

Office of the Secretary of Natural Resources

Clam and Oyster Aquaculture Work Group

**Report of the Work Group's
Deliberations and Recommendations
to Address Aquaculture Use Conflicts**

December 2018

Executive Summary

Authority, Directive, and Composition

The Office of the Secretary of Natural Resources decided in Summer 2018 to establish a Clam and Oyster Aquaculture Work Group, with its principal purpose being to identify clam and oyster aquaculture-related user conflicts on Virginia waterways and to explore potential solutions to them. The work group was established as an internal work group of the Secretary's office.

The work group is comprised of 17 people representing the General Assembly (elected members of the House of Delegates and Senate), the shellfish industry, local governments, waterfront property owners, and non-profit conservation organizations. One of the waterfront property owner representatives is also a professional marine contractor, and added that perspective to the discussion. In addition, a number of the other work group members are also waterfront property owners. Secretary of Natural Resources Matthew J. Strickler appointed members of the work group.

The work group consisted of the following members.

General Assembly

Delegate Christopher Stolle
Delegate Margaret Ransone
Senator Montgomery Mason

Delegate Robert Bloxom
Senator Lynwood Lewis

Shellfish Industry

Mike Oesterling
A.J. Erskine

Kim Huskey
Ann Gallivan

Local Government

Rebecca Kubin
Anne Ducey-Ortiz

James Barnett

Waterfront Property Owners

Robert Livengood

Chris Schellhammer

Non-Profit Conservation Organizations

Jay Ford
Bo Lusk

Karen Forget

Additionally, the work group was assisted by numerous State agency staff, including Deputy Secretary of Natural Resources Ann Jennings; Commissioner of Marine Resources Steve Bowman; Deputy Commissioner of Marine Resources Ellen Bolen; Tony Watkinson and Ben Stagg (Virginia Marine Resources Commission); Dr. Mark Luckenbach (Virginia Institute of Marine Science); and Laura McKay (Coastal Zone Management Program). Assistant Attorney General Kelci Block provided advice, as needed, to the Office of the Secretary of Natural Resources and to State agencies.

Secretary Stickler served as chair of the work group.

The Office of the Secretary of Natural Resources engaged L. Preston Bryant, Jr., of McGuireWoods Consulting (via the Virginia Center for Consensus Building at Virginia Commonwealth University) to serve as the work group's facilitator.

Facilitation Process

The work group engaged a certified mediator to organize its meetings and facilitate its discussions. The work group met on four occasions: August 16, 2018; September 18, 2018; November 5, 2018; and November 27, 2018.

Additionally, and outside of formal work group meetings, the facilitator engaged work group members via telephone to solicit information and ideas regarding various work group topics and also met on occasion with State agency staff for the purpose of research and agenda planning.

The work group worked collaboratively and collegially, identifying user conflict issues and focus areas as well as developing potential solutions to user and use conflicts and other issues. The work group worked on a consensus basis. The goal was to reach unanimity on all specific issues related to user conflicts and other related issues. The facilitator provided structure to the meetings and organized discussions – preparing all meeting materials, positing topics and questions to pursue, and drafting detailed summaries of each meeting – but the work group drove the process and held all decision-making authority.

It was agreed that the work group would develop consensus-based recommendations, and then the work group would submit a final report and recommendations to be released by the Office of the Secretary of Natural Resources.

Note: It was agreed in the first meeting – in facilitation “ground rules” – that consensus would be determined when no more than two work group participants dissented on any particular item or on the final work group report. It should further be noted that on all consensus items set forth in this report that full, unanimous consensus was obtained without dissent.

This document is the final report. The recommendations contained herein are the consensus of the work group.

Summary of Recommendations

The work group's recommendations can be generally categorized in the following ways:

