

OP. NO. 03-088

**FISHERIES AND HABITAT OF THE TIDAL WATERS: SUBMERGED LANDS
— GENERAL PROVISIONS RELATING TO MARINE RESOURCES
COMMISSION.**

**STATE WATERS, PORTS AND HARBORS: WHARVES, DOCKS, PIERS AND
BULKHEADS.**

Marine Resources Commission may collect, annually or otherwise, only royalties for commercial use of state-owned bottomlands; may not impose royalty for use of state-owned bottomlands where private wharf, pier or dock is used for noncommercial purposes, is within line of navigability, and is erected within size limitations prescribed by statute.

The Honorable Bill Bolling
Member, Senate of Virginia
November 14, 2003

Issues Presented

You ask whether the Marine Resources Commission has the authority to charge rents, as well as royalties, for use of state-owned bottomlands. If only a royalty is permitted, you ask whether a one-time payment or an annual royalty payment is required. You further ask whether there is a distinction between riparian owners' rights to and beyond the navigation line, and if so, whether a royalty may be assessed within the line.

Response

It is my opinion that the Marine Resources Commission may collect, annually or otherwise, only royalties for the commercial use of state-owned bottomlands. In fact, the General Assembly has indicated its intent to collect royalties in the 2003 Appropriation Act. It is also my opinion that the Commission may not impose a royalty for the use of state-owned bottomlands where the private wharf, pier or dock of a riparian landowner is used for noncommercial purposes, is within the line of navigability, and is erected within the size limitations prescribed by statute.

Applicable Law and Discussion

Article 1, Chapter 12 of Title 28.2, §§ 28.2-1200 through 28.2-1209, governs ownership and usage of submerged lands and provides the Marine Resources Commission with oversight responsibility for such usage.¹ Article 1 provides for the collection of royalties,² rent royalties,³ and rents.⁴ Your questions relate specifically to the collection of rents and/or royalties in circumstances where a riparian landowner builds a dock or wharf out to or upon navigable water.

Section 28.2-1203(A) provides:

It shall be unlawful for any person to build, dump, trespass or encroach upon or over, or take or use any materials from the beds of the bays, ocean, rivers, streams, or creeks which are the

property of the Commonwealth, unless such act is performed pursuant to a permit issued by the [Marine Resources] Commission

Section 28.2-1205 sets forth factors the Marine Resources Commission must use in determining whether to issue a permit for the use of state-owned bottomlands. Section 28.2-1205(E) requires that "[a]ll permits issued by the Commission for the use of state-owned bottom lands ... shall be in writing and specify the conditions, terms and royalties which the Commission determines are appropriate."⁵ Section 28.2-1205 authorizes the Marine Resources Commission to charge *royalties*⁶ for commercial use of state-owned bottomlands⁷ and makes no reference to *rents*. Therefore, I must conclude that the Marine Resources Commission may charge royalties, but not rents, for the uses described in § 28.2-1205.

"Rents" and "royalties," however, are similar: "rent" is "[c]onsideration paid, usu[ally] periodically, for the use or occupancy of property";⁸ "royalty" is "a payment (as a percentage of the amount of property used) ... for permitting another to ... use ... such property (as natural resources, patents or copyrights)"⁹ I am aware of no statute prohibiting the Marine Resources Commission from requiring an annual royalty payment as opposed to a one-time royalty payment.

The General Assembly recently acknowledged the fees and royalties imposed by the Marine Resources Commission in the 2003 Appropriation Act:

It is the intent of the General Assembly that beginning July 1, 2004, the Marine Resources Commission shall collect all fees and royalties assessed by the Commission for the use of state-owned bottomlands under the provisions of Chapter 12 of Title 28.2, Code of Virginia. Prior to resuming the collection of any such fees, the Secretary of Natural Resources shall review the report of the Virginia Delegation of the Chesapeake Bay Commission made pursuant to House Joint Resolution 633 (2003) and shall submit a plan for the collection of such fees to the Chairmen of the House Appropriations and Senate Finance Committees.^[10]

A 1986 opinion of this Office concludes that there is no requirement that royalties be made in lump sum payments.¹¹ The prior opinion further concludes that royalties assessed for the use of natural resources generally are paid periodically over the time of use.¹² The General Assembly is presumed to have knowledge of the Attorney General's interpretation of the law, and its "failure to make corrective amendments evinces legislative acquiescence in the Attorney General's interpretation."¹³ Therefore, there is no indication that the General Assembly intended to limit royalty payments to a one-time payment.¹⁴

You also ask whether there is a distinction between riparian owners' rights to and beyond the navigation line, and if so, whether a royalty may be assessed within the line.

