

CODE OF THE COUNTY OF YORK

Chapter 23.1

WETLANDS\*

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\***Cross reference**—Building regulations, Ch. 7.1; erosion and sediment control, Ch. 10; public areas; Ch. 17; subdivisions Ch. 20.5; zoning Ch. 24.1.

**Sec. 23.1-1. Adopted.**

The board of supervisors, acting pursuant to chapter 13 of title 28.2, Code of Virginia, for the purposes of fulfilling the policy standards set forth in such chapter, adopts this chapter regulating the use and development of wetlands.

**Sec. 23.1-2. Definitions.**

For the purposes of this chapter, the following words and phrases shall have the meanings respectively ascribed to them by this section.

*Commission.* The Virginia Marine Resources Commission.

*Commissioner.* The Commissioner of Marine Resources.

*Enforcement officer.* A person designated by the wetlands board to enforce this chapter.

*Governmental activity.* Any of the services provided by this county to its citizens for the purpose of maintaining public facilities including but not limited to, such services as constructing, repairing and maintaining roads, sewage facilities and street lights, supplying and treating water and constructing public buildings.

*Nonvegetated wetlands.* All the land lying contiguous to mean low water and which land is between mean low water and mean high water not otherwise included in the term "vegetated wetlands," as defined herein.

*Person.* Any individual, corporation, association, partnership, company, business, trust, joint venture or other legal entity.

*Vegetated wetlands.* All that land lying between and contiguous to mean low water and an elevation above mean low water equal to the factor one and one-half (1½) times the mean tide range at the site of the proposed project in this county and upon which is growing on the effective date of this article or grown thereon subsequent thereto, any one or more of the following: saltmarsh cordgrass (*Spartina alterniflora*), saltmeadow hay (*Spartina patens*), saltgrass (*Distichlis apicata*), black needlerush (*Juncus roemerianus*), saltwort (*Salicornia* sp.), sea lavender (*Limonium* sp.), marsh elder (*Iva frutescens*), groundsel bush (*Baccharis hamilifolia*), wax myrtle (*Myrica* sp.), sea oxeye (*Borrichia frutescens*), arrow arum (*Peltandra virginica*), pickerelweed (*Pontederia cordata*), big cordgrass (*Spartina cynosuroides*), rice cutgrass (*Leersia oryzoides*), wildrice (*Zizania aquatica*), bulrush (*Scirpus validus*), spikerush (*Eleocharis* sp.), sea rocket (*Cakile edentula*), southern wildrice (*Aizaniopsis miliacea*), cattail (*Typha* spp.), three-square (*Scirpus* spp.), buttonbush (*Cephalanthus occidentalis*), bald cypress (*Taxodium distichum*), black gum (*Nyssa sylvatica*), tupelo (*Nyssa aquatica*), dock (*Rumex* sp.), yellow pond lily (*Nuphar* sp.), marsh fleabane (*Pluchea purpurascens*), royal fern (*Osmunda regalis*), marsh hibiscus (*Hibiscus moscheutos*), beggar's tick (*Bidens* sp.), smartweed (*Polygonum* sp.) arrowhead (*Sagittaria* spp.), sweet flag (*Acorus calamus*), water hemp (*Amaranthus cannabinus*), reed grass (*Phragmites communis*), and switch grass (*Panicum virgatum*).

*Wetlands.* Both vegetated and nonvegetated wetlands.

*Wetlands board or board.* A board created as provided in section 28.2-1303, Code of Virginia.

