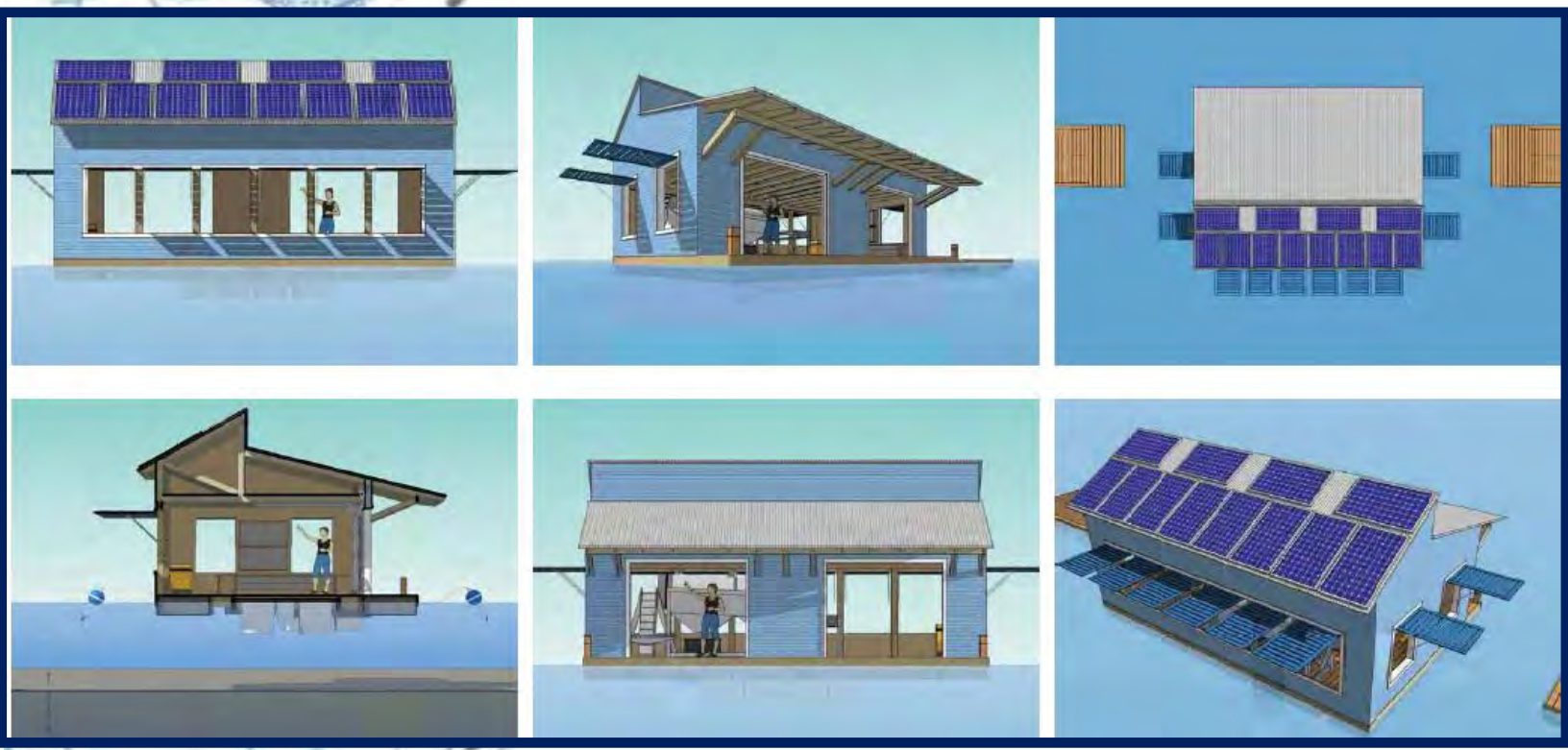

# FLOATING STRUCTURES:

## The Policy and Permitting Complexities



*This project research project, Task 53 was funded by the Virginia Coastal Zone Management Program at the Department of Environmental Quality through Grant #NA10NOS4190205 of the U.S. Department of Commerce, National Oceanic and Atmospheric Administration, under the Coastal Zone Management Act of 1972, as amended.*

*The views expressed herein are those of the authors and do not necessarily reflect the views of the U.S. Department of Commerce, NOAA, or any of its subagencies.*

MIDDLE PENINSULA
PLANNING DISTRICT COMMISSION

Virginia Coastal Zone
MANAGEMENT PROGRAM

NOAA
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION
U.S. DEPARTMENT OF COMMERCE

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## Executive Summary

As many coastal localities struggle with becoming less rural and more suburban, balancing growth, preserving coastal character, and encouraging and permitting new coastal uses predicated on innovative ideas, become more complex.

In summer 2012, Anderson's Neck, LLC submitted a Joint Permit Application (JPA) to Virginia Marine Resources Commission (VMRC) to establish an aquaculture business using an "Oysterplex" that would be used to harvest, clean, tag, and bag oysters in Morris Bay (King & Queen County). This Oysterplex was described by the applicant as "basically a barge with a building on it, walls, windows, doors, a roof, and solar panels on the roof to power upwellers."

In past efforts the Middle Peninsula Planning District Commission (MPPDC) staff assessed the policy implications of floating homes from a local government perspective (Virginia Coastal Zone Management Program Grant # NAOS4190466, Task 2.02). MPPDC staff considered the "use" of floating homes and focused on three specific classifications: (1) marina moorage, (2) private pier moorage, and (3) random moorage along waterfront moorage. As these categories encompassed the breathe of floating structures within the region at the time, with the proposal of the Anderson Neck's Oysterplexes that included two floating structures in open water used for commercial use rather than residential use, new permitting, regulatory and jurisdictional questions presented themselves to State and Local entities.

For this project (#NA10NOS4190205 Task 53) MPPDC staff worked to understand the permitting challenges and breakdowns of the Anderson's Neck project and explored ways to improve permitting processes for future innovative projects. To assist with gathering this information, MPPDC staff created a Floating Structures Committee that consisted of representatives from VMRC, Virginia Department of Health, Virginia Department of Housing and Community Development, and King & Queen County. Through extensive discussions with the Committee it became clear that each State entity has a very specific lens in which they consider a proposed project that is based on the agency's authority and mission. Nevertheless there were two questions consistently asked amongst these entities: (1) what is the location of the floating structure, and (2) what are the intended uses of the structure? As these questions typically guide the agency in the direction of remitting the proper permit(s), State agencies

advised that each submitted JPA project has unique details that are taken into consideration on a case-by-case basis.

As another outcome of working with Committee, communication was identified as an essential aspect of the permitting process that moves a project along in a timely manner. It was found that State entities need to work amongst each other as well as with local entities to provide a holistic solution to a proposed project. For instance, during the permitting of the Anderson's Neck project the JPA was received by the Local Wetland Board staffer at the County, it was reviewed and was found not to fall into the Board's jurisdiction. Although this satisfied the JPA's authorization needs from the Local Wetland Board, there were new and unanticipated local land-use implications that the King & Queen County Planning and Zoning Staff had to address. Thus communication between the Wetland Board staffer and the Planning and Zoning Staff would have improved efficiencies at the local level. Beyond this example, JPA applicants are encouraged to provide as much detailed information about the project and the proposed business plan to State and Local entities. This will assist entities with their permitting decisions. If information changes through the permitting process, this may alter the permitting course of the project and/or delay project altogether.

The Anderson's Neck Oysterplex project proved to be challenging, and as the scale and intensity of aquaculture technology and water uses change, localities across the coastal zone as well as State agencies will continue to face complicated policy questions and permitting options. While localities may need to acknowledge their jurisdiction over water and/or even consider zoning over water, which is consistent with the 2011 Virginia Supreme Court ruling *JENNINGS v. BOARD OF SUPERVISORS OF NORTHUMBERLAND COUNTY,* State agencies may need to redefine traditional uses and their approach to projects. Regardless, however the permitting of Anderson's Neck pushed State and Local entities to think outside of their traditional box and work through the permitting process. Overall, each entity gained an experience that will be a reference for the permitting of future projects.

## I. Introduction

Figure 1: Location of Anderson's Neck Aquaculture Business

Over the past decade, aquaculture has quickly become a mainstay within the Middle Peninsula regional economy. While traditional shellfish harvesting focused on wild populations from the State's public resources, new harvesting techniques are more intensive with shellfish aquaculture. Techniques have evolved from planting "shell on bottom" to contained practices that utilize cages, racks, and floats. As shellfish aquaculture supplements diminishing wild harvests, it also provides a strong source of revenue to local businesses. Therefore with increasing interest in shellfish aquaculture the industry is experiencing innovation and growth. However this innovation and creativity does not easily fit into current local and state permitting processes. This was particularly evident with the proposed Anderson's Neck Oyster Company project.

In 2012, Anderson's Neck, LLC submitted a Joint Permit Application (JPA) to establish an aquaculture business in Morris Bay (King & Queen County, Virginia) (Figure 1). As stated in the JPA:

> *The applicant proposed to establish an oyster nursery to grow native Crassostrea virginica from seed on approximately 64.5 acres of leased oyster grounds in Morris Bay on Poropotank Creek. The nursery is proposed to include a maximum of 6900 floating oyster cages attached to approximately 690 160-foot long lines spaced approximately 28 feet apart. The dimensions of the proposed cages are 4.5 foot long by 3 foot wide by 18 inches deep. Also proposed at two 28 foot by 20 foot enclosed floating structures containing 2 solar powered upwellers that will be moored by four mooring balls, as well as four stand-along 20-foot by 8 foot solar powered upweller platforms. Finally, approximately 500 off-bottom cages attached to approximately 50 long lines were proposed within 76 acres of leased oyster ground on the York River for the final Stages of grow-out of the Morris Bay oysters.* (Please see Appendix A for diagrams of the proposed project layout in Morris Bay)

Besides establishing precedence on the western shore of Virginia due to the scale and intensity of the operation, this proposed project entailed two floating structures, called Oysterplexes. An Oysterplex, as described during the VMRC public hearing, is basically a barge with a building on it. It has walls, windows, doors, a roof, and solar panels on the roof that power the upwellers (Figure 2). There is a work area inside the structure to grade, wash, tag, and bag oysters. This custom design was the first of its kind to be presented to Virginia State and Local entities and was difficult to define in the traditional regulatory paradigm.

**Figure 2: Photos of Oysterplex in Morris Bay.**

With funding through the Virginia Coastal Zone Management Program, Middle Peninsula Planning District Commission (MPPDC) staff explored the permitting and policy issues experienced with the proposed Anderson's Neck Oysterplexes and how current processes may be improved for future innovative applicants. More specifically MPPDC staff focused on three specific aspects of permitting the Anderson's Neck project:

1. **Lessons Learned**: What permitting issues and process breakdowns were encountered with the proposal of the Oysterplex? How can these breakdowns be avoided in the future?

2. **Agency Roles and Responsibilities**: With the creation of a **Floating Structures Committee**, consisting of State and Local entities, what were/are the roles and responsibilities of State and local entities regarding the permitting of Oysterplex and similar floating structures in the future.

3. Through the **Joint Permit Application** process, are there opportunities to inform a locality's planning and zoning administrator of JPA projects that involve land use decisions (ie. zoning, septic pump and haul permitting)?

## II. Lessons Learned (Product #1)

The Standard Joint Permit Application (JPA) is used for most commercial and/or non-commercial projects involving waters, wetlands and/or dunes, and beaches in Virginia that requires review and/or authorization by local wetland boards, the Virginia Marine Resources Commission (VMRC), the Department of Environmental Quality (DEQ), and/or the US Army Corps of Engineers (USACE). When a JPA is complete, the applicant submits it to VMRC, who then electronically transmits it to the regulatory agencies involved in the JPA process. Each entity conducts a separate but concurrent review of the application. Upon review of the JPA, each agency issues a separate permit, or provides notification that no permit is required for the project. Once an applicant receives all necessary authorization, or documentation, then the proposed work may begin.