There is a distinction. A riparian landowner's right to "wharf out" extends to the line of navigability.¹⁵ A pier to the line of navigability provides a riparian owner with access to the navigable waterway. Section 62.1-164 codifies the common

law right of a riparian landowner to erect a private, noncommercial pier or wharf in a watercourse opposite his land, provided that such right neither obstructs navigation nor results in injury to a person's private rights.¹⁶ Section 62.1-164 provides:

Any person owning land upon a watercourse may erect a *private wharf on the same, or private pier or landing*, in such watercourse opposite his land; provided, such wharf, pier or land is for *noncommercial purposes* and navigation be not obstructed, nor the private rights of any person be otherwise injured thereby. The circuit court of the county in which such wharf, pier or landing is, after causing ten days' notice to be given to the owner thereof, of its intention to consider the subject, if it be satisfied that such wharf, pier or landing obstructs the navigation of the watercourse, or so encroaches on any private landing as to prevent the free use thereof, may abate the same. [Emphasis added.]

In addition, § 28.2-1203(A)(5) provides that "placement of private piers for noncommercial purposes by owners of the riparian lands in the waters opposite those lands, provided that ... the piers do not extend beyond the navigation line," generally does not require a permit from the Marine Resources Commission.¹⁷

Statutes related to the same subject should be considered *in pari materia*¹⁸ and should be construed to "give the fullest possible effect to the legislative intent embodied in the entire statutory enactment."¹⁹ Sections 62.1-164 and 28.2-1203(A)(5) embody the same subject and, when read together, indicate that the General Assembly has determined that a riparian landowner's right to erect a private, noncommercial wharf, pier or landing to the navigation line does not significantly interfere with the public's right to use the state-owned bottomland, and, therefore, Commission oversight is not required. The General Assembly has provided no such exemption for commercial use by riparian landowners.²⁰

Recent Supreme Court of Virginia cases involving disputes between riparian landowners over noncommercial uses provide guidance as to riparian rights:

Among the rights to which a riparian owner is entitled is the right to the underwater soil between his land and the line of navigability in the watercourse. Upon that soil, the owner may erect docks and other facilities, subject to the rights of the public reserved by the General Assembly, provided no injury be done to the private rights of others.^[21]

The Court notes that the General Assembly has vested the Marine Resources Commission with jurisdiction to issue permits for use of state-owned bottomlands, including the placement of wharves by riparian landowners.²² Specifically, the Court stated that "[a]dministrative approval is required for such uses of subaqueous beds because title to the bed is vested in the Commonwealth, subject to use by the people in common."²³ Based on the statutory framework relative to riparian landowners' rights and the Supreme Court's recognition of the jurisdiction of the Marine Resources Commission to permit the use of state-owned bottom lands, I must conclude that the Marine Resources Commission may impose a royalty for the use of state-owned bottomlands unless the wharf, pier or dock is a private structure limited in size and scope and not reaching beyond the point of navigability. The royalty

imposed, annual or otherwise, must be a reasonable charge to protect the public's right to the Commonwealth's natural resources.²⁴

Conclusion

Accordingly, it is my opinion that the Marine Resources Commission may collect, annually or otherwise, only royalties for the commercial use of state-owned bottomlands. In fact, the General Assembly has indicated its intent to collect royalties in the 2003 Appropriation Act. It is also my opinion that the Commission may not impose a royalty for the use of state-owned bottomlands where the private wharf, pier or dock of a riparian landowner is used for noncommercial purposes, is within the line of navigability, and is erected within the size limitations prescribed by statute.

¹"The jurisdiction of the [Marine Resources] Commission shall include the Commonwealth's territorial sea and extend to the fall line of all tidal rivers and streams except in the case of state-owned bottomlands where jurisdiction extends throughout the Commonwealth." Va. Code Ann. § 28.2-101 (Michie Repl. Vol. 2001).

²See, e.g., § 28.2-1206 (B)-(D), (F) (Michie Repl. Vol. 2001).

³Section 28.2-1208(A) (Michie Repl. Vol. 2001) (providing for easement or lease of beds of Commonwealth's waters outside Baylor Survey for mining of specified minerals and mineral substances).