**Sec. 23.1-3. Wetlands board—Generally.**

- (a) There is hereby continued a wetlands board, which shall consist of five (5) residents of the county appointed by the board of supervisors. All terms of office shall be for five (5) years each except that original appointments shall be made for such terms that the term of one member shall expire each year. The chair of the board shall notify the board of supervisors at least thirty (30) days in advance of the expiration of any term of office, and shall also notify the board of supervisors promptly if any vacancy occurs. Such vacancies shall be filled by the board of supervisors without any delay, upon receipt of such notice. Appointments to fill vacancies shall be only for the unexpired portion of the term. Members may serve successive terms. A member whose term expires shall continue to serve until his/her successor is appointed and qualified. Members of the board shall hold no other public office in the county, except that they may be members of the local planning or zoning commission, members of a board established by the local governing body to hear cases regarding ordinances adopted pursuant to the Chesapeake Bay Preservation Act and regulations promulgated thereunder, directors of soil and water conservation boards, or local erosion commissions, or on the local board of zoning appeals. Where members of these local commissions or boards are appointed to a local wetlands board, their terms of appointment shall be coterminous with their membership on those boards or commissions. The board of supervisors shall also appoint at least one but not more than three alternate members to the wetlands board. The qualifications, terms, and compensation of alternate members shall be the same as those of members. Any member who knows that he will not be able to attend a board meeting shall notify the chairman at least 24 hours in advance of such meeting. The chairman shall select an alternate member to serve in place of the absent member at the board meeting, which shall be noted in the records of the board.
- (b) Upon a hearing with at least fifteen (15) days notice thereof, any board member may be removed for malfeasance, misfeasance, or nonfeasance in office, or for other just cause, by the board of supervisors.

(Ord. No. 04-14, 8/3/04; Ord. No. 06-1, 1/17/06)

**Sec. 23.1-4. Officers, meetings, rules, records and reports.**

The board shall annually elect from its membership a chair and such other officers as it deems necessary, who shall serve one-year terms. For the conduct of any hearing and the taking of any action, a quorum shall be not less than three (3) members of the five (5) member board. The board may make, alter and rescind rules and forms for its procedures, consistent with ordinances of the county and general laws of the commonwealth, including chapter 13, title 28.2, Code of Virginia. The board shall keep a full public record of its proceedings and shall submit a report of its activities to the board of supervisors at least once each year, and a copy of its report to the commission.

**Sec. 23.1-5. Meeting space and services.**

The board of supervisors shall supply reasonable meeting space for the use of the board and such reasonable secretarial, clerical, legal and consulting services as may be needed by the board.

**Sec. 23.1-6. Permitted uses and activities.**

The following uses of and activities on wetlands are permitted, if otherwise permitted by law:

- (a) The construction and maintenance of noncommercial catwalks, piers, boathouses, boat shelters, fences, duckblinds, wildlife management shelters, footbridges, observation decks and shelters and other similar structures; provided, that such structures are so constructed on pilings as to permit the reasonably unobstructed flow of the tide and preserve the natural contour of the wetlands:
- (b) The cultivation and harvesting of shellfish, and worms for bait;
- (c) Noncommercial outdoor recreational activities, including hiking, boating, trapping, hunting, fishing, shellfishing, horseback riding, swimming, skeet and trap shooting, and shooting preserves;

- provided, that no structure shall be constructed except as permitted in subsection (a) of this section;
- (d) The cultivation and harvesting of agricultural, forestry or horticultural products; grazing and haying;
  - (e) Conservation, repletion and research activities of the Virginia Marine Resources Commission, the Virginia Institute of Marine Science, the Virginia Department of Game and Inland Fisheries and other related conservation agencies;
  - (f) The construction or maintenance of aids to navigation which are authorized by governmental authority;
  - (g) Emergency decrees of any duly appointed health officer of a governmental subdivision acting to protect the public health;
  - (h) The normal maintenance, repair or addition to presently existing roads, highways, railroad beds, or facilities abutting on or crossing wetlands; provided, that no waterway is altered and no additional wetlands are covered;
  - (I) Governmental activity on wetlands owned or leased by the Commonwealth of Virginia, or a political subdivision thereof;
  - (j) The normal maintenance of man-made drainage ditches; provided, that no additional wetlands are covered; and provided further, that this subdivision shall not be deemed to authorize construction of any drainage ditch; and
  - (k) Other outdoor recreational activities; provided, that such activities do not impair the natural functions of the wetlands or alter the natural contour of the wetlands.