- While the clam and oyster aquaculture work group has worked collaboratively in 2018 on identifying certain user conflicts and making certain recommendations to address them, there is additional work to be done. The clam and oyster aquaculture work group, or a similarly constituted work group, should continue its deliberations in 2019 on issues to be determined by the Secretary of Natural Resources.
- Virginia Marine Resources Commission (VMRC) is a respected agency, and the Code of Virginia should be amended in agreed areas to provide the agency reasonable flexibility in its regulatory authority, especially regarding leases and leasing matters. The work group also sought recommendations that would build on VMRC's existing authorities. In particular, the work group suggested amending Va. Code § 28.2-1205, and/or other appropriate code sections, to clarify and accentuate VMRC's authority to consider beneficial use and other criteria in granting, denying, or renewing any lease or permit.
- Use plans received significant discussion and the majority of the work group sees certain benefit to implementing use plans. VMRC should establish a separate stakeholder group – including industry, waterfront property owners, local governments, and others – to further discuss what use plans will entail, including how VMRC might distinguish between new entrants to the industry and veteran producers in applying use plan requirements.
- The General Assembly should consider legislation in 2019 to continue allowing dredging in the Lynnhaven River in Virginia Beach, in condemned waters, in special service districts for improved navigation and access to channels.
- The Virginia Institute of Marine Science (VIMS) should conduct a study on floating and suspended aquaculture impacts on SAV beds and seek to develop best management practices (BMPs), if possible, that permit the coexistence of the two. The Secretary of Natural Resources and the General Assembly should collaborate on potential funding for such a study. The study should be conducted in collaboration with VMRC, industry, and the conservation community.
- VMRC should initiate a formal regulatory rulemaking process to address lease renewal exemptions and to establish a beneficial use standard. Addressing these two issues should be in support of the Public Trust Doctrine. VMRC will include a broad stakeholder group in this regulatory rulemaking process.

- The General Assembly should consider legislation in 2019 to increase or establish certain lease-related fees – specifically, the lease application fee, lease transfer fee, and lease renewal fee. Such fee increases are to support VMRC operations that historically have been underfunded and have hampered the agency’s administrative efficiencies in leasing, enforcement, and other functions. Other one-time, de minimis fees may be eliminated or consolidated.

Introduction and Overview

Shellfish aquaculture user conflict in Eastern Virginia is not a new phenomenon. However, in recent years, as cleaner waters have contributed to the growth of the aquaculture, and as waterfront properties continue to develop, user conflicts are becoming more frequent and acute.

Eastern Virginia is home to a thriving shellfish aquaculture industry. Industry growth has expanded as once-polluted and unproductive waters have become cleaner and oysters have returned to a newly viable habitat. The shellfish industry also continues to invest and reinvest in aquaculture operations in Virginia waters – tributaries to the Chesapeake Bay and in the Bay itself – on the Northern Neck, the Peninsula and Middle Peninsula, Hampton Roads, and the Eastern Shore. Significant aquaculture operations also exist on the seaside of the Eastern Shore. Today, Virginia’s shellfish aquaculture industry is among the most robust of its kind in the nation.

Eastern Virginia also continues to experience population growth. Among the most desirable places to build new homes are along scenic waterways. This residential growth brings more recreational use of waterways. Additional waterfront residences also bring more docks, piers, and other boating and recreational support structures along shorelines.

As Governor Ralph Northam said when he addressed the work group’s first meeting, today’s user conflicts, as unfortunate as they might be, are the result of multiple good-news stories: cleaner water, more oyster ground, increasing coverage of submerged aquatic vegetation (SAV), a thriving shellfish industry, and growing recreational use of Virginia’s waterways.

The work group’s charge was to come together in a collegial and collaborative setting, identify various user conflicts, assess their causes, and propose consensus-based solutions to address them.

Understanding Shellfish Aquaculture: Leasing, Laws, and Regulations

It was important that before the work group delved deeply into identifying user conflicts and discussing possible statutory or regulatory solutions to them, the work group should receive a primer on the laws and regulations under which VMRC must operate when engaging industry, local governments, waterfront property owners, boaters, and others.

VMRC staff provided in the first work group meeting an overview of Virginia laws and regulations that govern the agency's actions on non-commercial riparian shellfish growing, leasing of subaqueous lands, and commercial shellfish aquaculture.

This statutory and regulatory primer led to a robust discussion on such matters as the permitting process, leases, lease transfers, what "productivity" means and how it is applied, the agency's public interest review, public engagement on proposed leases, channel access, ground rents and other fees, pier construction, and more. This discussion helped identify or clarify early on many issues that would demand the work group's focus.

Identifying User Conflicts

The work group preliminarily identified numerous types of user conflicts.

- Navigational
- Recreational
- Shellfish growing areas
- Piers
- Dredging
- Marking
- Safety
- Sea-level rise, shore protection projects
- SAVs
- Land-based resources to support shellfish industry

Related to these and other user conflicts, Secretary Strickler further underscored areas for the work group's focus.

- Shellfish aquaculture industry growth
- Property rights
- Navigation
- Tourism
- Restoration goals
- Empowering VMRC

During early discussion about the above listed user conflicts, the work group found numerous issues that were common, or cross-cutting, among them.

