

**COMMONWEALTH OF VIRGINIA  
COUNTY OF FAIRFAX**

**MINUTES OF THE WETLANDS BOARD**

**DATE: Tuesday, August 10, 2021**

**TIME: 7:00 PM – 9:00 PM**

**LOCATION: Electronic Meeting via WebEx**

**Wetlands Board Member Attendance**

<b>Name</b>	<b>Present (P)/ Absent (A)</b>	<b>Name</b>	<b>Present (P)/ Absent (A)</b>
Anita Van Breda	P	R. Dean Costello	P
Bert Cramer	P	Deana M. Crumbling	P
Mt. Vernon Rep - Vacant	A	Douglas M. Kleine	P*
Kimberly Vanness Larkin	P	Clyde Wilber	P

*\*Part-time Attendee*

**In Attendance**

Katie Hermann	Dept of Planning and Development
Ellen Huber	Dept of Planning and Development
Kelly Atkinson	Dept of Planning and Development
Mark Eversole	Virginia Marine Resources Commission (VMRC)
Justin Sand	Property owner at 10625 Greene Drive, Lorton
Pam Pelto	Office of County Attorney (OCA)
Robin McCormack	Owner, Shoreline Services & Design
Bobby Duke	Employee, Shoreline Services & Design

**Community Members in Attendance**

The meeting was called to order at approximately 7:00 PM.

**1. Covid-19 Pandemic Special Motions**

Given that each member of the Wetlands Board was participating in the meeting from a separate location and in order to verify that a quorum of members was participating. Each member was able to confirm that their voice was clear, audible, and at an appropriate volume for all of the other members. Clyde Wilber performed a roll call of members and asked each Wetlands Board member participating in the meeting to state their name. Anita Van Breda moved that each member's voice was adequately heard by each other member of the Wetlands Board. The motion approved unanimously.

After having established that each member's voice could be heard by every other member, he next established the nature of the emergency that compelled these emergency procedures, the fact that the board was meeting electronically, the type of electronic communication that was being used, and how public access to this meeting was arranged. Clyde Wilber moved that the

Emergency Declaration caused by the COVID-19 pandemic makes it unsafe for the Wetlands Board to physically assemble and unsafe for the public to physically attend any such meeting, and that as such, the Freedom of Information Act's (FOIAs) usual procedures, which require the physical assembly of the Wetlands Board and the physical presence of the public, cannot be implemented safely or practically. He further moved that the Wetlands Board may conduct this meeting electronically through a dedicated audio-conferencing line, and that the public could access the meeting by calling 1-844-621-3956 and entering the code: 179 460 5702. The motion was seconded by Anita Van Breda and approved unanimously.

Clyde Wilbur further moved that each member of the public has three minutes to speak at the end of the meeting. The motion was approved unanimously.

## **2. Show Cause Hearing for Violation at 10625 Greene Drive, Lorton (Massey Creek)**

Clyde Wilber (the Chair) announced that this is a Show Cause Hearing for a reported Violation at 10625 Greene Drive, Lorton (Massey Creek),

Katie Herman called the role and announced a quorum was present. All persons present were asked to identify themselves (see attendance above).

The Chair asked the Board Members if they have any disclosures and or recusal. No Board member indicated disclosures or recusal.

The Chair stated WB Mission and Purpose as follows:

...protect the public interest, promote the public health, safety, and economic and general welfare of the commonwealth, to protect public and private property, wildlife, marine fisheries, and the natural environment. it is the declared to be the public policy of the commonwealth to preserve wetlands and to accommodate necessary economic development in a manner consistent with wetland preservation

The chair indicated this is a Show Cause hearing and not a permit review.

The Board does not have a complete permit application to consider at this time. This is a Show Cause hearing fact finding hearing to determine if a violation has occurred and to decide one of the following:

- Conclude based the information presented at this hearing one of the following
  - There is no violation, or
  - There is a violation – if there is a violation, the Board has two options:
    - Proceed to a Restoration Hearing/Restoration Order to require the permitted return the wetlands to pre-development condition, or
    - Require a complete Permit Application and subsequent public hearing.