**Sec. 23.1-7. Permit required; application generally; processing fee.**

- (a) Any person who desires to use or develop any wetland within this county, other than for those activities specified in section 23.1-6, shall first file an application for a permit with the wetlands board, directly or through the commission.
- (b) The permit application shall include the following: the name and address of the applicant; a detailed description of the proposed activity and a map, drawn to an appropriate and uniform scale, showing the area of wetlands directly affected, the location of the proposed work thereon, indicating the area of existing and proposed fill and excavation, especially the location, width, depth and length of any proposed channel and the disposal area, all existing and proposed structures, sewage collection and treatment facilities, utility installations, roadways, and other related appurtenances or facilities, including those on adjacent uplands, and a description of the type of equipment to be used and the means of equipment access to the activity site; the names and addresses of owners of record of adjacent land and known claimants of water rights in or adjacent to the wetland of whom the applicant has notice; an estimate of cost; the primary purpose of the project; any secondary purposes of the project, including further projects; the public benefit to be derived from the proposed project; a complete description of measures to be taken during and after the alteration to reduce detrimental offsite effects; the completion date of the proposed work, project or structure; and such additional materials and documentation as the wetlands board may deem necessary. The seaward limits of the proposed structure shall be staked in the field prior to the Wetlands Board site inspection.

(Ord. No. 099-14(R), 10/6/99)

- (c) A nonrefundable processing fee of one hundred dollars (\$150.00) to cover the cost of processing the application, set by the board of supervisors with due regard for the services to be rendered, including the time, skill, and administrator's expense involved, shall accompany each application; provided, however, that when an applicant for a permit has begun an unpermitted use of wetlands prior to making application for the necessary permit, the application processing fee shall be two hundred dollars (\$250.00) in order to offset the additional time and expense involved in properly processing the application.

**Sec. 23.1-8. Permits required for certain activities.**

It shall be unlawful for any person to conduct any activity which would require a permit pursuant to this chapter without such a permit.

**Sec. 23.1-9. Public hearing on application.**

Not later than sixty (60) days after receipt of a complete application, the wetlands board shall hold a public hearing on the application. The applicant, the board of supervisors, the commissioner, the owner of record of any land adjacent to the wetlands in question, known claimants of water rights in or adjacent to the wetlands in question, the Virginia Institute of Marine Science, the Department of Game and Inland Fisheries, the Water Control Board, the Department of Transportation and governmental agencies expressing an interest therein shall be notified by the board of the hearing, by mail, not less than twenty (20) days prior to the date set for the hearing. The wetlands board shall also cause notice of such hearing to be published at least once a week for two weeks prior to such hearing in a newspaper having a general circulation in this county. Every such advertisement shall contain a reference to the place or places within the county where copies of the proposed application may be examined. The costs of such publication shall be paid by the applicant.

**Sec. 23.1-10. Public inspection of application.**

All applications, and maps and documents relating thereto, shall be open for public inspection at the department of environmental and development services and as specified in the advertisement for public hearing required under section 23.1-9 of this chapter.

**Sec. 23.1-11. Factors to be considered in making decision.**

- (a) In fulfilling its responsibilities under this chapter, 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.
- (b) In making its decision whether to grant, to grant in modified form, or to deny an application for a permit, the board shall consider the following:
  - (1) Such matters raised through the testimony of any person in support of or in opposition to the permit application;
  - (2) Impact of the development on the public health, safety, and welfare; and
  - (3) The proposed development's conformance with the standards prescribed in section 28.2-

1308, Code of Virginia and guidelines which may have been promulgated pursuant to section 28.2-1301, Code of Virginia.

- (c) The board shall grant the permit if all of the following criteria are met:
  - (1) The anticipated public and private benefit of the proposed activity exceeds its anticipated public and private detriment.
  - (2) The proposed development conforms with the standards prescribed in section 28.2-1308, Code of Virginia and guidelines promulgated pursuant to section 28.2-1301, Code of Virginia.
  - (3) The proposed activity does not violate the purposes and intent of this chapter or chapter 13 of Title 28.2, Code of Virginia.
- (d) If the board finds that any of the criteria listed in this section are not met, the board shall deny the permit application but allow the applicant to resubmit the application in modified form.