- Permitting piers, dredging, and aquaculture
- Leases (generally; transfers, renewals, etc.)
- Lease renewal and transfer v. Productivity
- "Productivity" or "beneficial use" (definition of)
- Ground rents and one-time fees (application fees, transfer fees, recordation fees)
- Suburban area needs (onshore land use impacts, increased water recreation, etc.)

The work group determined that by focusing on cross-cutting, common-denominator issues, they likely would be able to address and possibly fashion solutions to many of the identified user conflicts.

General Points of Agreement or Affirmation

Throughout the work group's discussions, there were numerous points that, by consensus, were generally agreed or affirmed, and which should be noted. Indeed, these points alone represent much of the work group's progress, aside from several more significant and actionable consensus items.

These points of agreement or affirmation are noted below. They are stand-alone points and are independent of each other. They may be useful guidance in further discussions.

- Aquaculture user conflicts are resulting in large part from cleaner waters where once unproductive shellfish grounds are now increasingly productive; a thriving aquaculture industry; increased SAV; increased waterfront development; and increased recreational use of waters.
- All clam and oyster aquaculture work group stakeholders remain committed to working collaboratively and in good faith to reach consensus wherever possible.
- Virginia Marine Resources Commission is a respected regulatory agency, and it should be given certain latitude to exercise discretion – to use “common sense,” as many put it – on matters regarding leasing.
- VMRC is committed to improving its processes in generally agreed areas, including the electronic submission of applications and other materials and establishing a beneficial use standard.
- VMRC's ability to exercise discretion is sometimes limited by law.
- When the General Assembly considers legislation affecting VMRC's regulatory authority over leases and leasing, generally speaking, the legislation should not be overly prescriptive.
- VMRC is committed to following the law as established by the General Assembly. The agency is committed to developing regulations, within the confines of the law, and where applicable doing so via stakeholder engagement. VMRC is committed to process transparency.
- The Virginia shellfish aquaculture industry is thriving. Industry has invested heavily in research and development to improve aquaculture production techniques.

- Local governments have an interest in what takes place in state-owned waters. Aquaculture leases and operations may have onshore and offshore impacts to private property owners and public infrastructure.
- Local governments generally support both habitat restoration and dredging for better navigational access to main channels.
- Generally speaking, waterfront property owners should have navigational access to channels.
- There is a need for greater public education regarding the rights of both watermen and property owners.
- Two recurring, cross-cutting issues in the work group’s discussions are leases/leasing and beneficial use.
- VMRC should be able to ensure that leases are for production and other beneficial uses.
- Leasing public ground for non-beneficial use purposes – especially for so-called “spite leases” – is inappropriate. Further, leasing state-owned bottom for non-beneficial use purposes reduces ground available for lease and can push operations closer to the shoreline.
- VMRC should initiate a regulatory rulemaking to address lease renewal exemptions and to establish a beneficial use standard, with affected stakeholders being fully a part of the rulemaking process. Such rulemaking should be in furtherance and support of the Public Trust Doctrine.
- There may be legitimate business or operational reasons for producers to hold one lease or multiple leases but not have the lease or leases in active production at all times.
- Use plans may be helpful to regulators, industry, and the public. Use plans may help legitimize the public interest and review process. They may be insightful to a potential leaseholder’s intentions and allow regulators to anticipate user conflicts. They may serve to support a leaseholder’s intentions and operations. They may facilitate the application and renewal processes. They may provide greater public transparency.
- Use plans, if implemented, should be simple, flexible, unburdensome, and not costly to applicants.
- VMRC should establish a stakeholder group to further discuss what use plans will entail, including how VMRC might distinguish between new entrants to the industry and veteran producers in applying use plan requirements.

- Dredging should be allowed through leased oyster grounds in condemned or non-productive waters for improved navigation or access to channels. The Code of Virginia should be amended to reflect this. Such Code amendments should be restricted, for now, to the Lynnhaven River in Virginia Beach, in condemned waters, in the city’s special service districts. Additional discussion was had to find consensus on circumstances allowing dredging through leased ground that is productive. (See the Addendum to this report for agreed resolution regarding dredging through leased productive grounds.)
- VMRC should establish an “appraisal” advisory group regarding developing guidelines to value leases and compensate leaseholders when leases are subject to dredging or other public projects. VMRC should assist local governments in working with leaseholders to identify appropriate compensation. (The need for an appraisal advisory group may be eliminated subject to ongoing stakeholder discussions.)
- Established sanctuary reefs should be considered a beneficial use.
- There is interest in knowing whether floating and suspended aquaculture can be compatibly conducted over SAV beds with the use of BMPs. The Virginia Institute of Marine Science should conduct a study in collaboration with VMRC, industry, and the conservation community.
- Industry and other stakeholders agree that VMRC is underfunded in key areas and such underfunding may significantly hamper the agency’s operations. As a result, industry and other stakeholders who rely on the agency timely processing licenses and permits, for example, are negatively impacted. Industry and other stakeholders agree that certain VMRC fees should be increased to support the agency’s operations, with other de minimis fees eliminated or consolidated.

