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June 25, 2013

Curtis W. Smith
Director of Planning
Accomack-Northampton Planning District Commission
P.O. Box 417, 23372 Front Street
Accomac, VA 23301

Re: Camping Platform Permitting (NSGLC-12-04-03)

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Dear Curtis,

Please find below our analysis regarding the development of a series of camping platforms along a water trail on the seaside of the Eastern Shore of Virginia. As I understand it, the Accomack-Northampton Planning District Commission would like to construct platforms for overnight use for those traveling along rivers. These platforms could either be land-based, floating, or constructed on pilings situated on state-owned bottomland. While the Commission has held initial discussions about the legality and permitting required for new construction of platforms elevated on pilings, it has not been able to find information on the repurposing of existing piling foundations for use as camping platforms. Specifically, the Commission is seeking

information on using existing piling foundations that once supported hunting blinds and have either been abandoned or impacted by storm events to the point of disrepair.

Waterfowl hunting blinds are regulated by the Virginia Department of Game and Inland Fisheries (DGIF). The construction and use of the abandoned hunting blind pilings in question were originally licensed pursuant to Virginia's waterfowl hunting blind laws and regulations.¹ A license from the DGIF is required to hunt from either stationary or floating blinds, with exceptions in some areas of the state.² In most instances, riparian owners and their lessees have prior rights to license stationary blinds on their shoreline and in certain public waters in front of their shoreline.³ If a riparian owner does not exercise his right to have a blind, any locations remaining in the public waters belong to whoever obtains a license from the DGIF and proceeds to erect a blind. No one, however, may license a blind within 500 yards of an established blind. Licenses are renewable on an annual basis; however, riparian owners can re-assert their prior rights when renewals are sought, even if they forfeited their privileges the preceding year. Blinds destroyed by hurricanes or other events outside the owner's control may be replaced within thirty days. Blind licensees are required to remove the blinds when their licenses expire or when they no longer intend to use the blind for waterfowl hunting.

If the blinds have been removed and the pilings remain, the relevant question becomes how would the repurposing of the pilings for a camping platform be permitted or licensed by the state? The existing duck blind laws have no provisions for the reuse of an old blind, and, in fact, require duck blinds to be removed after a license expires or when a duck blind is no longer in use. As there would no longer be a duck blind, the proposed activity would fall outside the licensing authority of the DFIG. Instead, construction of the camping platforms on existing pilings would be governed by the more generally applicable submerged lands permitting rules.

Since the camping platforms will be attached to or located over riverbeds, the general permitting guidelines for state-owned submerged land would apply. Unless otherwise specified, the Commonwealth of Virginia holds the title to the bed of a navigable river up to the mean low-water mark.⁴ The Commonwealth may grant a lease, easement, or other limited interest in state-owned bottomlands covered by waters.⁵ In fact, it is illegal "to build, dump, or otherwise trespass upon or over or encroach upon or take or use any materials from the beds of the bays and ocean, rivers, streams, creeks, which are the property of the commonwealth, unless such act is pursuant to statutory authority or a permit by the [Virginia] Marine Resources

¹ Va. Code Ann. § 29.1-340- 29.1-351.1. Licenses may not be issued in certain areas of the state. Regs. For example, the Department of Game and Inland Fisheries will not issue new licenses for Virginia Beach or on the Chickahominy River in Charles County.

² East of I-95 Va. Code Ann. § 29.1-340. Also, the shores and public waters and marshes of Accomack and Northampton Counties. Va. Code Ann. § 29.1-350

³ Riparian owners only have prior rights in water off the shoreline that has a depth of less than eight feet at mean high tide and out to the halfway point across the river.

⁴ Va. Code Ann. § 28.2-1200

⁵ Va. Code Ann. § 28.2-1200.1.

Commission.”⁶ Therefore, any camping platforms built on state-owned lands would require a permit. Individuals owning land along rivers (“riparian owners”) in Virginia retain ownership of land down to the mean low water mark, and this ownership includes certain riparian rights that extend into the water, such as the right to access the water and a limited right to wharf out.

Before seeking a VMRC permit for the camping platforms, it would be important to ensure that the camping platform would not infringe on the rights of riparian owners. Pursuant to state common law, “a riparian owner has the right to the water frontage belonging by nature to his land. This right includes ... the right of access from the front of his property [past the low water mark] to the navigable part of the waterway, and also the right to the soil under the water between his land and the navigable line of the watercourse. Upon this soil the owner may erect wharves, piers, or bulkheads for his own use, or the use of the public, subject to such rules and regulations as the General Assembly may impose for the public’s protection.”⁷ This right to “wharf out” is limited by statute to noncommercial purposes and to uses that will not obstruct navigation or injure another’s property rights:

*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.*⁸

A camping platform located in front of a riparian owner’s property could arguably interfere with the riparian owner’s rights of use and enjoyment, including the right to wharf out. A camping platform located “between [the riparian owner’s] land and the navigable line of the watercourse” could interfere with a riparian owner’s right of access and right to wharf out if it was located in such a way that forced the owner to change his preferred route from his pier. Even if the owner does not currently have a pier or dock, they may wish to build on in the future and the construction of a camping platform could interfere with this potential use.