**Sec. 23.1-12. Grant or deny application.**

- (a) In acting on any application for a permit, the board shall grant the application upon the concurring favorable vote of three (3) of its members. The chair of the board, or in the chair's absence the acting chair, may administer oaths and compel the attendance of witnesses. Any person may testify at the public hearing. Each witness at the hearing may submit a concise written statement of his/her testimony. The board shall make a record of the proceedings, which shall include the application, any written statements of witnesses, a summary of statements of all witnesses, the findings and decision of the board, and the rationale for the decision. The board shall make its determination within thirty (30) days from the hearing. If the board fails to act within such time, the application shall be deemed approved. Within forty-eight (48) hours of its determination, the board shall notify the applicant and the commissioner of its determination. If the board fails to make a determination within the thirty-day period, it shall notify the applicant and the commission that thirty (30) days have passed and that the application is deemed approved. The term "act" referenced above shall be the action of taking a vote on the application. If the application receives less than three (3) affirmative votes, the permit shall be denied.
- (b) The board shall transmit a copy of the permit to the commissioner. If the board's decision is reviewed or appealed, then the board shall transmit the record of its hearing to the commissioner. Upon a final determination by the commission, the record shall be returned to the board. The record shall be open for public inspection at the department of environmental and development services.

**Sec. 23.1-13. Time for issuance of permit.**

No permit shall be issued until the period within which a request for review or an appeal to the commission may be made has expired. If a request for review is made or an appeal is noted, no activity for which the permit is required shall be commenced until the commission has notified the parties of its determination.

**Sec. 23.1-14. Permit not to affect zoning.**

No permit granted by the wetlands board shall affect in any way the applicable zoning and land use ordinances of this county or the right of any person to seek compensation for any injury in fact incurred by him because of the proposed activity.

**Sec. 23.1-15. Standards for use and development of wetlands; utilization of guidelines.**

- (a) The following standards shall apply to the use and development of wetlands and shall be considered in the determination of whether any permit required by this chapter should be granted or denied:
- (1) Wetlands of primary ecological significance shall not be altered so that the ecological systems in the wetlands are unreasonably disturbed; and
  - (2) Development in the county, to the maximum extent practical, shall be concentrated in wetlands of lesser ecological significance, in vegetated wetlands which have been irreversibly disturbed before July 1, 1972, in nonvegetated wetlands which have been irreversibly disturbed prior to January 1, 1983, and in areas outside of wetlands.
- (b) The provisions of guidelines promulgated by the commission pursuant to section 28.2-1301, Code of Virginia shall be considered in applying the standards listed in this chapter.

**Sec. 23.1-16. Bond or letter of credit; suspension or revocation of permit.**

The board may require a reasonable bond or letter of credit, in an amount and with surety and conditions satisfactory to it, securing to the Commonwealth compliance with the conditions and limitations set forth in the permit. The board may, after hearing as provided herein, suspend or revoke a permit if the board finds that the applicant has failed to comply with any of the conditions or limitations set forth in the permit or has exceeded the scope of the work as set forth in the application. The board, after a hearing, may suspend a permit if the applicant fails to comply with the terms and conditions set forth in the application.

**Sec. 23.1-17. Form of permit.**

The permit shall be in writing, signed by the chair of the board and notarized. A copy of the permit shall be transmitted to the commissioner.

**Sec. 23.1-18. Expiration of permit.**

No permit shall be granted without an expiration date established by the board. The board, however, may, upon proper application therefor, grant permit extensions.

**Sec. 23.1-19. Investigations and prosecutions.**

The wetlands board may investigate all projects, whether proposed or ongoing, which alter wetlands

located within the county. The wetlands board may prosecute all violations of such orders of such board, or and any violation of any provision of this chapter.