In the case of Anderson's Neck JPA submission in August 2012, VMRC transmitted this application to DEQ, USACE, and King and Queen County's Wetland Board, as prescribed. However due to the scale and nature of the proposed project VMRC project managers recognized the uniqueness of this project and organized a meeting to review the proposed scope with State and Local entities involved and ancillary to the typical JPA process. At the meeting there was representation from VMRC, USACE, U.S. Coast Guard, Virginia Department of Health (VDH), Virginia Institute of Marine Sciences (VIMS), King & Queen County Planning Staff, Local Law Enforcement, MPPDC staff, and Mr. Hild, Owner of Anderson's Neck, LLC. Meeting participants discussed all aspects of the project including the project's scale, location, navigation issues, law enforcement needs, and sanitation concerns. The overall outcome of this meeting was the need for the proposed project to be downsized. Specific factors influencing this decision were the possible exclusion of existing fisheries (ie. crab potters and gill netters), navigation concerns, as well as the biological capacity of Morris Bay. As a result Mr. Hild downsized this project to 1670 OysterGro floats attached to 138 longlines, 2 Moored Oysterplexes, and 4 floating upwellers. This downsized scope was eventually approved and permitted by VMRC.

While the overall permitting timeline of Anderson's Necks project (refer to project timeline on right) was consistent with the average project, there were new questions and considerations presented that stalled the permitting action from some agencies. For instance initial obstacles for State and Local entities, including:

1. VDH struggled to offer timely solutions to sanitation concerns;

2. VDH, VRMC, and King &Queen found themselves in a position where traditional rules and polices did not exactly address Aquaculture, more specifically an Oysterplex (floating building/vessel/barge) that could accommodate approximately ten workers to clean, bag, and tag oysters;

3. VDH, VRMC, and King &Queen all indicated administrative support for the project, but each entity had a hard time identifying how exactly to permit such an operation quickly, fairly, and appropriately; and

4. King & Queen County zoning did not address the land and water use aspects of such a large scale oyster operation. In order for VMRC to issue a permit, local government must indicate that the project is consistent with local zoning.

To understand State and Local entity roles in the permitting of Anderson's Neck project, MPPDC staff conducted research, held individual interviews with entities, and then organized a Floating Structures Committee. Through research and interviews, MPPDC staff developed a matrix to demonstrate the State and Local entities involvement in the Anderson's Neck JPA permitting process, the authorities/missions of each entity, and how each entity approached the project (Table 1).

**PROJECT TIMELINE:**

8/7/2012- USACE, Norfolk District, Public Notice for Anderson's Neck Project was announced.

9/12/2012 – Modification to the original JPA (ie. cage number reduction, navigation, crop rotation, danger buoys and slow flashing lights); Hurricane plan submitted to VMRC; Sanitation concern persisted

11/2012- Discussions of sanitation on the Oysterplex continue; External floating port-a-potty proposed. This option lack local support.

12/2012 – VMRC permit hearing; Additional sanitation options provided by VDH.

1/4/2013 – Mr. Hild assessed sanitation options and decided to modify design to accommodate an externally accessible bathroom and the mobile/hearted hand washing station. King & Queen submitted application to VDH for Pump and Haul permit.

1/8/2013 – Revised drawings for Oysterplex to have additional space for solar panels, equipment, materials, etc to power electrical heated hand washing stations.

2/21/2013 – King Rental's agreement signed by Mr. Hild to rent a portable toilet with a service schedule of once per month.

2/25/2013 – KQ received the Permanent Pump and Haul Agreement and General Permit from the VDH to empty the grey/black water from the mobile marine toilet/hand-washing tank in the Anderson Necks land based port-a-john.

2/26/2013 – Bond ($150) for permanent pump and haul received by the King & Queen.

Table 1:

# **Joint Permit Application** for the "Oysterplex"

*In summer 2012, Anderson's Neck LCC submitted an application to establish an aquaculture business that included an "Oysterplex" to grow native Crassostrea virginica in Morris Bay (King & Queen County, VA). This diagram demonstrates the number of agencies involved in permitting this floating structure, their role, and approach to permitting.*

### Virginia Marine Resources Commission

Responsible for activities on State-wide submerged lands, tidal wetlands, and dunes/beaches:
Code of Virginia Title 28.2, Chapters 12, 13, and 14

•Concerned with:
1. Public Trust
2. Carrying capacity of the river/bay
3. Navigation

•Distributed a copy of the JPA and original plan copies submitted by Mr. Hild to the other regulatory agencies involved in the JPA process (ie. DEQ, Local Wetland Board, USACE). Also engaged other appropriate agencies and stakeholders to move this project forward

•Visited and accessed location of proposed project; considered how reasonable it was to have this structure where it was proposed.

•Held public hearing (Dec 2012); collected public comment.

•Collected $3,870.42 in royalties and required a $25,000 bond for removal of structures if left or if damaged.

### Department of Environmental Quality

Responsible for activities in State Waters and wetlands:
Section 404 of the Clean Water Act (33 U.S.C. §1341);
State Water Control Law (Code of Virginia Title 62.1) ;
VAC Regulations 9VAC25-210 et seq., 9 VAC25-660 et seq., 9VAC25-670 et. seq., 9VAC25-680 et seq., and 9VAC25-690 et seq.

•Concerned with those activities requiring a Virginia Water Protection (VWP) permit including dredging, filling, or discharging any pollutant.

• It was determined that a VWP permit was not required

### Local Wetlands Board (King & Queen Co.)

Responsible for activities in tidal wetland and dunes/beaches:
Code of Virginia Title 28.2, Chapters 13 and 14

•It was determined by the KQ Environmental Compliance Code office that the Wetland Board did not need to hear this application as the proposed project did not fall into their jurisdiction.

### US Army Corps of Engineers

Regulates activities in waters of the US including wetlands:
Section 404 of the Clean Water Act (33 U.S.C. §1344);
Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. §403);
Section 103 of the Marine Protection Research and Sanctuaries Act of 1972 (33 U.S.C. §1413)

•Concerned with navigation based on the number of proposed cages and the location of the operation within the navigable water channel.

•Required an Regional General Permit.

•Required a Hurricane Plan which would help to ensure public safety for clean up of Oysterplex and/or cages after a storm.

### US Coast Guard

Ensures the safety, security and stewardship of the Nation's Waters:
Title 6 of US Code

•Concerned with navigation and safety of the public.

•Made sure that the mooring buoys are were properly marked according to the International Association of Marine Aids to Navigation and Lighthouse Authorities (IALA) Maritime Buoyage System.

### Virginia Department of Health (ie. Division of Shellfish Sanitation, and Onsite Sewage and Water Services)

Promote and protect the health of all Virginians: VAC AGENCY NO. 5

•Determined that this "Oysterplex" was a floating building and a place of employment.

•Due to the intended uses of the Oysterplex a bathroom externally accessible with a mobile marine toilet and mobile heated hand washing station was required on the Oysterplex.

•Required King & Queen enter into a permanent pump and haul contract with the State Health Commissioner. The Commissioner then issued a single permanent pump and haul general permit to the Board of Supervisors of King & Queen County.

### Virginia Institute of Marine Science

a three-part mission to conduct interdisciplinary research in coastal ocean and estuarine science, educate students and citizens, and provide advisory service to policy makers, industry, and the public:
Code of Virginia § 28.2-1100

•Concerned with ecologic impacts.

•Asked to calculate the carrying capacity of Morris Bay. Based on the initially proposed scale of the Anderson Neck operation, that covered 34% of Morris Bay and included 6900 floating oyster cages, it was determined that there was only enough phytoplankton in this shallow water to host 1.5-3.75 million oysters (i.e. 670 floats).

### King & Queen County

Board of Supervisors: acts as a legislative committee and appoints a County Administrator to act as a full time executive officer directly responsible to the Board of Supervisors to execute county functions under the direction and guidance of the Board.
Planning Department: responsible for protecting King & Queen natural resources and quality of life through sound land use development practices

• Planning Dept: Concerned with zoning and associated ordinances; Amended zoning ordinance by adding aquaculture and a definition

• Board of Supervisors applied to the State Health Commissioner for a Permanente Pump and Haul General Permit. BOS received the permit which authorized to provide Mr. Hild with a pump and haul permit that would deal with grey/black water from the mobile marine toilet/hand-washing tank on the Oysterplex..

•Required cash bond of $150 associated with the permanent pump and haul permit.

### Middle Peninsula Planning District Commission

promote the orderly and efficient development of the physical, social and economic elements of the district by planning, and encouraging and assisting localities to plan, for the future.

•Coordinated with participating agencies and Mr. Hild to understand the obstacles that were slowing down the permitting process.

•After some thought questions persisted: (a) Does this "thing" trigger uniform building code (UBC) construction standards? (b) do maritime construction standard trump UBC? (c) is this structure taxed?

### Virginia Department of Housing and Community Development

committed to creating safe, affordable, and prosperous communities to live, work and do business in Virginia. Regulates Virginia's building and fire codes, provides training and certification for building officials, and invests into housing and community development projects throughout the state

*Outstanding questions:*
*•Does USBC regulate a structure of this nature?*

*•Who would issue permits and perform inspections?*

*•Does this structure have an onboard engine or would it be towed like a barge?*

*•Who is the manufacturer of the structure?*

*•Does this structure have holding tank, and if so, what gallon capacity?*

*•Is it safe o assume that utilities (electrical, fresh water, water pressure, etc.) necessary to operate this facility are self-contained?*

**KEY**

- Entities involved in prescribed JPA process for projects involving water, wetlands and dune/beach resources
- Entities that became involved due to the scope of the project
- Authority or Mission
- Ancillary entity not considered relevant at the time of the proposal, but was later involved
- Role in Oysterplex Proposal

Once this matrix was developed, MPPDC staff hosted a Floating Structures Committee meeting to gain more information. From discussions it became clear that each State agency has a very specific lens in which they consider a proposed project that is based on the agency's authority and mission. However there were two questions consistently asked amongst the entities: (1) what is the location of this floating structure, and (2) what are the intended uses of the structure? Table 2 provides an overview of the agencies involved in the permitting of the Oysterplex and how they address the two questions above to decide how the Oysterplex would be permitted.

***VDH Focus***

Figure 3: Cucumber Picker

Over the course of approximately seven months, there were several attempts by VDH to deal with sanitation on the Oysterplex. Initially, Mr. Hild compared this oysterplex operation to a cucumber harvesting operation (Figure 3). Workers would complete a service on the farm equipment (ie. 'picking' oysters) and leave. However based on the use, size, and design of the Oysterplex, VDH considered the floating structure a place of employment that needed proper sanitation. VDH argued that Oysterplex workers would be a 2-3 mile boat ride away from a land-base restroom and since they would be working directly over oyster beds, proper sanitation would be required. To address the sanitation issue, VDH requested a toilet and a hand washing facility. In response, Mr. Hild designed a portable toilet with hand washing facility that would be secured to a floating barge (Figure 4). After much discussion between VDH and King & Queen County this "floating porta-potti" was not desirable as the potential for polluting local waters was high. Thus, VDH offered two additional options:

1. Put an externally accessible bathroom on the Oysterplex with a mobile marine toilet and mobile heated hand washing station.

2. Put a mobile heated hand-washing station on the Oysterplex with a mobile marine toilet on a boat.

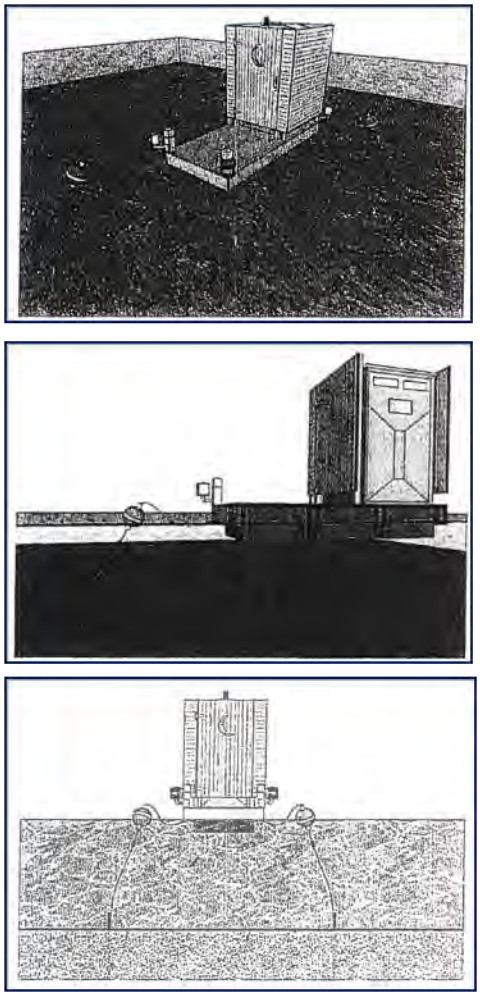


Figure 4: Portable toilet with hand washing facility that would be secured to a floating barge. Designs submitted by Anderson's Neck Oyster Company.