Consensus Recommendations

- **Beneficial Use**

In the work group’s discussion, the issue of “beneficial use” came up many times. It was a common denominator to a number of lease- or leasing-related matters, including leaseholder rights, lease applicants’ intentions, enforcement of leases, lease transfers, lease renewals, subleasing, exercise of regulatory discretion, use plans, restoration, dredging, and more. All work group members agreed that the definition of beneficial use is central and required focused discussion.

The work group considered various possible criteria to determine, fairly, beneficial use. Such possible criteria discussed included minimum productivity requirements, propagating and planting requirements, how leased parcels factor into aquaculture operations (such as rotating), how grounds are used for conservation, and more.

Beneficial use also can be instrumental in identifying “bad actors” – i.e., leaseholders who hold ground for reasons other than clam or oyster production, which sometimes may be for nefarious purposes.

The work group agreed broadly that state-owned bottomlands should be leased in furtherance of the Public Trust Doctrine. This would include, for example, traditional shellfish planting and harvesting, aquaculture operations, and restoration and conservation.

In the end, the work group agreed that VMRC should initiate an official regulatory rulemaking process to address beneficial use and to establish a beneficial use standard. It also was agreed that VMRC would include stakeholders in the rulemaking process.

VMRC staff also believe that establishing a beneficial use standard in regulation will enable the agency to more clearly exercise its duly granted authority (and discretion) on lease and leasing matters as it takes into consideration both applicants’ and the public’s interests.

- **CONSENSUS:** The work group recommends that VMRC initiate an official regulatory rulemaking process, with full stakeholder involvement, to develop a beneficial use standard. (Note: This regulatory rulemaking initiative may be combined with the consensus recommendation to initiate regulatory rulemaking to address lease renewal exemptions.)

- **Use Plans**

As the work group discussed various issues – from VMRC regulatory oversight to leasing to productivity criteria and more – the concept of “use plans” continuously came up, and was seen by a majority of the work group as a potential solution, or partial solution, to certain problems related to use conflicts.

A use plan would be an approximately two-page document accompanying a lease application that would generally indicate how the applicant plans to use the bottomland to be leased. A use plan would be simple, unburdensome, and not costly to the applicant. It also would be flexible and amendable upon certain circumstance or operational changes. As discussed, a use plan likely would indicate such things as anticipated type of planting or propagation; type of aquaculture structure, if applicable; estimated acreage to be leased; estimated production goals; etc. A use plan would not seek proprietary or strategic business information.

The work group had robust discussion over use plans. While some expressed concern over what information would be required and how use plans would be used by regulators, it was generally agreed that use plans would provide regulators and the public with a

single document indicating a leaseholder's intentions for a parcel. Some also believed that use plans may speed up the lease application process as well as be a general public-information tool and provide certain transparency.

In particular, it was agreed that VMRC, in determining who should be required to provide a use plan, should distinguish between new entrants to the aquaculture industry who have no production history and industry veterans who have a clear history of production.

All generally agreed that new entrants to the industry who have no production history should have to prepare a use plan.

There was not full consensus on whether aquaculture industry veterans who have a clear history of production should or should not have to provide a use plan for lease renewals – i.e., whether industry veterans should just provide a use plan with a lease application for new ground where they had no production history.

It also was determined that VMRC has existing authority to enter into a regulatory process to establish use plan-related regulations. However, it is at present unclear whether VMRC currently has authority to enforce use plans.

- **CONSENSUS:** The work group concluded that VMRC and stakeholders should engage more – establish a separate work group – to discuss use plans. A majority of the work group does not object to use plans, based on the provisions generally noted above, and looks forward to a use plan stakeholder group being formed to discuss what use plans will entail, including how VMRC might distinguish between new entrants to the industry and veteran producers in applying use plan requirements.

- **Dredging for Improved Navigation (Lynnhaven River)**

Impacting leased ground to improve navigation or to allow for better access to channels is not a new issue. The General Assembly, VMRC, and local governments have been debating it for several years, with some progress being made. All agreed there exists broad good will and a desire to improve upon previous progress made and come up with an agreed upon solution. The controversy around this issue has been most accentuated in Virginia Beach and the Lynnhaven River.