**Sec. 23.1-20. Monitoring, inspections, compliance, and restoration.**

- (a) The wetlands board chair may require a permittee to implement monitoring and reporting procedures the chair believes are reasonably necessary to ensure compliance with the provisions of the permit and this chapter.
- (b) The wetlands board chair may require such on-site inspections as the chair believes are reasonably necessary to determine whether the measures required by the permit are being properly performed, or whether the provisions of this chapter are being violated. Prior to conducting any inspection, the wetlands board chair shall provide notice to the resident owner, occupier, or operator, who shall be given an opportunity to accompany the site inspector. If it is determined that there is a failure to comply with the permit, the wetlands board chair shall serve notice upon the permittee at the address specified in his/her permit application or by delivery at the site of the permitted activities to the person supervising those activities and designated in the permit to receive the notice. The notice shall describe the measures needed for compliance and the time within which these measures shall be completed. Failure of the person to comply within the specified period is a violation of this section.
- (c) Upon receipt of a sworn complaint of a substantial violation of this chapter from the designated enforcement officer, the wetlands board chair may, in conjunction with or subsequent to a notice to comply as specified in this section, issue an order requiring all or part of the activities on the site to be stopped until the specified corrective measures have been taken. In the case of an activity not authorized under this chapter or where the alleged permit noncompliance is causing, or is in imminent danger of causing, significant harm to the wetlands protected by this chapter, the order may be issued without regard to whether the person has been issued a notice to comply pursuant to this section. Otherwise, the order may be issued only after the permittee has failed to comply with the notice to comply. The order shall be served in the same manner as a notice to comply, and shall remain in effect for a period of seven (7) days from the date of service pending application by the enforcing authority, permittee, resident owner, occupier, or operator for appropriate relief to the circuit court of the county. Upon completion of corrective action, the order shall immediately be lifted. Nothing in this section shall prevent the wetlands board chair from taking any other action specified in section 28.2-1316, Code of Virginia.
- (d) Upon receipt of a sworn complaint of a substantial violation of this chapter from a designated enforcement officer, the wetlands board may order that the affected site be restored to predevelopment conditions if the board finds that restoration is necessary to recover lost resources or to prevent further damage to resources. The order shall specify the restoration necessary and establish a reasonable time for its completion. The order shall be issued only after a hearing with at least thirty (30) days' notice to the affected person of the hearing's time, place, and purpose, and shall become effective immediately upon issuance by the board. The board shall require any scientific monitoring plan it believes necessary to ensure the successful re-establishment of wetlands protected by this chapter and may require that a prepaid contract acceptable to the board be in effect for the purpose of carrying out the scientific monitoring plan. The board may also require a reasonable bond or letter of credit in an amount and with surety and conditions satisfactory to it securing to the Commonwealth compliance with the conditions set forth in the restoration order. The appropriate court, upon petition by the board, may enforce any such restoration order by injunction, mandamus, or other appropriate remedy. Failure to complete the required restoration is a violation of this chapter.



- (e) The duties of the wetlands board chair may be delegated to a designee; however, this designee shall not be a designated enforcement officer.

**Sec. 23.1-21. Violations.**

Any person who knowingly, intentionally, negligently or continually violates any order, rule or regulation of the wetlands board or violates any provision of a permit granted by the wetlands board pursuant to this chapter shall be guilty of a Class 1 misdemeanor. Following a conviction, every day the violation continues shall be deemed a separate offense.

**Sec. 23.1-22. Injunctions.**

Upon the petition of the wetlands board to the circuit court of the county where any act is done or threatened which is unlawful under this chapter the court may enjoin the unlawful act and order the defendant to take any necessary steps to restore, protect, and preserve the wetlands involved. This remedy shall be exclusive of and in addition to any criminal penalty which may be imposed under section 23.1-23.

**Sec. 23.1-23. Penalties.**

- (a) Without limiting the remedies which may be obtained under this chapter, any person who violates any provision of this chapter or who violates or fails, neglects, or refuses to obey any wetlands board notice, order, rule, regulation, or permit condition authorized by this chapter shall, upon such finding by an appropriate circuit court, be assessed a civil penalty not to exceed twenty-five thousand dollars (\$25,000) for each day of violation. Such civil penalties may, at the discretion of the court assessing them, be directed to be paid into the treasury of the county, for the purpose of abating environmental damage to or restoring wetlands therein, in such a manner as the court may, by order, direct, except that where the violator is the county itself, or its agent, the court shall direct the penalty to be paid into the state treasury.
- (b) Without limiting the remedies which may be obtained under this chapter, and with the consent of any person who has violated any provision of this chapter or who has violated or failed, neglected, or refused to obey any wetlands board order, rule, regulation, or permit condition authorized by this chapter, the wetlands board may provide, in an order issued by the wetlands board against such person, for the one-time payment of civil charges for each violation in specific sums, not to exceed ten thousand dollars ( \$10,000) for each violation. Civil charges shall be in lieu of any appropriate civil penalty which could be imposed under this section. Civil charges may be in addition to the cost of any restoration ordered by the wetlands board.