Given the power requirements to heat a mobile hand-washing station, Mr. Hild chose Option 1 and modified the Oysterplex design to accommodate an externally accessible bathroom and incremental batteries, solar panels, and equipment to power the mobile/heated hand-washing station. In addition to the mobile marine toilet and mobile heated hand-washing station, a permanent pump and haul permit to dispose of grey/black water from the Oysterplex was required. This meant that King and Queen County Board of Supervisors had to submit an application and enter into an agreement with the Board of Health to administer a pump and haul permit to Anderson's Neck land-based port-a-potty. Since the adoption of the Sewage Handling and Disposal Regulations (Regulations) in 1982, each individual application for permanent pump and haul is processed through the central office with the State Health Commissioner and the local governing entity entering into an agreement (contract) for each individual site. Once the locality enters into this agreement with the Board of Health, the locality may continue to add facilities to their general permit.

Due to VDH's delay in resolving the sanitation concerns, this ultimately delayed King and Queen County to enter into a permanent pump and haul general permit agreement with the Board of Health. It is important to mention the VMRC does not remit its permits without proper VDH permits and indication from local government that it is consistent with local zoning.

Essentially the lesson learned from this project is that communication is critical throughout the permitting process. State entities need to work amongst each other as well as with local entities to provide a holistic solution to the proposed project. For instance, earlier communication and involvement of King and Queen Local Staff could have assisted with more

timely verification and consistency with local ordinances (ie. zoning) and policies. Additionally applicants are encouraged to provide as much detailed information about the project and the proposed business plan. This will assist State and Local entities with their permitting decisions. If information changes during the permitting process, this may alter the permitting course of the project and/or delay the project altogether. Finally, the overall experience that this project gave to State and Local entities was priceless and will influence and assist in the permitting of future projects.

Table 2: How intended uses and locations of floating structures influence State and Local entity decisions.

| AGENCY/ENTITY | USE of floating structure | LOCATION of floating structure | CONCLUSION | HOW CHANGES TO THE PROPOSED BUSINESS PLAN WOULD IMPACT PERMIT REMISSION? |
|---|---|---|---|---|
| **Virginia Marine Resource Commission** | Non-water dependent use; cleaning, bagging, and tagging oysters; no oyster processing occurring on the structure | Fixed structure in the middle of Morris Bay.<br><br>Where is the structure located in proximity to the applicants land? Is it reasonable to have this structure located where it is proposed? Does the applicant have the support of adjacent riparian land owners? | This is a non-water dependent and fixed structure. The scale of the operation may exclude current fisheries in Morris Bay; there may be navigation issues; and the biological carrying capacity is concern. Therefore the initially proposed project needed to be downsized.<br><br>Does the applicant have the support of adjacent riparian land owners? Yes, there was one letter of support that was enough to issue a permit for this project. | **Does the applicant have the support of adjacent riparian land owners?** *As part of the JPA there is an option to include a signed Adjacent Property Owner Acknowledgment Form and comments about the project at hand. If adjacent property owners are opposed then the project is less likely to be approved.*<br><br>**What is the proximity of the proposed operation/floating structure to leased grounds? Is this project reasonable?** *If the applicant's land was in closer proximity to the leased oyster grounds, VMRC may not have permitted the structure since proposed activity on the Oysterplex could have been more easily managed on land rather than over water. Please note each proposed project will be assessed on an individual basis.* |
| **Virginia Department of Environmental Quality** | Will the grading, tagging, and bagging impact water quality? NO | Will the grading, tagging, and bagging over water impact water quality impact water quality? NO | Determined that there would be no impact to water quality based on the proposed uses of the operation and therefore a Virginia Water Protection permit would not be required. | *If the project concerned dredging, filling or discharging of any pollutant into Virginia water then a Virginia Water Protection permit would be needed.* |
| **Local Wetland Board** | Will the grading, tagging, and bagging impact local wetlands? NO | Will the grading, tagging, and bagging over impact local wetlands? NO | King & Queen County Wetland Board Staff determined that this project would not impact wetlands and not need to be considered by the Wetlands Board. | |
| **US Army Corps of Engineers** | Not a factor | Located within a navigable waterway and may impact public safety | Required an Individual Permit;<br>Required a Hurricane Plan which would help to ensure public safety for cleanup if and when storm damage would occur. | |
| **US Coast Guard** | Not a factor | Located within a navigable waterway and may impacts public safety | Moored structures and bouyes need to be properly marked according to the International Association of Marine Aids to Navigation and Lighthouse Authorities (IALA) Maritime Buoyage System. | |
| **Virginia Department of Health** | | | | |
| *Division of Shellfish Sanitation* | Washing, seeding, and transplanting oysters | Floating structure and work area are located directly over the oyster beds. Thus, will this operation cause additional closures or condemnations? Or will it impact the oyster products to be sold? | Determined that this operation would not cause additional closures, condemnations or would it impact the oysters. | If the establishment began to store, process, pack, or repack oyster then the applicant would need to obtain a Certificate of Inspection (12VAC5-150) |
| *Local Health District/Onsite* | A place of work | Location is 2-3 miles from land-based restroom; restrooms are not easily accessible. | Required a bathroom externally accessible with a mobile marine toilet and mobile heated hand washing station on the Oysterplex.<br><br>Required King & Queen enter into a permanent pump and haul contract with the State Health Commissioner. The Commission then issued a single permanent pump and haul general permit to Board of Supervisors of KQ County. | If the Oysterplex becomes a "vessel" the VDH Marina Program would get involved as it deals with vessels, sewage and holding tanks etc. |

| AGENCY/ENTITY | USE of floating structure | LOCATION of floating structure | CONCLUSION | HOW CHANGES TO THE PROPOSED BUSINESS PLAN WOULD IMPACT PERMIT REMISSION? |
|---|---|---|---|---|
| **Virginia Institute of Marine Science** | Not a factor | The size of the operation (ie. number of floats, oysterplexes) and impacts to the ecology of the location; What is the carrying capacity of the location/body of water? | Calculated the carrying capacity of Morris Bay and based it was determined that there was only enough phytoplankton in the shallow water to host 1.5-3.75 million oysters rather than the 69 million initially proposed. The number of oyster floats was reduced from 6900 to 1670. | |
| **Virginia Department of Housing and Community Services** | Operation is seasonal and currently involves several employees working on the floating structure tending oyster beds from seeding and monitoring to some harvesting | Floating over water | "This specific floating work station is deemed to be a farm building/structure, thus it is not regulated by the either the USBC or IBSR nor is required to obtain a building permit." | If this structure were to be placed on land, land zoning ordinances would need to be met. Currently Middle Peninsula locality do not zone over water. |
| **Virginia Department of Labor and Industry** | If there are employees (1-more), OSHA/VOSH standards need to be meet | Not a factor | As the Virginia Department of Labor and Industry administers Virginia Occupational Safety and Health (VOSH) Program and enforces OSHA (Occupational Safety and Health Administration), both standards play a role in the activity that occurs on the structure. While OSHA/VOSH does not regulate structures, OSHA/VOSH standards apply to employees working in the structure once the operation is initiated. | The Virginia Employment Commission's involvement may be needed if migrant workers are employed. |

## III. Floating Structures Committee (Product #2)

On July 31, 2013, MPPDC staff organized and hosted a Floating Structures Committee to guide the discussion regarding the Anderson's Neck Oysterplex project and approaches to permitting this project. Committee members included representatives from VMRC, VDH-Division of Onsite Sewage, VDH – Division of Shellfish Sanitation, Virginia Department of Housing and Community Services (VDHCD), Virginia Coastal Zone Management Program, and King and Queen County. *Please see meeting agenda, minutes and presentation in Appendix B*.

From this meeting it was found that as each State agency has a very specific lens in which they consider a proposed project. However there are two questions consistently asked amongst the entities: (1) what is the location of the floating structure, and (2) what are the intended uses of the structure? As mentioned above, Table 2 provides an overview of the agencies involved in the permitting of the Oysterplex and how they addressed the two questions.

Additionally, although not initially involved with the permitting of the Oysterplex, Virginia Department of Housing and Community Development (DHCD) was brought into the floating structures discussion as building and zoning permit and construction standard questions persisted. As DHCD was involved in the Floating Structures Committee, they provide valuable insight into the classification of this structure from their agency's prescriptive. Following the meeting, DHCD provided MPPDC staff will a Memorandum (Appendix C) stating the agency's position on this floating structure: "this specific floating work station is deemed to be a farm building/structure, thus it is not regulated by the either the USBC [Virginia Uniform Statewide Building Code] or IBSR [Industrialized Building Safety Regulations] nor is required to obtain a building permit." The Memorandum also states that, "our agency will advise local building department that there is not a building permit required for this building/structure serving what is an essential farming operation." Please note that while the State takes this position on this floating structure, local zoning ordinances still need to be adhered to. The irony is that current zoning ordinances within all Middle Peninsula localities do not consider zoning over water and several localities do not recognize jurisdiction over water within the comprehensive plan. Moreover, since King & Queen County had to issue a pump and haul

permit for the Anderson's Neck project the locality needed to recognize its jurisdiction over water. If not, the permit would not have been valid. With the 2011 ruling of the *JENNINGS v. BOARD OF SUPERVISORS OF NORTHUMBERLAND COUNTY* Virginia Supreme Court case, it affirms that localities do have zoning authority over water within their jurisdiction.

## IV. Standard Joint Permit Application (Product #3)

During the Anderson's Neck JPA permitting process, the JPA was received by the King and Queen County Local Wetland Board staffer. This staffer reviewed the application and determined that the project did not to fall into the Board's jurisdiction. Although this satisfied the JPA's authorization needs from the Local Wetland Board, there were new and unanticipated local land-use implications that the King and Queen County Planning and Zoning Staff had to address.

At the time in which the project was introduced to King and Queen County, aquaculture was not defined or considered in their County zoning ordinances. With currently no formal mechanism(s) to inform county planning and zoning staff of projects through the JPA process, King and Queen County Planning and Zoning staff had to quickly react and respond to the needed land-use ordinance changes. Although the County was able make the necessary zoning amendments, MPPDC staff found that there is an opportunity to involve county planning and zoning staff earlier in the process. As previously stated the JPA is transmitted from VMRC to the Local Wetlands Board. The King and Queen County Wetlands Board is a five member body, appointed by the Board of Supervisors, responsible for the review of requests for permits for the alteration, development, or use of wetlands. Like most local wetland boards the County will staff the Board as an advisor. This staffer will review the JPA to identify whether or not the Board needs to hear or take action on the proposed project. Therefore when that local staffer receives the JPA for review, this staff needs to have knowledge of local land use concerns and regulations in order to bring the proposed project to the attention of the local planning and zoning staff. With an internal agreement between the planning and zoning staff and the wetlands board staffer, the JPA project may be thoroughly reviewed for wetland and other land

use issues. Additionally, VMRC has list of local contacts that they disseminate the JPA to, thus if a locality wants to verify or change the local point-of-contact, VMRC should be contacted.

JPA applicants are also encouraged to contact their local planning departments early in project development. This may assist local staff in assessing the county's policies and will provide time for the locality in proactively address concerns or issues.

## V. Conclusions

As the scale and intensity of aquaculture technology changes, localities across the coastal zone, and in particular the Middle Peninsula, as well as State agencies are faced with considering complicated policy changes and permitting options to keep pace with such advances. With the experience of permitting Anderson's Neck Oysterplex project, State and Local agencies had to make permitting and policy decisions that did not necessarily fit into their traditional paradigm. However as they worked through the permitting process, State and Local entities acquired an experience that may be used a reference when permitting future innovative projects.