The work group agreed that waterfront property owners should have access to channels. That fundamental point is not in dispute. What is centrally at issue is dredging through productive leased ground.

The work group agreed that when leased ground is condemned or non-productive, then dredging for improved navigation and access to channels should be allowed. All agreed that, in these circumstances, there is a public good that should be noted.

However, the work group did not fully agree on the circumstances under which productive leased ground could be dredged. Additional discussion among the most affected stakeholders will continue, with hope that an approach to resolving the issue will materialize in the weeks ahead.

Additionally, the work group agreed that VMRC would establish an “appraisal work group” to advise the agency on developing guidelines regarding the valuation of leases and compensation to leaseholders when leases are subject to dredging or other public uses. (The need for an appraisal advisory group may be eliminated subject to ongoing stakeholder discussions.)

The work group acknowledged that there exists an acute problem on the Lynnhaven River in Virginia Beach, where dredging for improved navigation is desired but there are a small number of leases in the areas that complicate proposed dredging plans. The work group agreed to focus on the Lynnhaven River and its well-known and defined dredging issue.

- **CONSENSUS:** The work group agrees that municipal dredging should be allowed on the Lynnhaven River in the special service districts through leases in condemned or non-productive waters. The work group agrees that there should be a notice provision – i.e., conceptually, VMRC would send a registered letter to leaseholders at their last-known address and require a response within 30 days; if no response, then permission to dredge in condemned grounds is deemed granted (or something along these lines) – and that the current July 1, 2019, sunset in Va. Code § 28.2-618.5 should be extended by 16 years to July 1, 2035. The work group also clarified that established sanctuary reefs should be considered a “beneficial use” and be considered in any dredging plan. Additional discussion among key stakeholders must be had to achieve agreement on circumstances allowing dredging through leased ground that is productive.
- **Leases and Leasing**

Leases and leasing matters are central to almost any discussion about the aquaculture industry. Such also is central to almost any discussion about aquaculture-related user conflicts between industry, waterfront property owners, local government offshore interests, dredging, navigation, riparian rights, piers, and more.

Leases and leasing were thus central to almost every user conflict-related issue identified and discussed by the work group.

The work group immersed itself in leasing matters – policy, regulation, law; administrative oversight and processes; applications, renewals, transfers; enforcement; beneficial use and lease roles in aquaculture operations; and ground rents and related fees.

VMRC staff fully participated in the work group's discussion on leases and leasing matters, which was helpful. The work group acknowledged that in considering lease applications VMRC is at times put in difficult positions when considering industry, local government, and community interests. Sometimes, the difficult positions result from regulatory and statutory constraints and thus the agency's reduced discretion. As noted, VMRC must adhere to existing regulation and law in rendering decisions.

The work group agreed that certain lease and leasing-related reforms, or clarifications, are in order. The group also generally agreed that the aquaculture industry has significantly grown and strengthened in recent decades and thus care should be taken to not "over correct" when considering leasing-related changes to guidance, policy, regulation, or laws.

Generally, the work group's lease and leasing-related discussions often reverted to discussions of VMRC's authority (i.e., discretion), aquaculture operations, use plans, beneficial use (i.e., productivity), dredging, conservation, and other related issues.

Most central to the work group's lease-related discussions, however, was lease renewal exemptions. It is in clarifying or reforming lease renewal exemptions that the work group believed held most promise for addressing a number of lease or leasing issues.

For the most part, the work group agreed that any reforms to leasing guidance, policy, regulations, or laws should focus on unproductive leased ground and "bad actors" – i.e., those who may be leasing state-owned bottom for non-beneficial use purposes. All agreed that such is not in keeping with the Commonwealth's interests (especially regarding the Public Trust Doctrine), local governments' interests, waterfront property owners' interests, the conservation community's interests, or the industry's interests.

The work group noted that one example of bad actors' abuse of leasing is, in the case of lease renewal applications, an applicant moving to transfer a lease, often to a relative, when a renewal application is denied. The work group agreed that this loophole should be closed. The work group also agreed that among VMRC's criteria for considering lease renewal applications should be a lease be in good standing and being for beneficial use.

The work group also was mindful that leaseholders who are not commercial operators but who often hold small leases for personal, small bushel harvesting should not be unduly harmed by any broad reforms that might be instituted.

The work group underscored that any reforms to leasing guidance, policy, regulations, or laws should foremost be in support of the Public Trust Doctrine.

