulfill responsibilities under law

Appeal must be filed within 10 days and appeal hearing conducted within 45 days

12 **STANDARD ON APPEAL BEFORE VMRC****Va. Code Sec. 28.2-1313**

VMRC can modify, remand, or reverse decision of Board if:

- Board failed to fulfill responsibilities under wetlands ordinance, OR
- Substantial rights of appellant or applicant were prejudiced because findings of Board were:
 1. Unconstitutional
 2. In excess of authority
 3. Made on unlawful procedure
 4. Based on error of law
 5. Unsupported by evidence on record
 6. Arbitrary, capricious or abuse of discretion

13 **ENFORCEMENT OPTIONS****Va. Code Sections 28.2-1316 through 28.2-1320**

- Monitoring and inspections
- Issuance of compliance notice
- Issuance of stop work order by "designated enforcement officer" for substantial violations
- Restoration order to restore area affected by violation
- Suspension or revocation of permit
- After the fact permit
- Criminal charges ---12 months jail and/or \$2,500 fine
- Injunctions---mandatory order punishable by contempt
- Civil charges--- up to \$10,000 each violation with consent of violator
- Civil penalties ---up to \$25,000 per day for each day of violation in Circuit Court