**Project Findings:**

1. Virginia Department of Housing and Community development drafted a policy memorandum stating their position: "this specific floating work station is deemed to be a farm building/structure, this is not regulated d by the either USBC [Virginia Uniform Statewide Building Code] or IBSR [Industrialized Building Safety Regulations] nor is required to obtain a building permit." However, "local zoning ordinances need to be met as well as state regulations dealing with health regulations; DOLI/VOSH regulations; applicable provisions of DEQ regulation; the Marine Resource Commission's permitting processes; and there could even be the Virginia Employment Commission's involvement for migrant workers."

2. County staff of Local Wetland Boards should have the education/experience to identify when a JPA project has local land use implication and needs the attention of the planning and zoning administrator. An internal agreement should be established between planning/zoning staff and wetland board staff in order to address both wetland and land-use (ie. zoning) implications of a project.

3. VMRC has a list of local contacts that they disseminate the JPA to, therefore if a locality wants to verify, change, or add a local point of contact, contact VMRC.

4. Communication is essential to move a project along. State entities need to work amongst each other as well as with local entities to provide a holistic solution to the proposed project. Additionally applicants should be encouraged to provide as much detailed information about the project and the proposed business plan. This will assist State and Local entities with their permitting decisions. If information changes through the permitting process, this may alter the permitting course of the project and/or delay the project altogether.

5. Localities may need/want to consider addressing zoning over water as the intensity of uses change; particularly as current zoning ordinances in the Middle Peninsula are silent on this issue.

## VI. Legal Actions

In recent years there have been a handful of court cases related to floating structures as well as State and Local jurisdiction over water which may influence how future projects are regulated or permitted. While the LOZMAN v. CITY OF RIVIERA BEACH may not have specific bearing on floating structures within Virginia, the *VIRGINIA MARINE RESOURCE COMMISSION v. CHICOTEAGUE INN AND RAYMOND BRITTON* may influence VMRC's jurisdiction on temporarily moored structures and associated permits in the future. Also in a 2011 Virginia Supreme Court ruling of *JENNINGS v. BOARD OF SUPERVISORS OF NORTHUMBERLAND COUNTY*, local government was deemed to have the authority to zone over water within the County's jurisdiction.

*JENNINGS v. BOARD OF SUPERVISORS OF NORTHUMBERLAND COUNTY*

*Mr. J*ohn L. Jennings, owns approximately 12.4 acres of real property in Northumberland County (the County), part of which fronts Cockrell's Creek, a tidal, navigable tributary of the Chesapeake Bay. He operates a business on this property known as "Jennings Boatyard Marina" (the Marina), "a commercial marina/boatyard with 45 mooring slips and accompanying piers." With interest in expanding his business with an additional of 45 mooring slips with piers, the marine design construction company submitted a special exception permit application on Jennings' behalf. The County's Board of Supervisors (BOS) initially tabled the application, and then after amendments to Mr. Jennings request, the BOS unanimously denied the special

exception permit. In response Mr. Jennings argued that only VMRC has authority to permit the placement of piers beyond the mean low-water mark and therefore the County lacked jurisdiction to regulate his project through its special exception permit process.

This case was heard by the Virginia Supreme Court and in 2011, and it was affirmed that localities have zoning authority over water within their jurisdiction. For the entire opinion of this case please see Appendix D.

*LOZMAN v. CITY OF RIVIERA BEACH, FLORIDA*

Mr. Lozman's floating home was a house-like plywood structure with empty bilge space underneath the main floor to keep it afloat. He had it towed several times before deciding on a marina owned by the City of Riviera Beach City. After various disputes with Mr. Lozman and unsuccessful effort to evict him from the marina, the City brought a federal lawsuit against the floating home, seeking a lien for dockage fees and damages for trespass. Mr. Lozmen moved to dismiss the suit. The district Court found the floating home to be a "vessel" under the Rules of Construction Act, which defines a "vessel" as including "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water," 1 U.S.C §3, concluding that admiralty jurisdiction was proper, and awarded the City dockage fees and nominal damages. The Eleventh Circuit affirmed, agreeing that the home was a "vessel" since it was "capable" of movement over water despite subjective intent to remain moored indefinitely.

However in an appeals case, it was determined that Mr. Lozman's floating home was not a §3 "vessel." The following was determined:

A. Based on the board definition of "transportation", the conveyance of persons or things from one place to another, the Eleventh Circuit did not apply the definition practically. Consequently, a structure does not fall within the scope of the statutory phrase unless a reasonable observer, looking to the home's physical characteristics and activities, would consider it designed to a practical degree for carrying people or things over water.
B. Except for the fact that the floating home floats, nothing about Lozman's home suggests that it was designed to transport persons or things over water. It had no steering mechanism, no capacity to generate or store electricity, and also lacked self propulsion.

C. The city Statue's language, read naturally, lends itself to interpretation which reveals little reason to classify floating homes a "vessels."
D. Several important arguments made by the City and its role in the court case were unavailing.
E. The City's additional argument that Lozman's floating home was actually used for transportation over water was unpersuasive.

For the entire Syllabus of this case from the Supreme Court of the United States please see Appendix E.

*VIRGINIA MARINE RESOURCE COMMISSION v. CHICOTEAGUE INN AND RAYMOND BRITTON*

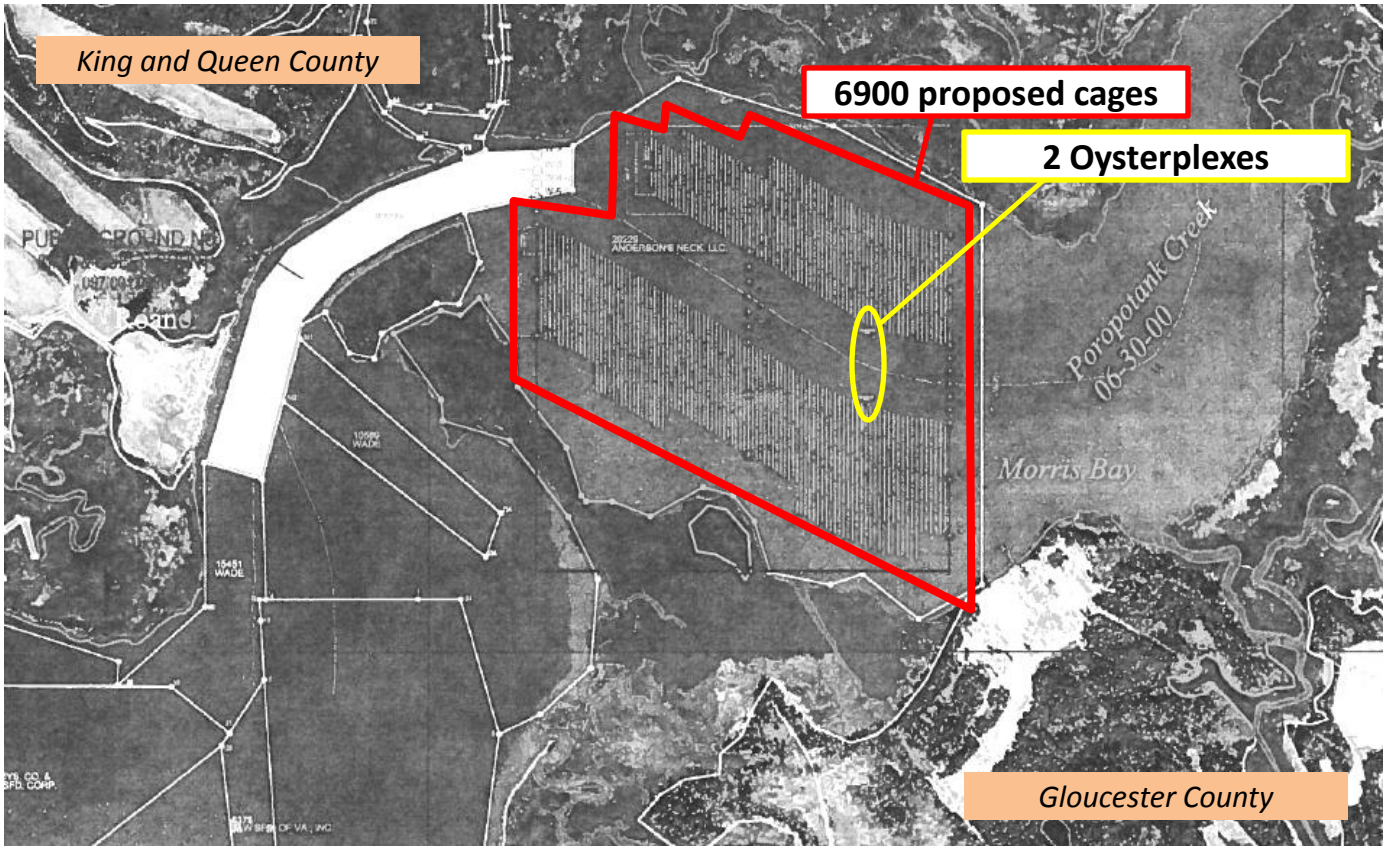
In 2010, Chincoteague Inn borrowed a barge from BIC, Inc., moored it to the dock outside of the Inn along the Chincoteague Channel, outfitted it with a new deck, tables and chairs and installed and connected the bard to shore power and water. The restaurant intended to use it for four months as additional seating for the restaurant. However later in 2010, Virginia Marine Resources Commission was notified the Inn's actions and conducted a site inspection. It was determined that part of the vessel/barge was over state owned subaqueous bottomland and did not have a permit. The VMRC requested that the Inn move the vessel and apply for the appropriate permits. The Chincoteague Inn objected and requested a hearing with VMRC. The VMRC ordered the portion of the platform over state-owned bottomlands removed. The Inn appealed, arguing that the VMRC did not have jurisdiction to regulate a temporarily docked vessel because the state's action was preempted by federal maritime law. The court agreed with the Inn. On appeal, the Virginia Court of Appeals reversed the decision, finding that federal law granted the VMRC jurisdiction over the vessel. However, the Virginia Court of Appeals granted the Inn a rehearing to determine if the VMRC had the authority to order removal of the vessel. The court found that it did not. "Although a portion of the vessel was temporarily moored over state-owned bottomlands, it was not unlawfully encroaching over the bottomlands such that it violated the rights of the people of the Commonwealth to use the bottomlands. Neither did it interfere with VMRC's management of state-owned bottomlands or fish and shellfish habitats." For the complete published opinion please see Appendix F.

VMRC has filed and was granted an appeals case with the Supreme Court of Virginia in September 2013. The case is expected to be heard late 2013 or early 2014. This will ultimately weigh in on VMRC's jurisdiction on temporarily moored structures and associated permits.