As much of the work group's discussion centered on lease renewal exemptions and beneficial use, the work group agreed that VMRC should initiate an official regulatory rulemaking process, with full stakeholder involvement, to address lease renewal exemptions and a beneficial use standard. VMRC is supportive of this.

Regarding leasing-related matters – especially lease renewal exemptions and VMRC’s authority and discretion – the work group focused on three pertinent sections of the Code of Virginia: § 28.2-607, § 28.2-613, and §28.2-1205, with the latter being the chief focus. The work group sought to agree on amendments to these three Code sections that would (i) give VMRC clearer authority to grant or deny or renew any permit or lease; (ii) ensure that oyster disease remains a factor in assessing a leaseholder’s productivity level on leased ground when considering lease renewals; (iii) ensure that the benefits of shellfish aquaculture is a factor when considering lease renewals; and (iv) make other necessary amendments to the three Code sections to ensure that they not only are not in conflict with each other but indeed are complementary.

The work group agreed to two consensus positions and actions. Each is independent of the other.

- **CONSENSUS:** VMRC should initiate an official regulatory rulemaking process to address lease renewal exemptions. Such rulemaking should be principally in support of the Public Trust Doctrine. The agency shall establish a stakeholder group as part of the regulatory rulemaking process. (Note: This regulatory rulemaking initiative may be combined with the consensus recommendation to initiate regulatory rulemaking to establish a beneficial use standard.)
 - **CONSENSUS:** The work group agreed that the Secretary of Natural Resources and VMRC staff should work with General Assembly members to prepare legislation for introduction in the 2019 General Assembly session that amends Va. Code § 28.2-600, § 28.2-607, § 28.2-613, and/or §28.2-1205 to make clearer that VMRC has discretion to grant, deny, or renew leases in furtherance of the Public Trust Doctrine and to ensure that leased state-owned bottom is for beneficial use. One amendment should make clear that VMRC has discretion to deny or adjust riparian lease boundaries. However, the principle Code section pertaining to VMRC’s authority (and discretion) regarding leases and leasing is §28.2-1205. Amendments to state code should include among the agency’s lease-related decision-making criteria the potential of oyster disease impacts and the benefits of shellfish aquaculture. Last, in amending these Code sections, care should be taken to ensure that the Code sections, read together, are not in conflict and are indeed complementary.
- **Subaqueous Vegetation BMP Study**

The work group noted that there has long been discussion among industry, VMRC, and scientists on whether floating or suspended aquaculture in SAV beds are harmful, neutral, or beneficial to the viability of the beds.

It also has been noted that the Virginia Institute of Marine Science (VIMS) has the experts who could address such questions and its work and results would be widely accepted.

- **CONSENSUS:** The work group agreed that VIMS would design and conduct an SAV BMP study in collaboration with industry. It also was agreed that the study would endeavor to provide clarity within two years, with periodic updates, on whether floating or suspended aquaculture could be compatibly conducted within SAV beds with the use of BMPs. VMRC will have to issue certain permits to allow the study. It also is understood that such a study will be contingent upon funding. VMRC also will not update its guidance in this area until after the study's completion and its results assessed.
- **VMRC Revenues, Increased Fees**

Over the course of the work group's four meetings, its members tackled a number of difficult issues, with all intuitively knowing that among the most difficult would be those related to potential fee increases that would be paid mostly by industry. However, the work group also knew that after many years of fee increases being discussed, with various proposals being made, there has been in recent years a growing acceptance that some fee increases are warranted.

If there are to be fee increases, however, the work group wanted to put good, rational thought to it during its meetings (time was somewhat limited), and it wanted to ensure, to the extent possible, that the public revenues generated from increased fees would address key VMRC needs, such as surveying related to lease applications (there has been a backlog in recent years), enforcement, etc. All this said, the industry wanted to have further discussion on the options considered during its facilitated meetings. (Indeed, further discussions were had on fees. See the Addendum to this report for details on the agreed resolution to a new fee structure.)

VMRC staff provided ballpark estimates on the total revenues generated from certain fees, which helped put into context the amount of new revenue certain potential fee increases might generate and how such new revenue might help address VMRC operational needs.

The work group considered the various monies the industry pays, in one form or another, to the Commonwealth – ground rents for leased bottomland and one-time fees, such as lease application fees, lease transfer fees, recordation fees, and assignment fees. Some produce significant revenues and some do not (recordation fees and assignment fees are de minimis).