The “riparian zone” into which the riparian owner’s rights extend is determined in the following manner:

A just rule of division is to measure the length of the shore and ascertain the portion thereof to which each riparian proprietor is entitled; next measure the length of the line

⁶ Va. Code Ann. § 28.2-1203 See also Virginia Marine Resources Commission, “Subaqueous Guidelines” At p. 5. <http://ccrm.vims.edu/education/seminarpresentations/fall2006/Workshop%20CD/Official%20Guidelines/Subaqueous%20Guidelines.pdf> Exceptions for owners of riparian lands seeking to build private piers for noncommercial purposes, provided the piers meet certain requirements. Code § 28.2-1203(A)-§ 28.2-1203 (A)(5).

⁷ Langley v. Meredith, 237 Va. 55, 62 (Va. 1989).

⁸ § 62.1-164.

of navigability, and give to each proprietor the same proportion of it that he is entitled to of the shore line; and then draw straight lines from the points of division so marked for each proprietor on the line of navigability to the extremities of his lines on the shore. Each proprietor will be entitled to the portion of the line of navigability thus apportioned to him, and also to the portion of the flats, or land under the water, within the lines so drawn from the extremities of his portion of the said line to the extremities of his part of the shore. The general rule of division, therefore, is, as the whole shore line is to the whole line of navigability so is each one's share of the shore line to each one's share of the line of navigability. The lines so drawn will be parallel, or diverge, or converge, as the navigable water line happens to be equal and parallel with, or is longer, or shorter, than the shore line.⁹

In less arcane terms, the riparian zone extends from the shoreline to the river's line of navigability, the point where the river becomes deep enough to support watercraft. As long as camping platforms are located beyond the line of navigability, there should not be any interference with the riparian owner's right of access and right to wharf out.

Another consideration of the affect on riparian owners' rights would be the riparian owner's future rights to license a duck blind in front of his property. The legislature has given riparian owners the exclusive privilege of licensing blinds on their shoreline and a prior right of licensing blinds in public waters.¹⁰ Even if a permit for a camping platform is received from VRMC, the platform may have to be removed if a riparian owner re-asserts prior rights for a duck blind.

In addition to the effect on riparian rights, construction of a camping platform in navigable waters could also raise public trust concerns. The Virginia Constitution states:

To the end that the people have clean air, pure water, and the use and enjoyment for recreation of adequate public lands, waters, and other natural resources, it shall be the policy of the Commonwealth to conserve, develop, and utilize its natural resources, its public lands, and its historical sites and buildings. Further, it shall be the Commonwealth's policy to protect its atmosphere, lands, and waters from pollution, impairment, or destruction, for the benefit, enjoyment, and general welfare of the people of the Commonwealth.¹¹

Essentially, "the Public Trust Doctrine is the principle that the state holds the land lying beneath public waters as trustee for the benefit of all citizens. As trustee, the state is responsible for proper management of the resource to ensure the preservation and protection of all appropriate current and potential future uses, including potentially conflicting uses, by the public."¹² When deciding whether to grant permits, the VMRC is required to ensure that the

⁹ Groner v. Foster, 94 Va. 650, 652-653 (Va. 1897).

¹⁰ Exclusive privileges... "shall be recurrent each year even if the privileges were forfeited to some other person or persons in the preceding year." Va. Code Ann. § 29.1-347.

¹¹ Va. Const. Art. XI, § 1.

¹² Subaqueous Guidelines at 4.

project complies with the public trust doctrine.¹³ A camping platform could conflict with the public's use of a navigable waterway. Although the camping platforms in some ways would facilitate the public's use of the waterway for recreational purposes, they could interfere with waterfowl hunting. Under Virginia's public trust doctrine, the public has the right to fowl on public waters. The location of a camping platform could affect these rights. New blinds may not be licensed within 500 yards of an established blind. The location of a camping platform could prohibit the placement of a new blind if established blinds are located less than 500 yards away.

In conclusion, if planning a camping platform located in front of riparian property, especially the "riparian zone," it would be prudent to contact the riparian owner and obtain permission prior to submitting a permit to the VMRC. If the riparian owner does give permission, the camping platform permit would likely receive scrutiny from the VMRC to determine whether its construction would implicate public trust issues. Thank you for bringing your question to us. If you would like additional information, please let us know.

Sincerely,

/s/ Terra Bowling
Research Counsel, National Sea Grant Law Center

¹³ Va. Code Ann. § 28.2-1205.