**APPENDIX A:**

**Preliminary Diagrams of Anderson's Neck Oyster Company in-water Operation**

# Preliminary Diagrams of Anderson's Neck Oyster Company in-water Operation




**APPENDIX B:**

**Floating Structure Committee Meeting Agenda and Minutes**

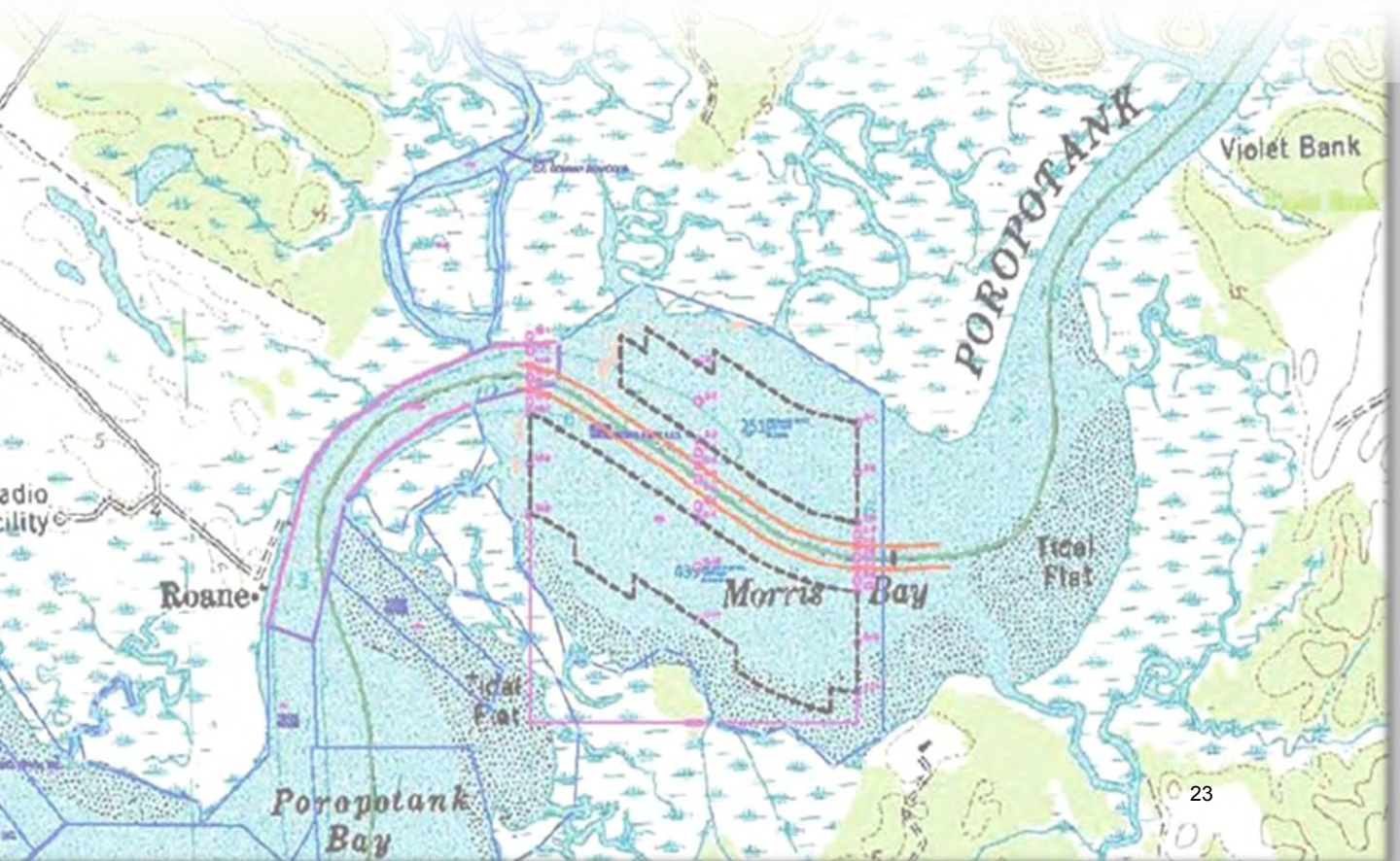
MIDDLE PENINSULA PLANNING DISTRICT COMMISSION

# Floating Structures Committee

Meeting 1
Saluda, VA
July 31, 2013 at 10am

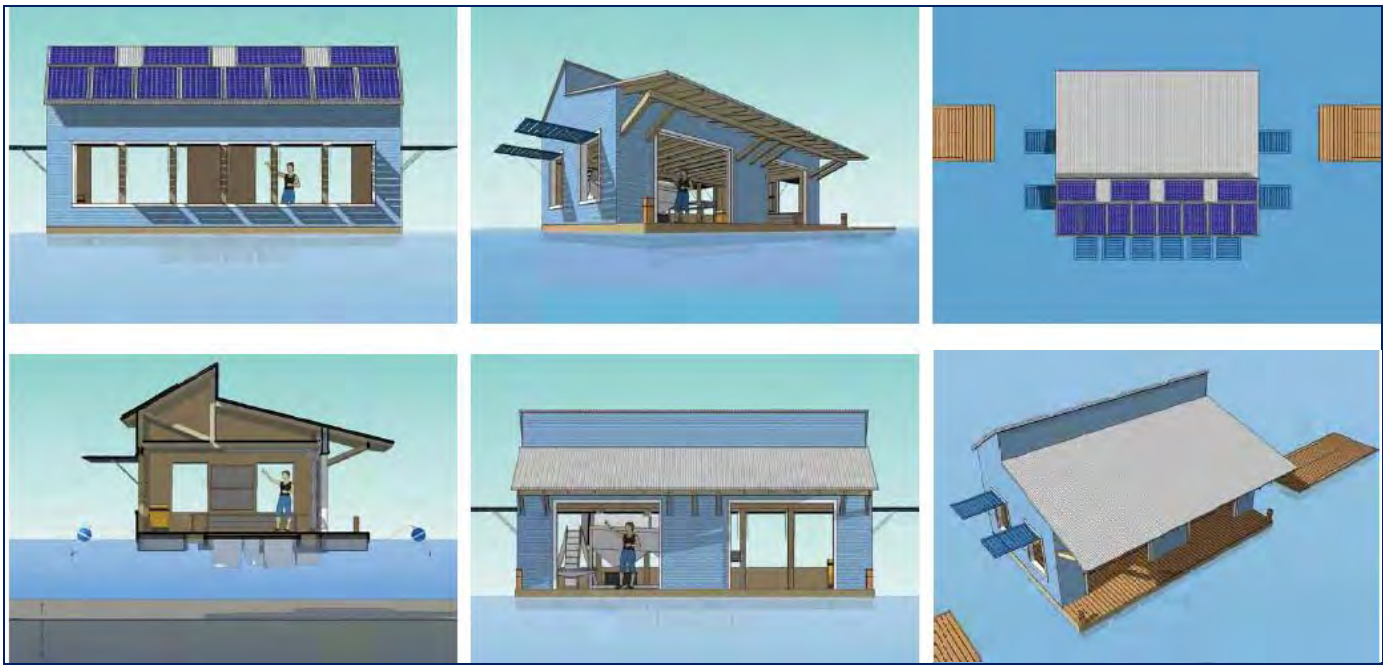
## AGENDA

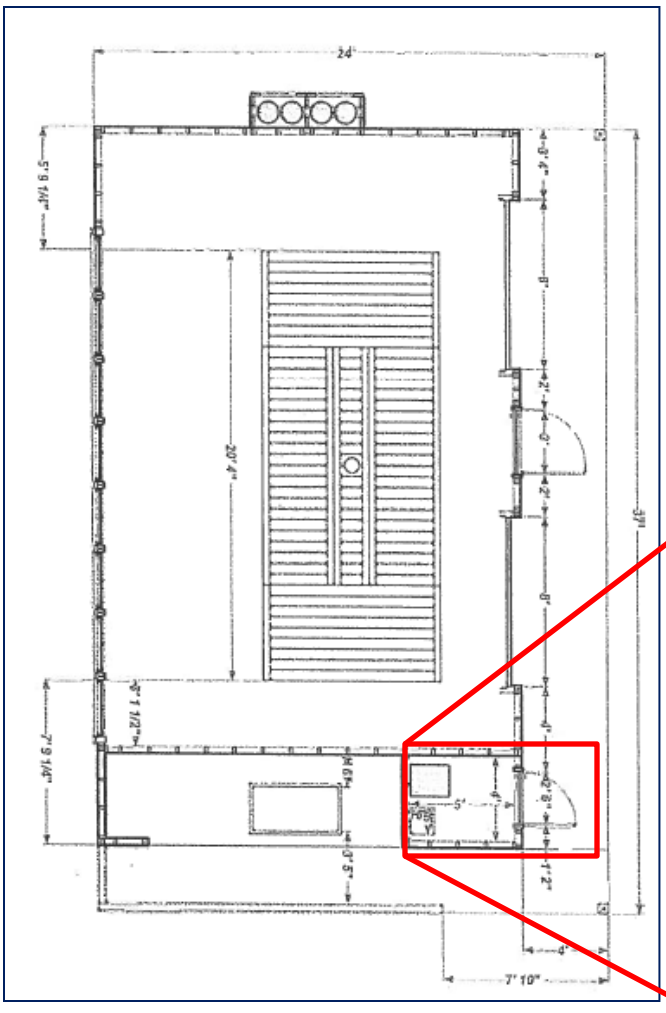
1. Welcome & Introductions
2. Background: Why are we here?
3. Discussion:
   a. What was your role in permitting the Oysterplex?
   b. Defining the Oysterplex
4. Next Steps / Adjourn meeting



# The Anderson Neck Oyster Company “Oysterplex”

*As proposed in the JPA (joint permit application) : two 28 ft by 20 ft enclosed floating structures containing 2 solar powered upwellers that will be moored by four mooring balls.*

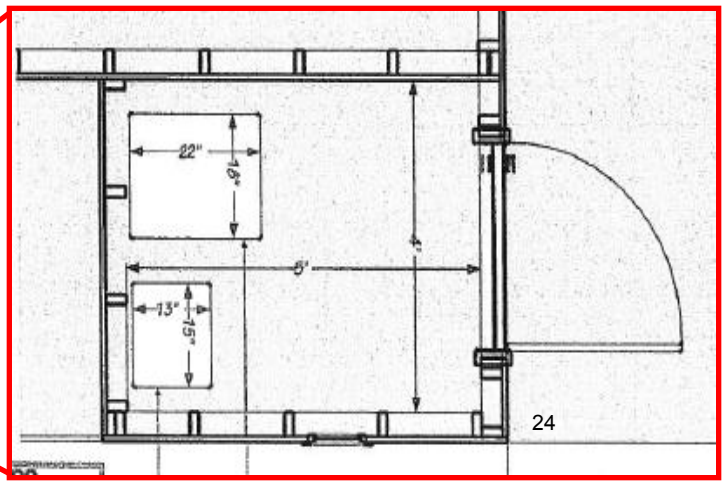





ABOVE: Various exterior views of the Oysterplex according to the initial proposal.

LEFT : Scale drawing of the Oysterplex. To meet VDH requirements a bathroom externally accessible with a mobile marine toilet and mobile heated hand washing station was included. This then required King and Queen County to submit an application to VDH for a pump and haul permit to empty the grey/black water from the mobile marine toilet/hand-washing tank on Anderson Neck’s land based portajohn.

BELOW: A zoomed-in look of the bathroom on the Oysterplex.



**Floating Structures Committee – Meeting 1**
Meeting Minutes
July 31, 2013

## 1. Welcome & Introductions

The first meeting of the Floating Structures Committee was held at the Middle Peninsula Planning District Commission (MPPDC) in Saluda, VA on Wednesday, July 31, 2013 at 10 am. Ms. Jackie Rickards, Regional Projects Planner II, welcomed those in attendance. Steering committee members in attendance were: Chip Neikirk (Virginia Marine Resource Commission (VMRC) Habitat Management); Randy Owen (VMRC Habitat Management); Tony Watkinson (VMRC Chief Habitat Management); Patrick Bolling (VDH); Preston Smith (VDH Marina Program Manager); Danielle Schools (VDH Marina Program); David Fridley (Local VDH Three Rivers District); Keith Skiles (VDH Division of Shellfish Sanitation Classification Chief); Jon Dickerson, (VDH Norfolk Shellfish Field Director); Emory Rodgers (Department of Housing and Community Development (DHCD) Deputy Director of Building and Fire Regulations) and Donna Sprouse (King and Queen County Environmental Compliance Department). Also in attendance were Lewie Lawrence, MPPDC Executive Director, and Beth Polak, Virginia Coastal Zone Management Program**.**

## 2. Background: Why are we here?

Ms. Rickards provided a brief presentation (see Attachment A) regarding the Anderson's Neck Oyster Company project proposal as well as a timeline of events. In July 2012, Virginia Marine Resources Commission received a joint permit application (JPA) from Mr. Hild, owner of Anderson's Neck Oyster Company. The original proposal included 6,000 floating cages for oyster propagation, 2 Oysterplexes (28ft x 20ft) moored to four mooring balls, and 4 stand alone solar powered upwellers. Due to the scale of this project VMRC worked with Virginia Institute of Marine Sciences (VIMS) to understand the carrying capacity of Morris Bay/Poropotank Creek where the project was propsed. Based on findings from VIMS scientific studies, it was determined that Morris Bay/Poropotank Creek would not have enough food for the 69 million oysters proposed to be grown in the Bay. Therefore, it was requested that Mr. Hild re-scaled his operation in September 2012. The operation was reduced in scale to include 1,000 floating cages and 2 Oysterplexes (28ft x 20ft) moored to four mooring balls, and 4 stand alone solar powered upwellers. Overall the scale dropped from 34% to 5% of the total footprint of Morris Bay. With the rescaling of the project, the issue of sanitation was the next piece of the puzzle.