Increases to the current \$1.50/acre ground rent was discussed. This is not a new issue. The current ground rent rate was set more than 50 years ago and has not changed. Adjusted for a half-century's inflation, it would be significantly higher. Industry defended the low ground rent fee, noting that it costs an operator many thousands of dollars per acre to ready an acre of bottom for production. Industry also noted that the one other state that rivals Virginia's thriving aquaculture industry – Louisiana – has an equally low ground rent rate.

All this said, industry, as represented on the work group, did not rule out a potential ground rent increase, so long as it had parameters. For example, the work group discussed, conceptually, a modest increase if it were structured to be phased in over many years. Such, they suggested, would allow operators to gradually adjust business plans to account for such ground rent increases.

The work group concluded, however, that it would be more productive to discuss potential increases in one-time fees. The group believed that increases in one-time fees offered a greater likelihood of stakeholder (industry) acceptance.

The work group thus focused its discussion on lease application fees, lease transfer fees, lease renewal fees, recordation fees, and assignment fees.

In addition to discussing how certain fee increases might help fund key VMRC operational needs, the work group also underscored that fee increases would help deter some bad actors who take advantage of low fees to lease bottom for non-beneficial uses. The work group agreed that fee increases – especially if substantial increases – could serve a key strategic purpose in helping deter leasing for reasons other than clam or oyster production, conservation, or other beneficial uses.

The work group agreed that the time is right to advocate for increases in one-time fees, namely the lease application fee and the lease transfer fee. The work group also agreed to advocate for the establishment of a lease renewal fee. And the work group agreed to support the elimination of the recordation fee and assignment fee, which would be consolidated into a substantially increased lease application fee or lease transfer fee.

It should be noted, clearly, that the work group advocated for truly substantial fee increases. The group advocated – clearly and strongly – for an increase in the lease application fee from its current \$25 to \$1,000. The work group similarly advocated – clearly and strongly – that the lease transfer fee be boosted from its current \$5 or \$10 fee to \$1,000. And the work group advocated – clearly and strongly – to establish, for the first time, a \$300 lease renewal fee. The work group also agreed that the recordation fee and assignment fee be eliminated (VMRC staff also agreed to eliminating these two fees).

Particularly, to achieve the \$1,000 sum for the lease application fee and the lease transfer fee, the work group discussed several options. Option 1 included, simply, a \$1,000 application fee, regardless of the acreage to be leased (this option received certain favorable consideration). Option 2 included a \$300 base fee, with the balance being achieved via an additional dollar-per-acre fee (this was not industry's preferred option, and indeed was not generally agreed). Option 3 included, conceptually, a three-tiered fee structure aligned with certain acre-ranges to be leased (this option received certain favorable consideration).

Last, importantly, it should be noted that, at present, lease-related fees paid are deposited in the state's General Fund – meaning they do not remain at VMRC. The Secretary of Natural Resources, legislators, VMRC, and stakeholders should have further discussions

regarding whether certain fees should continue being deposited into the General Fund or be dedicated to VMRC and directed toward certain operational needs important to those who principally pay the fees.

- **CONSENSUS:** The work group agreed that the time is right to advocate for certain fee increases. The work group agreed to support increases in the following one-time fees:

- (i) lease application fee – increase lease application fee from its current \$25 to the equivalent of \$1,000, achieved preferably by a \$1,000 flat fee or via a three-tiered fee structure aligned with certain acre-ranges to be leased; in preparation for potential 2019 legislation, VMRC staff will provide lease-related revenue information to aid stakeholders in determining how a fee structure might be established to meet certain agreed upon goals;

- (ii) transfer fee – increase the transfer fee from its current \$5 or \$10 fee to the equivalent of \$1,000, achieved preferably by a \$1,000 flat fee or via a three-tiered fee structure aligned with certain acre-ranges to be leases; in preparation for potential 2019 legislation, VMRC staff will provide lease-related revenue information to aid stakeholders in determining how a fee structure might be established to meet certain agreed upon goals;

- (iii) lease renewal fee – establish a lease renewal fee in the amount of \$300; this would be paid at the time of an approved 10-year lease renewal;

- (iv) recordation fee and assignment fee – eliminate recordation fee and the assignment fee (these are de minimis fees and will be assumed in the lease application fee and lease transfer fee).

The work group agreed that legislation to adjust the above fees, as described in options above, should be introduced in the 2019 General Assembly. In order to have legislation introduced in the 2019 General Assembly session, VMRC must prepare fee-increase scenarios and discuss options with stakeholders. The work group further agreed to strongly encourage key stakeholder constituencies to actively support fee-increase legislation during the 2019 General Assembly that is in keeping with the above.