⁴Section 28.2-1208(C).

⁵Section 28.2-1203(B) makes it unlawful to use state-owned bottomlands without a permit except as set forth in subdivisions A 1 through A 6 of § 28.2-1203. Section 28.2-1206(A)-(D) establishes certain permit fees and royalties to be charged for dredging state-owned bottomlands.

⁶See § 28.2-1205(E) (Michie Repl. Vol. 2001).

⁷Section 28.2-1205(D) authorizes the Commission to issue permits for noncommercial uses of state-owned bottomlands.

⁸Black's Law Dictionary 1299 (7th ed. 1999).

⁹Webster's Third New International Dictionary of the English Language Unabridged 1982 (1993); see also 1986-1987 Op. Va. Att'y Gen. 338, 340 (defining "royalty" as share of product or profit reserved by owner for permitting another to use property).

¹⁰2003 Va. Acts ch. 1042, at 1733, 2154 (quoting § 1-108, Item 398).

¹¹1986-1987 Op. Va. Att'y Gen., *supra* note 9, at 340.

¹²*Id.* at 340.

¹³City of Winchester v. American Woodmark Corp., 250 Va. 451, 458, 464 S.E.2d 148, 153 (1995); see also 2003 Op. Va. Att'y Gen. 03-018 (May 13, 2003), available at <http://www.vaag.com/media%20center/Opinions/2003opns/03-018.htm>. The General Assembly has taken no corrective action to the 1986 opinion related to the Marine Resources Commission, but it has taken action to ensure collection of royalties and fees.

¹⁴The General Assembly has, however, provided the option for commercial facilities engaged in the primary business of ship construction and repair to pay a one-time fee in lieu of annual royalties, other than those for dredging. Section 28.2-1206(B) (Michie Repl. Vol. 2001); see also § 28.2-1206(C).

¹⁵Taylor v. Commonwealth, 102 Va. 759, 773, 47 S.E. 875, 880 (1904).

¹⁶1985-1986 Op. Va. Att'y Gen. 108, 110.

¹⁷A riparian landowner must obtain a permit from the Marine Resources Commission if the pier or structure exceeds a certain size or height. Section 28.2-1203(A)(5) (LexisNexis Supp. 2003).

¹⁸See Prillaman v. Commonwealth, 199 Va. 401, 405-06, 100 S.E.2d 4, 7-8 (1957); 2002 Op. Va. Att'y Gen. 199, 201. "*In pari materia*" is the Latin phrase meaning "[o]n the same subject; relating to the same matter." Black's Law Dictionary, *supra* note 8, at 794.

¹⁹Va. Real Estate Bd. v. Clay, 9 Va. App. 152, 157, 384 S.E.2d 622, 625 (1989); see also 2003 Op. Va. Att'y Gen. 03-006 (Mar. 31, 2003), available at <http://www.vaag.com/media%20center/Opinions/2003opns/03-006.htm>.

²⁰A 1985 opinion of this Office notes that the General Assembly, in enacting § 62.1-164, intended to preserve the common law right of riparian landowners to erect private, noncommercial piers and wharves, subject to reasonable state regulation. 1985-1986 Op. Va. Att'y Gen., *supra* note 16, at 110. The General Assembly has not modified § 62.1-164 subsequent to the 1985 opinion and, therefore, has not demonstrated any intent to extend the right to "wharf out" for commercial uses.

²¹Zappulla v. Crown, 239 Va. 566, 569, 391 S.E.2d 65, 67 (1990) (citation omitted); Langley v. Meredith, 237 Va. 55, 62, 376 S.E.2d 519, 523 (1989). *Zappulla* involves riparian apportionment. It should be noted that the "right to build wharves is one which is subject to State regulation, and, while it involves a certain use of the soil under the water for the specific purposes designated, is not exclusive ownership." *Taylor*, 102 Va. at 772, 47 S.E. at 880.

²²*Zappulla*, 239 Va. at 570, 391 S.E.2d at 67. The question for the Court was the impact of a permit from the Marine Resources Commission on a dispute between private parties.

²³*Id.* The Court determined that the Marine Resources Commission does not determine rights as between private parties, but "determines only the rights of an applicant vis-a-vis the Commonwealth and the public." *Id.* at 570, 391 S.E.2d at 68.

²⁴ See § 28.2-1205(A).

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