Virginia Department of initially proposed an external floating protapotty to deal with sanitation on the Oysterplexes. However due to County Official concerns, VDH provided a second option which was executed. This option included an inxternally accessible bathroom on the oysterplex with a mobile marine toilet and mobile hearted hand washing station. With the sanitation device approved by VDH, VDH then required King and Queen County to apply to the State Health Commission for a permanent pump and haul permit in order to remove the grey/black water from the Oysterplex.

Mr. Lawrence explained that although the overall timeline of the project seemed concise there were a variety of permitting questions and obstacles along the way. Mr. Lawrence asked the committee if they believed that there were opportunities to improve this permitting process to make it easier for constituents in the future to obtain permits.

## 3. Discussion:

The following are note from the meeting separated by agency -

*VMRC:*

- *Before the JPA application was submitted, VMRC recognized the need to meet will all agencies that would involved due to the original proposed scale of the Anderson Neck Oyster operation. VMRC organized Virginia Institute of Marine Science, Virginia Department of Health, US Army Corps of Engineers, US Coast Guard, and King & Queen County. At the initial meeting this project was introduced.*
- *Due to the scale of this operation VMRC requested the VIMS conduct an ecological survey of Morris Bay to determine the carrying capacity of the Bay and whether or not the Bay could support an operation this size.*
- *A permit is issued for the proposed project (ie. location and use). If the project changes then the applicant is expected to inform VMRC of the change. The project change could impact the type(s) of permits that are remitted.*
- *[Anderson Neck's] floating structure was considered a non-water dependent. Also it was a unique situation with the location of the land in reference to the leased land.*
    - *Question: Is it reasonable to have this structure in the location?*
- *Without the support of an adjacent land owner this project may not have been permitted.*

*Virginia Department of Health, Onsite:*

- The applicant explained the Oysterplex as farm equipment, like a cucumber picker (see picture to the right). However VDH did not agree, but considered it a place of work, which meant that it needed sanitation.

- This was not a vessel, but a place of work. Since there was a service being done on the Oysterplex and the design of the structure it was considered a place of employment that needed proper sanitation.
- Permanent pump and haul agreement with the locality

*VDH, Division of Shellfish Sanitation:*

- *Concerned with the sanitation of oysters, impact to growing area and impact to products being sold. Since this floating structure was proposed to be located over the oyster grounds, will this result in closure or contamination*
- *If the applicant is proposing to process, grade and pack oysters on the floating structure is not permit requirements, however if shucking occurs then a permit is required.*
- Safety classification of area – mitigate this as much as possible.

*Department of Housing and Community Development:*

- If not built on site then the Virginia Building Code does not apply
- The State Code exempts farm buildings
- Zoning is a controlling factor over land and water.

- What is the physical structure? Where are you placing it? What is the intended us? Who regulates it? And if the proposed project changes is the project subject to new/other regulations?

Therefore with these varying definitions it was determined that the use of this oysterplex was the determining factor for permitting this structure.

### a. Defining the Oysterplex:

As this was the first Oysterplex that any state agency has seen it was difficult to define it. The state agencies considered a two board factors when approaching the permitting of this structure including, location of the structure/operation and the intended uses of the structure. Although these were two board factors being considered, through discussions it was found that each State Agency still had different conclusions based on their agencies mission:

VMRC:

a. location of the structure/operation – Permanent structure over water
b. intended uses of the structure – non-water dependent uses
c. permitting outcome – regional permit 19

VDH – Onsite:

a. location of the structure/operation - a floating building
b. intended uses of the structure – place of employment
c. permitting outcome – need sanitation on structure and a permanent pump and haul permit with King and Queen County

VDH – Shellfish Sanitation:

a. location of the structure/operation – over oyster beds; does this operation result in additional closures or contamination?
b. intended uses of the structure – handling of shellfish (ie. grading, tagging, and bagging); shellfish are not being processed on this structure
c. permitting outcome – no permits required

DHCD:

a. location of the structure/operation – not relevant in permitting decision
b. intended uses of the structure – agriculture use
c. permitting outcome – Farm buildings exempt from building permits

**4. Next Steps/ Adjourn Meeting**

With the extensive amount of information provided at this meeting Ms. Rickards explained that additional research would take place and that information would be organized appropriately. Organized information will be emailed to the committee for review.

# Floating Structures

## The policy and permitting complexities

Middle Peninsula Planning District Commission
July 31, 2013

This presentation was funded by the Virginia Coastal Zone Management program at the Department of Environmental Quality through grant #NA10NOS4190205 Task 53 of the U.S. Department of Commerce, national Oceanic and Atmospheric Administration, under the Coastal Zone Management Act of 1972, as amended The views expressed herein are those of the authors and do not necessarily reflect the views of the U.S. Department of Commerce, NOAA, or any of its subagencies.

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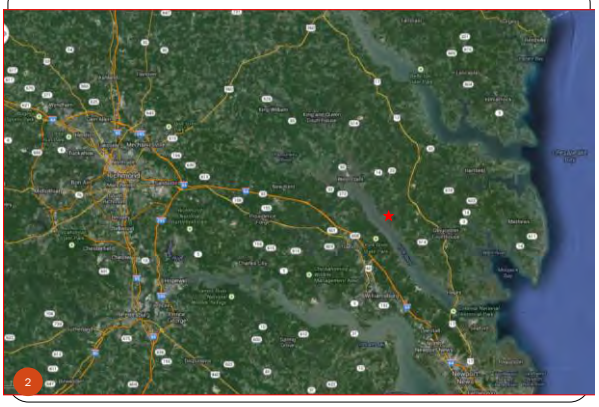

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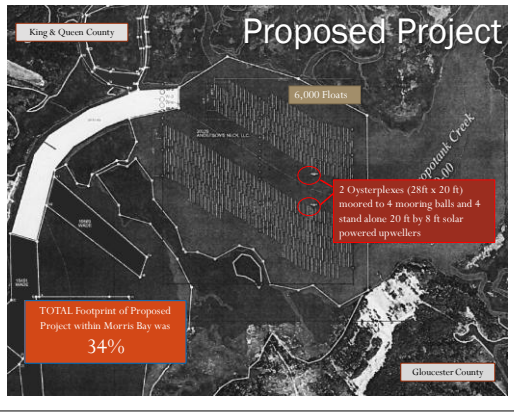


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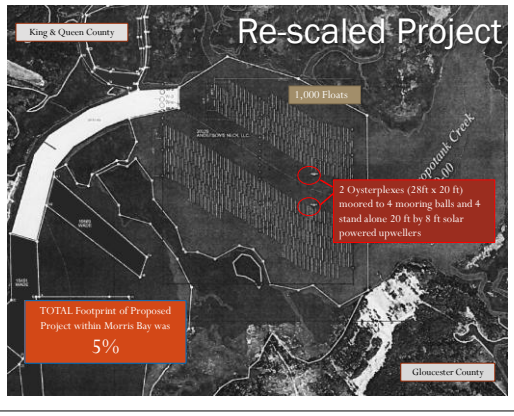


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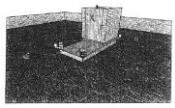
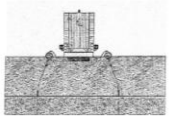
## VDH Options

November 2012:

-VDH requested a toilet with hand washing facility

- In response, Mr. Hild proposed a portable toil with hand washing capabilities that would be secured on a floating barge



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## More VDH Options

December 2012:

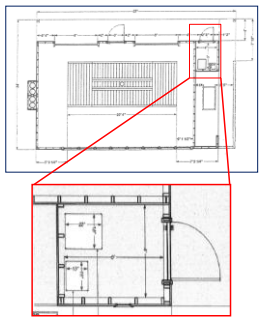
1. Put an externally accessible bathroom on the oysterplex with a mobile marine toilet and mobile heated hand washing station
2. Put a mobile heated hand-washing station on the oysterplex with a mobile marine toilet on our boat

6

## More VDH Options

January 2013:

2. Put a mobile heated hand-washing station on the oysterplex with a mobile marine toilet on our boat



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## Description/Definition of Oysterplex

- Anderson's Neck, LLC (Presentation to KQ BOS): equipment, essentially a floating barge on which we can grow seed and work oysters
- VMRC (Audio Notes 12/2012): "basically a barge with a building on it, walls, windows, doors, a roof, solar panels on the roof to power the upwellers"; has work area inside for workers to wash and tag oysters.
- VDH (per interview): floating building due to the fact it was a place of employment

8

## Anderson's Neck Oyster Company

- Submitted JPA in July 2012
  - August 7, 2012 : USACE issued a public notice for proposed project , Comments were due September 10, 2012
  - September 2012 – Mr. Hild made modifications to the original application
  - November 2012: VDH requests a toilet with a handwashing facility
  - November 26, 2012: Mr. Hild gives presentation to KQ BOS
  - December 2012: VMRC Public Hearing
  - February 2013: Pump and Haul Permit was issued

9

**APPENDIX C:**

**Virginia Department of Housing and Community Development Memorandum**

Robert F. McDonnell
Governor

James S. Cheng
Secretary of
Commerce and Trade



# COMMONWEALTH of VIRGINIA

William C. Shelton
Director

## DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT

MEMORANDUM

TO: Ms. Jackie Rickards
Middle Peninsula Planning District Commission

FROM: Emory Rodgers, Deputy Director
Division of Building & Fire Regulation

DATE: August 6, 2013

SUBJECT: Floating Oyster Work Station

The meeting held on July 31, 2013 was very informative and helpful in my decision as to whether this floating oyster work station structure is covered by our Virginia Uniform Statewide Building Code (USBC) or our Industrialized Building Safety Regulations (IBSR). The USBC is for the construction of buildings and structures on site while the IBSR regulates buildings and structures constructed in a plant and shipped to a site for assembly. The Oysterplex as it has been named would fall into the IBSR category if deemed to be regulated.

The workplace is attached to a floatation system; can be moved; and, though not a boat, per se, can be deemed similar to a barge used for pile driving and other work on the water. What factors that I have considered to determined that this fabricated workstation is not regulated under the IBSR rests on the following information gleamed from the meeting.

- The operation is seasonal and currently involves several employees working on the floating structure doing work associated with the definition of a farm building/structure in the COV § 36-99 (B). The employees are doing work tending oyster beds from seeding and monitoring to some harvesting.
- The owner is planting these oyster beds under his control similar to land-based farms planting and harvest crops.
- The floating structure is not residential in nature and if were to be residential use, then a review of my decision will be necessary.
- Local zoning ordinances need to be met as well as state regulations dealing with health regulations; DOLI/ VOSH regulations; applicable provisions of DEQ regulations; the Maritime Resource Commission's permitting processes; and, there could even be the Virginia Employment Commission's involvement for migrant workers. Federal regulations probably come into play on navigable bodies of water or movement of this floating work structure.

In conclusion, it is my opinion that this specific floating work station is deemed to be a farm building/structure, thus it is not regulated by the either the USBC or IBSR nor is required to obtain a building permit.

Our agency will advise local building departments that there is not a building permit required for this building/structure serving what is an essential farming operation.

Please feel free to contact me if there are questions or a need for further clarification.

Copy: Cindy Davis
VBCOA

**APPENDIX D:**

**JENNINGS v. BOARD OF SUPERVISORS OF NORTHUMBERLAND COUNTY**

Present: Kinser, C.J., Lemons, Goodwyn, Millette, and Mims, JJ., and Carrico and Koontz, S.JJ.

JOHN L. JENNINGS,
T/A JENNINGS BOATYARD, INC.

v. Record No. 100068

BOARD OF SUPERVISORS OF
NORTHUMBERLAND COUNTY

OPINION BY
CHIEF JUSTICE CYNTHIA D. KINSER
April 21, 2011

FROM THE CIRCUIT COURT OF NORTHUMBERLAND COUNTY
Harry T. Taliaferro, III, Judge

In this appeal, a landowner with riparian rights who operates a commercial marina/boatyard challenges a locality's zoning authority to regulate the construction of additional mooring slips and accompanying piers that would lie beyond the mean low-water mark of a tidal, navigable body of water. The landowner also challenges as void the locality's special exception permit ordinance, claiming that the ordinance lacks adequate standards to guide the governing body's decision to grant or deny a special exception permit. Because we conclude that the circuit court did not err in denying the landowner's request for declaratory relief on either ground, we will affirm the circuit court's judgment.