**The Chair requested the staff report. It was stated as follows:**

On June 21<sup>st</sup>, Katie Hermann issued a sworn complaint and the Board Chairman issued a stop work order on that same day for impacts to tidal wetlands without a permit. On July 9<sup>th</sup>, a Notice to Comply letter was sent to the property owner, alerting them to this meeting and asking for their participation. The property owner or their agent submitted a Joint Permit Application (JPA) to VMRC on August 2<sup>nd</sup>. Review comments and items to update in the application have not yet been developed and sent to the property owner and agent.

The following information was presented from County staff:

- On the evening of Tuesday, June 15<sup>th</sup> – myself, VMRC and the County’s Land Development Services (LDS) received a complaint about on-going work being done at this property. VMRC and the County determined that no permits were submitted for any of this work.
- A County Code Compliance Inspector visited the property the day before we did (on June 16<sup>th</sup>), and he collected three photos.
- Due to the property owner being away on vacation, VMRC, VIMS, myself and other Board members were not able to gain access to the property owner on June 17<sup>th</sup>. So we observed the site from across Massey Creek from the neighborhood marina. There were two photos taken from the marina.
- Through researching the recent history of wetlands on Massey Creek, a related photo from a nearby joint permit application for the Harbor View Rec Club was discovered.
- During VMRC’s site visit in early July, Mark Eversole took a photo of vegetation on the site and sent it to VIMS to have their staff determine the species of the plant. This statement was provided by Emily at VIMS: *“This plant is “Polygonum sp. (smartweed). This is an obligate wetland plant that is included in the definition of vegetated wetlands under §28.2-1300. This identification was made using only this photo, provided by VMRC staff, and not from onsite analysis. Therefore, there are portions of this property that are “vegetated wetlands.”*
- Images and photographs taken at the property were shown and were referenced as such
  - An image from 2020 County oblique imagery of the property at the shoreline.
  - Three photos from the property owner from a flooding event in early 2021, showing water breaching the old bulkhead
  - Five photos taken from County’s Land Development Services (LDS) on June 16<sup>th</sup> which showed the active construction and a newly-constructed bulkhead
  - Two more photos taken by Katie Hermann from across Massey Creek at the Marina. One image shows the northern-most corner of the subject property, with a more natural shoreline at the neighbor's property that is adjacent to the bulkhead. The other photo shows the work in progress.
  - The next photo shown was taken by VMRC staff on June 29, 2020 (so last summer in 2020) and was included in a public report created by VMRC to help document the conditions of Massey Creek, this report is available online at the VMRC website and has been since the JPA for the Rec Club was approved. This photo shows the subject property with water breaching the bulkhead, again this would have occurred a year ago to the old bulkhead.
  - A following photo shows vegetation on the site in early July, this was the same image that was sent to VIMS to have their staff determine the species of the plant.

- Lastly, Katie showed an image from 1990 imagery collected by the County, that shows the bulkhead on the site. The county also has imagery from 1980 and the bulkhead is not present on the property. So the exact date of installation of the bulkhead is unknown.
- County staff summarized the status of the violation, with this update:
  - County Staff created a sworn complaint on Monday, June 21st (a few days after we learned of the issue) and then the Board's chairman issued a stop work order on that same day, for impacts to tidal wetlands without a permit. That correspondence was sent to the property owner and the contractor (Shoreline Services & Design LLC in Westmoreland County) on June 21st and posted to the front door of the property owner's residence. The County Code Compliance Inspector for the Dept of Land Development services also posted a notice of violation for work being done without a permit in the RPA.
  - Then on July 9<sup>th</sup> – a Notice to Comply letter was sent to the property owner, alerting them to this meeting and asking for their participation.
- The property owner or their agent submitted a Joint Application permit to VMRC on August 2, last Monday. County staff and VMRC have not completed their review of the application yet, but comments will be developed and sent to the property owner & agent of items to update in the application.

The Chair asked if any Board members had questions for staff:

Anita asked if Katie received any other commentary or written correspondence of the violation and Katie said she is in coordination with the compliance inspector and VMRC and has not received complaints from any additional citizens. Mark Eversole said the JPA has been completed and VMRC will pick up the application and continue with a hearing in Hampton after the Wetlands Board makes its decision.

The Chair asked the applicant if they had a statement or evidence for the show cause hearing.