Action Items

- Strive to submit final work group report to the Office of the Secretary of Natural Resources (OSNR) for release by December 15, 2018.
- Legislation to be prepared for the 2019 General Assembly to amend the Code of Virginia to allow dredging in the Lynnhaven River in Virginia Beach in condemned or unproductive waters in special service districts. The Code also should be amended to grant VMRC discretion to deny or adjust proposed riparian lease boundaries.
- OSNR and General Assembly to collaborate on potential funding for a VIMS-led SAV BMP study on floating or suspended aquaculture's impacts on SAV beds.
- VMRC to establish stakeholder group to discuss how what use plans will entail, including how VMRC might distinguish between new entrants to the industry and veteran producers in applying use plan requirements.
- VMRC to establish an "appraisal" work group consisting of certain aquaculture and other relevantly experienced persons to advise the agency on developing guidelines regarding the valuation of leases and compensation to leaseholders when leases are subject to dredging or other public uses.
- VMRC to exercise existing authority to begin, in due course, accepting lease applications and other material via electronic means.
- VMRC to initiate an official regulatory rulemaking initiative, including stakeholders, to address lease renewal exemptions and a beneficial use standard. These may be separate rulemaking processes or combined to address both.
- Legislation to be prepared for the 2019 General Assembly to increase the lease application fee, increase the lease transfer fee, establish the lease renewal fee, eliminate the recordation fee, and eliminate the assignment fee.

**Addendum to Report of the
Clam and Oyster Aquaculture Work Group**

**Clam and Oyster Aquaculture Work Group
Conference Call, December 14, 2018, 11:00 am to 12:00 pm
Summary of Consensus Decisions by the Work Group**

NOTE: The Clam and Oyster Aquaculture Work Group's Report on Use Conflicts notes that certain additional discussion of the work group may occur to address dredging issues in the Lynnhaven River, particularly dredging in leased productive grounds. Secretary of Natural Resources Matt Strickler facilitated those discussions. This addendum reflects those discussions and is to be included in the work group's final report.

Principles of Agreement on Dredging in the Lynnhaven River

- Establish a fair process to avoid leases subject to a beneficial use, whenever possible, and compensate leaseholders when a dredging project must go through ground subject to a beneficial use.
- This process shall be limited to the Lynnhaven River.
- Any proposed municipal dredging project located in the Lynnhaven River shall be reviewed by VMRC staff (the Commissioner) to ensure that, in addition to other environmental considerations, the dredging project avoids grounds subject to a beneficial use to the maximum extent practicable.
- Once VMRC staff (the Commissioner) is satisfied that the proposal has met that standard, it will provide notice to any impacted leaseholder requesting a response within 30 days. The City of Virginia also will contact the leaseholder.
- If the leaseholder and the City are able to agree voluntarily on compensation within 90 days from the time the initial notice is sent, no additional action is necessary.
- If the leaseholder objects or there is any other protest of the project, it must be considered by the full Commission at a public hearing, per the Commission's existing statutory requirement. If the project is approved, or approved in modified form, and the affected leaseholder does not reach an agreement with the City, the steps below will apply. Upon agreement between the City and the leaseholder or court determination of compensation, the Commission permit for the project shall be issued.
- If the leaseholder and the City are not able to agree, the City must offer in writing, and at its expense, to enter into mediation with the leaseholder as defined in the Code of Virginia [§ 8.01-581.21](#).
- A voluntary or mediated compensation agreement may include terms dictating a timeline for the leaseholder to vacate the impacted portion of the lease.

- If the leaseholder refuses mediation, or if an agreement cannot be reached within 9 months of the initial offer (12 months after the initial notice was sent), a court of competent jurisdiction shall determine and order fair compensation.
- If a lease is transferred during this process, the timeline is not restarted.
- This process negates the need for a VMRC “appraisal” advisory group noted in the Work Group Report at pages. 8, 10, and 16.

Principles of Agreement on Riparian Lease Configurations

- Grant VMRC (the Commissioner), through legislation, the discretion to adjust the boundaries of a proposed riparian lease.

Principles of Agreement on Fees

- Lease application and transfer fees will be set at \$300 for leases less than 5 acres; \$500 for leases between 5 and 25 acres; and \$1,000 for leases greater than 25 acres.
- Fees will remain nonrefundable.
- Grant VMRC, through legislation, the authority to establish a fee structure for lease renewal applications. Fees will be based generally on the amount of staff time necessary to process the renewal application and shall not exceed \$300. This is in lieu of a flat fee of \$300 for renewal applications (Work Group Report, pages. 15 and 16).

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