## MATERIAL FACTS AND PROCEEDINGS

The facts essential to this appeal are undisputed. The appellant, John L. Jennings, owns approximately 12.4 acres of real property in Northumberland County (the County), part of which fronts Cockrell's Creek, a tidal, navigable tributary of

the Chesapeake Bay. On this property, Jennings operates a business known as "Jennings Boatyard Marina" (the Marina), "a commercial marina/boatyard with 45 mooring slips and accompanying piers." In March 2005, Jennings engaged a marine design construction company to develop plans and submit necessary applications for 46 additional mooring slips with accompanying piers (the Project). The proposed slips would lie approximately 300 to 400 feet beyond the mean low-water mark of Cockrell's Creek. They are designed as "deep water slips" for sailboats.

Subsequently, the marine design construction company submitted a special exception permit application on Jennings' behalf. The County's Board of Supervisors (the Board) initially tabled the application, indicating that it wanted Jennings to obtain a riparian rights survey. After obtaining the survey, Jennings reduced the additional slips requested from 46 to 31 to accommodate riparian lines. After a public hearing on Jennings' application, the Board unanimously denied the special exception permit. In a letter to Jennings, the County's zoning administrator explained that the "Board felt that since there are currently three (3) marinas in the area, including [Jennings'], that have mooring slips available for boaters, there would be no justification to allow an expansion at this time."

Jennings filed an action seeking declaratory relief against the Board. See Code §§ 8.01-184 and -186. Jennings alleged that only the Virginia Marine Resources Commission (VMRC) has authority to permit the placement of piers beyond the mean low-water mark and therefore the County lacked jurisdiction to regulate the Project through its special exception permit process. The Board answered, stating that it had authority to regulate beyond the mean low-water mark of the County's creeks and rivers.

Jennings moved for summary judgment, asserting that the County's zoning ordinances requiring a special exception permit for the expansion of the Marina are invalid and void ab initio. In ruling on that motion, the circuit court concluded that "title to land below [the] mean low[-]water [mark] is in the Commonwealth," and that "the VMRC has the exclusive right to issue permits" authorizing use of that land. However, the court rejected Jennings' argument that Code § 28.2-1203(A)(5), which allows the construction of private noncommercial piers beyond the mean low-water mark without VMRC's authorization, carves out from VMRC's otherwise exclusive jurisdiction a locality's "sole grant of authority . . . to zone in tidal[,] navigable waters." The court instead reasoned that the "general grant of authority to zone land . . . necessarily and fairly implie[s] that the County[,] in zoning upland for a marina/boatyard[,] has the

authority to regulate . . . piers and boat slips which are necessarily all part of the same use." Thus, the circuit court concluded that Jennings' "proposed expansion of piers and slips may be constructed only pursuant to a permit from the VMRC, but [is also] subject to the Northumberland County Zoning Ordinance." The circuit court, accordingly, denied Jennings' motion for summary judgment.

At a subsequent evidentiary hearing regarding the reasonableness of the Board's denial of Jennings' application for a special exemption permit, Jennings argued for the first time that the County's special exception permit ordinances, Northumberland Zoning Ordinance (NZO) §§ 148-95(A) and -138(A) and (B), are void for lack of any "objective criteria stated." Jennings also reiterated that the Board lacked zoning authority over the Project because it would lie beyond the mean low-water mark. The Board disputed, inter alia, Jennings' argument that the County's ordinances are "inadequate."[1]

In a letter opinion, the circuit court concluded that the Board's denial of Jennings' special exemption permit application

[1] The Board argued before the circuit court that Jennings did not challenge "the adequacy of [the] special exception ordinance" in his bill for declaratory relief and that the issue therefore was not "before the [c]ourt." Because the circuit court nevertheless ruled on that issue and the Board has not assigned cross-error to the court's doing so, the issue is now before this Court. See Rule 5:18(b).

"was not arbitrary, capricious and unreasonable."[2] Relying on Bollinger v. Board of Supervisors, 217 Va. 185, 187, 227 S.E.2d 682, 683 (1976), the court further concluded "that the [challenged ordinance] is not invalid for failure to state standards to be applied by the Board in the issuance of a special exception permit." Accordingly, the circuit court entered an order denying the relief sought by Jennings. Jennings appeals from the circuit court's judgment.

ANALYSIS

The primary issue now before us is whether the County's zoning jurisdiction extends to the regulation of commercial piers and marinas to be constructed on bottomlands that lie beyond the mean low-water mark in the Commonwealth's tidal, navigable waters. Secondarily, we must decide whether the County's ordinance regulating the issuance of special exception permits is void for lack of adequate standards. Both issues are questions of law reviewed de novo by this Court. See Schefer v. City Council, 279 Va. 588, 592, 691 S.E.2d 778, 780 (2010);

[2] This Court did not award Jennings an appeal on his assignment of error asserting that the Board's denial of his special exception permit application was arbitrary and capricious. Thus, that issue is not before us. Because the Court awarded an appeal limited to Jennings' assignments of error challenging the County's zoning authority over the Project and the validity of the County's ordinance regarding special exception permits, the rule requiring exhaustion of administrative remedies does not apply. See Dail v. York County, 259 Va. 577, 582, 528 S.E.2d 447, 449 (2000).

Marble Techs., Inc. v. City of Hampton, 279 Va. 409, 416 & n.9, 690 S.E.2d 84, 87 & n.9 (2010).

"Zoning is a legislative power vested in the Commonwealth and delegated by it, in turn, to various local governments for the enactment of local zoning ordinances." Byrum v. Board of Supervisors, 217 Va. 37, 39, 225 S.E.2d 369, 371 (1976); accord National Mar. Union v. City of Norfolk, 202 Va. 672, 680, 119 S.E.2d 307, 312 (1961). Thus, a locality's zoning powers are " 'fixed by statute and are limited to those conferred expressly or by necessary implication.' " Board of Supervisors v. Countryside Inv. Co., 258 Va. 497, 503, 522 S.E.2d 610, 613 (1999) (quoting Board of Supervisors v. Horne, 216 Va. 113, 117, 215 S.E.2d 453, 455 (1975)). Localities have been delegated authority to include in their zoning ordinances "reasonable regulations and provisions" "[f]or the granting of special exceptions under suitable regulations and safeguards[.]" Code § 15.2-2286(A)(3). A governing body is also authorized to "reserve unto itself the right to issue such special exceptions," "notwithstanding any other provisions of this article." Id.

In Code § 15.2-2280, the General Assembly expressly granted localities the authority to zone "the territory under its jurisdiction." This authority extends to "regulat[ing], restrict[ing], permit[ting], prohibit[ing], and determin[ing],"

inter alia, "[t]he use of land, buildings, structures and other premises for agricultural, business, industrial, residential, flood plain and other specific uses" as well as "[t]he . . . construction . . . of structures[.]" Code § 15.2-2280(1) and (2). Thus, the County has express authority to regulate Jennings' Project in accordance with the requirements of the County's zoning ordinances if the bottomland in Cockrell's Creek that lies seaward of the mean low-water mark is "territory under [the County's] jurisdiction."

It is undisputed that such bottomland in Cockrell's Creek that lies seaward of the mean low-water mark is "the property of the Commonwealth," Code § 28.2-1200,[3] and that "the limits or bounds" of Jennings' real property lying on Cockrell's Creek and his "rights and privileges . . . extend to the mean low-water mark but no farther." Code § 28.2-1202(A); Scott v. Burwell's Bay Improvement Ass'n, 281 Va. ___, ___, ___ S.E.2d ___, ___ (2011) (this day decided). Also, neither party disputes VMRC's regulatory authority over the bottomland in Cockrell's Creek seaward of the mean low-water mark, see Scott, 281 Va. at ___, ___ S.E.2d at ___, also described as "state-owned bottomlands," Code § 28.2-101; see Code §§ 28.2-103, -1204, and -1205; or that

[3] "All the beds of the bays, rivers, creeks and the shores of the sea within the jurisdiction of the Commonwealth, not conveyed by special grant or compact according to law, shall remain the property of the Commonwealth." Code § 28.2-1200.

the County's zoning authority over all "the territory under its jurisdiction" includes Jennings' real property, with its "rights and privileges . . . extend[ing] to the mean low-water mark." Code §§ 15.2-2280 and 28.2-1202(A). The dispute in this case concerns whether both the County and the VMRC enjoy concurrent regulatory authority over the Project to be constructed on state-owned bottomlands.

As Jennings notes, the statutory provisions pertaining to a locality's zoning authority, specifically Article 7, titled "Zoning," in Chapter 22 of Title 15.2, provide no rule for determining what "territory" is "under [a locality's] jurisdiction" for purposes of zoning, with one exception.[4] However, Code § 15.2-3105 provides, in pertinent part, that

> [t]he boundary of every locality bordering on the Chesapeake Bay, including its tidal tributaries (the Elizabeth River, among others), or the Atlantic Ocean shall embrace all wharves, piers, docks and other structures, except bridges and tunnels that have been or may hereafter be erected along the waterfront of such locality, and extending into the Chesapeake Bay, including its tidal tributaries (the Elizabeth River, among others), or the Atlantic Ocean.

Jennings argues that this statute is not relevant to the question before us because it is found in Article 1, titled

[4] Code § 15.2-2281 provides that "the governing body of a county shall have jurisdiction over all the unincorporated territory in the county, and the governing body of a municipality shall have jurisdiction over the incorporated area of the municipality."

"Boundary Lines Established by Commissioners," in Chapter 31 of Title 15.2. According to Jennings, Code § 15.2-3105 pertains only to establishing boundaries as between localities. We do not agree. This statute states that the boundaries of localities "bordering on the Chesapeake Bay, including its tidal tributaries . . . shall embrace all wharves, piers, docks and other structures . . . erected along the waterfront of such locality, and extending into the Chesapeake Bay, including its tidal tributaries." Code § 15.2-3105. The territory under a locality's jurisdiction subject to its zoning ordinances cannot vary depending on the identity of the parties to the dispute. Further, as the circuit court noted, "while [Code § 15.2-3105] sets a rule for application in establishing county boundary lines where the opposite banks of the creek are in different counties, it does not follow either logic or the law that when both sides of the creek are in the same county, piers built out from the shore are not located within the boundaries of that county."

Jennings argues that even if Code § 15.2-3105 is applicable, VMRC's regulatory authority over the Commonwealth's bottomlands is exclusive. Jennings bases that assertion on Code § 28.2-1200, which recognizes the Commonwealth's ownership of bottomlands, and Code § 28.2-1204, which delegates authority to VMRC to "[i]ssue permits for all reasonable uses of state-owned

bottomlands not authorized under" Code § 28.2-1203(A). That statute requires a permit to be obtained from VMRC to "build . . . upon" the Commonwealth's bottomlands. Code § 28.2-1203(A). We disagree with Jennings' analysis.

The regulatory authority granted the VMRC by the General Assembly does not preclude, but rather contemplates, that VMRC and a locality will have concurrent authority to regulate the construction of piers upon state-owned bottomlands where the pier is also "erected along the waterfront of such locality." Code § 15.2-3105. Pursuant to Code § 28.2-1203(A)(5), a permit from VMRC is not required for the "placement of private piers for noncommercial purposes by owners of the riparian lands in the waters opposite those lands" if such piers conform to certain specifications, but they remain "[s]ubject to any applicable local ordinances." Thus, we hold that the circuit court did not err in concluding that the County's zoning authority "embrace[s]" the entirety of Jennings' proposed construction, even the portion that "extend[s] into the Chesapeake Bay['s] tidal tributaries," i.e., Cockrell's Creek. Code § 15.2-3105.

The circuit court also did not err in holding that NZO § 148-138(A) is not "invalid for failure to state standards to be applied by the Board in the issuance of a special exception[]

permit." NZO § 148-95(A)(21)[5] requires a special exception permit for commercial or private, noncommercial marinas and boatyards. Pursuant to NZO § 148-138(A),[6] special exception permits "shall be subject to such conditions as the governing body deems necessary to carry out the intent of this chapter," i.e., Chapter 148, styled "Zoning."