Mr. Sand indicated that his representative, Bobby Duke, would speak for him.

Bobby Duke provided the statement that it is the position of Shoreline Service and Design, that under Virginia Code, Section 116-1-3 that the construction and maintenance of noncommercial catwalks, piers, boathouses, boat shelters, fences, duckblinds, wildlife management shelters and others are allowed. He stated that it is their position that the project is not in wetlands as the mean high and mean low water goes in front of and behind the bulkhead. He further stated that there is also evidence that there was a bulkhead in the exact location and alignment for 20-30 years prior to this. The dredging that took place over the past year accelerated the failing of the bulkhead and it needed to be replaced. By replacing it, they are helping reduce the need for the channel to be dredged again. Justin Sand provided the statement that the bulkhead was significantly deteriorating and needed to be replaced, and that they have no intention of doing anything other than replacing the bulkhead.

The Chair asked if there were any questions from the Board:

Kimberly Vanness Larkin asked if they knew what year the dredging took place and Justin Sand responded it was completed in January and February 2021. Dean Costello asked after the stop work order was issued what kind of stabilization measures were put in place and Justin Sand said he was given a list of measures by Katie Hermann and every measure was implemented the next day.

The Chair asked Mr. Sand if there was water landward of the newly installed bulkhead. Mr. Sand responded that yes there was.

The Chair called for discussion by the Board:

Clyde Wilbur and Kim both opined that a violation has occurred on the basis that there were jurisdiction wetlands around the failed bulkhead for an extended period of time prior to the current project and that there are jurisdictional wetlands on the property landward of the bulkhead and statutory wetlands plants stated by VIMS.

Kim made the motion that a violation has taken place, Dean Costello seconded the motion. The motion passed unanimously.

Clyde presented the draft Show Cause conclusion and moved that the Board concludes that a violation has occurred, ordered the existing stop work order continue until a complete permit application is approved and any future work must be conducted in accordance with an approved permit, and in lieu of a restoration order, the permittee is hereby required to provide a complete permit application fully addressing the 2021 VMRC Wetlands Guidance within 120 days. Dean seconded the motion. When discussing the draft, Clyde added “This stop-work order shall not prevent the permittee from placing approved wetlands vegetation to stabilize the exposed slope” and changed 120 days to 180. Clyde accepted the amendment and made the motion to approve the amendments, Doug Kleine seconded. The motion passed unanimously.

Doug moved to close the hearing; Anita Van Breda seconded. The motion passed unanimously.

After the close of the show cause hearing, the Chair made the following comments:

- The Chair Requests that County Staff work in consultation with VMRC, VIMS, and if applicable DCR, to assist the permittee in evaluating and selecting suitable shoreline stabilization techniques applicable for this property in accordance with the 2021 VMRC Wetlands Guidance.
- The Chair recognizes that the applicant does not have a history of violations. I request that staff explain the civil charge determination process and the mitigating factors of
  - Good Faith
  - Degree of Willfulness
  - History of Non-Compliance
  - Cooperation.

Note also that profession ignorance is not considered a mitigating factor.

- The Chair request County staff provide a written update on this application to the Wetlands Board within 60 days to ensure Board members are informed.
- Chair asked for any further comments by the Board members. There were none.

### **3. Update on Proposed Comprehensive Plan Amendment and Zoning Ordinance Revisions for Living Shorelines**

Katie Hermann reviewed edits to the Proposed Changes to the Comprehensive plan sent in an email on July 30<sup>th</sup> and requested feedback by August 13<sup>th</sup>. Kim sent comments in an email to Katie Hermann regarding wordsmithing edits from what is possible to what is practical. Comments from the Board regarding Kim's edits are to be sent back to Katie.

### **4. Set date for next Wetlands Board meeting**

A tentative date was set for the 5<sup>th</sup> of October at 7 pm.

### **5. Meeting Minute Review and Approval**

The review and approval of the July meeting minutes were pushed to a later time.

### **6. Public Comment Period**

Clyde Wilbur asked the board members email Katie if they had participated in second a motion and which motions, they seconded.

### **7. Adjournment**

Deanna Crumbling motioned to close the meeting, and Dean Costello seconded the motion. The vote was approved unanimously.

The meeting adjourned at 8:21 pm