In Bollinger, this Court addressed whether a section of the Roanoke County Code was unconstitutional because it failed to provide adequate standards to guide the governing body's decision whether to grant conditional use permits. 217 Va. at 186, 227 S.E.2d at 683. The challenged section of the Roanoke County Code required a conditional use permit for certain uses of real property, such as "borrow pits and sanitary fill method garbage and refuse sites." Id. (internal quotation marks omitted). That section of the county code also stated that "[t]hese permits shall be subject to such conditions as the governing body deems necessary to carry out the intent of this chapter." Id. (internal quotation marks omitted). Virtually the same language appears in NZO § 148-138(A). Because the governing body there, like the County in this case, reserved unto itself the power to issue conditional use permits, we held

[5] This ordinance has been recodified as NZO § 148-107(A)(21).

[6] This ordinance has been recodified as NZO § 148-150(A).

that it was performing a legislative function when it granted or denied such permits. Id. We further held that "zoning ordinances enacted pursuant to [former Code § 15.1-491, now Code § 15.2-2286(A)(3),] need not include standards concerning issuance of special use permits where local governing bodies are to exercise their legislative judgment or discretion." Id. at 187, 227 S.E.2d at 683. The same conclusion applies to the County ordinance at issue in this appeal. But see, e.g., Ames v. Town of Painter, 239 Va. 343, 349, 389 S.E.2d 702, 705 (1990) (noting that "delegations of legislative power" from a locality's governing body to a board of zoning appeals "are valid only if they establish specific policies and fix definite standards to guide the official, agency, or board in the exercise of the power").

Jennings, nevertheless, contends that this Court's decision in Cole v. City Council, 218 Va. 827, 241 S.E.2d 765 (1978), compels a different conclusion. There, this Court addressed a City of Waynesboro ordinance reserving to the City Council "'the right to issue a special exception . . . permit whenever public necessity and convenience, general welfare or good zoning practice justifies such special exception.'" Id. at 832, 241 S.E.2d at 769 (emphasis added). We concluded that the ordinance at issue was "fatally defective and invalid" because it reserved to the

> [City] Council the authority to issue a special exception . . . permit for the construction of a building in any zoning district in Waynesboro whenever, in its sole discretion, such action is justified by public necessity and convenience and the general welfare. The ordinance gives [City] Council an opportunity to grant a special exception without a consideration of good zoning practices or a consideration by it of the purposes of the zoning ordinances of the city or the objectives which zoning ordinances seek to accomplish.

Id. at 833, 241 S.E.2d at 769.

As nothing in NZO § 148-138(A) authorizes the Board to determine whether a special exception permit should be granted outside "the framework of the zoning statutes and principles that apply to zoning" or provides "an open invitation for a special exception to be granted without any consideration being given to certain basic principles of law applicable in the zoning field," that ordinance is not void for lack of adequate standards. Cole, 218 Va. at 833-34, 241 S.E.2d at 769-70; see Bollinger, 217 Va. at 186-87, 227 S.E.2d at 683.

CONCLUSION

For these reasons, we will affirm the judgment of the circuit court.

Affirmed.

**APPENDIX E:**

**LOZMAN v THE CITY OF RIVIERA BEACH, FLORIDA**

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

# SUPREME COURT OF THE UNITED STATES

Syllabus

## LOZMAN *v.* CITY OF RIVIERA BEACH, FLORIDA

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 11–626. Argued October 1, 2012—Decided January 15, 2013

Petitioner Lozman's floating home was a house-like plywood structure with empty bilge space underneath the main floor to keep it afloat. He had it towed several times before deciding on a marina owned by the city of Riviera Beach (City). After various disputes with Lozman and unsuccessful efforts to evict him from the marina, the City brought a federal admiralty lawsuit *in rem* against the floating home, seeking a lien for dockage fees and damages for trespass. Lozman moved to dismiss the suit for lack of admiralty jurisdiction. The District Court found the floating home to be a "vessel" under the Rules of Construction Act, which defines a "vessel" as including "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water," 1 U. S. C. §3, concluded that admiralty jurisdiction was proper, and awarded the City dockage fees and nominal damages. The Eleventh Circuit affirmed, agreeing that the home was a "vessel" since it was "capable" of movement over water despite petitioner's subjective intent to remain moored indefinitely.

*Held*:

1. This case is not moot. The District Court ordered the floating home sold, and the City purchased the home at auction and had it destroyed. Before the sale, the court ordered the City to post a bond to ensure Lozman could obtain monetary relief if he prevailed. P. 3.

2. Lozman's floating home is not a §3 "vessel." Pp. 3–15.

(a) The Eleventh Circuit found the home "capable of being used . . . as a means of transportation on water" because it could float and proceed under tow and its shore connections did not render it incapable of transportation. This interpretation is too broad. The definition of "transportation," the conveyance of persons or things from one

place to another, must be applied in a practical way. *Stewart* v. *Dutra Constr. Co.*, 543 U. S. 481, 496. Consequently, a structure does not fall within the scope of the statutory phrase unless a reasonable observer, looking to the home's physical characteristics and activities, would consider it designed to a practical degree for carrying people or things over water. Pp. 3–5.

(b) But for the fact that it floats, nothing about Lozman's home suggests that it was designed to any practical degree to transport persons or things over water. It had no steering mechanism, had an unraked hull and rectangular bottom 10 inches below the water, and had no capacity to generate or store electricity. It also lacked self-propulsion, differing significantly from an ordinary houseboat. Pp. 5–6.

(c) This view of the statute is consistent with its text, precedent, and relevant purposes. The statute's language, read naturally, lends itself to that interpretation: The term "contrivance" refers to something "employed in contriving to effect a purpose"; "craft" explains that purpose as "water carriage and transport"; the addition of "water" to "craft" emphasizes the point; and the words, "used, or capable of being used, as a means of transportation on water," drive the point home. Both *Evansville & Bowling Green Packet Co.* v. *Chero Cola Bottling Co.*, 271 U. S. 19, and *Stewart, supra*, support this conclusion. *Evansville* involved a wharfboat floated next to a dock, used to transfer cargo, and towed to harbor each winter; and *Stewart* involved a dredge used to remove silt from the ocean floor, which carried a captain and crew and could be navigated only by manipulating anchors and cables or by being towed. Water transportation was not the primary purpose of either structure; neither was in motion at relevant times; and both were sometimes attached to the ocean bottom or to land. However, *Stewart*'s dredge, which was regularly, but not primarily, used to transport workers and equipment over water, fell within the statutory definition while *Evansville*'s wharfboat, which was not designed to, and did not, serve a transportation function, did not. Lower court cases, on balance, also tend to support this conclusion. Further, the purposes of major federal maritime statutes—*e.g.*, admiralty provisions provide special attachment procedures lest a vessel avoid liability by sailing away, recognize that sailors face special perils at sea, and encourage shipowners to engage in port-related commerce—reveal little reason to classify floating homes as "vessels." Finally, this conclusion is consistent with state laws in States where floating home owners have congregated in communities. Pp. 6–11.

(d) Several important arguments made by the City and its *amici* are unavailing. They argue that a purpose-based test may introduce a subjective element into "vessel" determinations. But the Court has

Syllabus

considered only objective evidence, looking to the views of a reasonable observer and the physical attributes and behavior of the structure. They also argue against using criteria that are too abstract, complex, or open-ended. While this Court's approach is neither perfectly precise nor always determinative, it is workable and consistent and should offer guidance in a significant number of borderline cases. And contrary to the dissent's suggestion, the Court sees nothing to be gained by a remand. Pp. 11–14.

(e) The City's additional argument that Lozman's floating home was *actually* used for transportation over water is similarly unpersuasive. P. 14.

649 F. 3d 1259, reversed.

BREYER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, THOMAS, GINSBURG, ALITO, and KAGAN, JJ., joined. SOTOMAYOR, J., filed a dissenting opinion, in which KENNEDY, J., joined.

# SUPREME COURT OF THE UNITED STATES

No. 11–626

FANE LOZMAN, PETITIONER *v.* THE CITY OF RIVIERA BEACH, FLORIDA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[January 15, 2013]

JUSTICE BREYER delivered the opinion of the Court.

The Rules of Construction Act defines a "vessel" as including "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." 1 U. S. C. §3. The question before us is whether petitioner's floating home (which is not self-propelled) falls within the terms of that definition.

In answering that question we focus primarily upon the phrase "capable of being used." This term encompasses "practical" possibilities, not "merely . . . theoretical" ones. *Stewart* v. *Dutra Constr. Co.*, 543 U. S. 481, 496 (2005). We believe that a reasonable observer, looking to the home's physical characteristics and activities, would not consider it to be designed to any practical degree for carrying people or things on water. And we consequently conclude that the floating home is not a "vessel."

## I

In 2002 Fane Lozman, petitioner, bought a 60-foot by 12-foot floating home. App. 37, 71. The home consisted of a house-like plywood structure with French doors on three sides. *Id.*, at 38, 44. It contained a sitting room, bedroom,

closet, bathroom, and kitchen, along with a stairway leading to a second level with office space. *Id.*, at 45–66. An empty bilge space underneath the main floor kept it afloat. *Id.*, at 38. (See Appendix, *infra*, for a photograph.) After buying the floating home, Lozman had it towed about 200 miles to North Bay Village, Florida, where he moored it and then twice more had it towed between nearby marinas. In 2006 Lozman had the home towed a further 70 miles to a marina owned by the city of Riviera Beach (City), respondent, where he kept it docked. Brief for Respondent 5.

After various disputes with Lozman and unsuccessful efforts to evict him from the marina, the City brought this federal admiralty lawsuit *in rem* against the floating home. It sought a maritime lien for dockage fees and damages for trespass. See Federal Maritime Lien Act, 46 U. S. C. §31342 (authorizing federal maritime lien against vessel to collect debts owed for the provision of "necessaries to a vessel"); 28 U. S. C. §1333(1) (civil admiralty jurisdiction). See also *Leon* v. *Galceran*, 11 Wall. 185 (1871); *The Rock Island Bridge*, 6 Wall. 213, 215 (1867).

Lozman, acting *pro se,* asked the District Court to dismiss the suit on the ground that the court lacked admiralty jurisdiction. See 2 Record, Doc. 64. After summary judgment proceedings, the court found that the floating home was a "vessel" and concluded that admiralty jurisdiction was consequently proper. Pet. for Cert. 42a. The judge then conducted a bench trial on the merits and awarded the City $3,039.88 for dockage along with $1 in nominal damages for trespass. *Id.,* at 49a.

On appeal the Eleventh Circuit affirmed. *Riviera Beach* v. *That Certain Unnamed Gray, Two-Story Vessel Approximately Fifty-Seven Feet in Length*, 649 F. 3d 1259 (2011). It agreed with the District Court that the home was a "vessel." In its view, the home was "capable" of movement over water and the owner's subjective intent to remain

moored "indefinitely" at a dock could not show the contrary. *Id.,* at 1267–1269.

Lozman sought certiorari. In light of uncertainty among the Circuits about application of the term "capable" we granted his petition. Compare *De La Rosa* v. *St. Charles Gaming Co.,* 474 F. 3d 185, 187 (CA5 2006) (structure is not a "vessel" where "physically," but only "theoretical[ly]," "capable of sailing," and owner intends to moor it indefinitely as floating casino), with *Board of Comm'rs of Orleans Levee Dist.* v. *M/V Belle of Orleans*, 535 F. 3d 1299, 1311–1312 (CA11 2008) (structure is a "vessel" where capable of moving over water under tow, "albeit to her detriment," despite intent to moor indefinitely). See also 649 F. 3d, at 1267 (rejecting views of Circuits that "'focus on the intent of the shipowner'").

## II

At the outset we consider one threshold matter. The District Court ordered the floating home sold to satisfy the City's judgment. The City bought the home at public auction and subsequently had it destroyed. And, after the parties filed their merits briefs, we ordered further briefing on the question of mootness in light of the home's destruction. 567 U. S. ___ (2012). The parties now have pointed out that, prior to the home's sale, the District Court ordered the City to post a $25,000 bond "to secure Mr. Lozman's value in the vessel." 1 Record, Doc. 20, p. 2. The bond ensures that Lozman can obtain monetary relief if he ultimately prevails. We consequently agree with the parties that the case is not moot.

## III

### A

We focus primarily upon the statutory phrase "capable of being used . . . as a means of transportation on water." 1 U. S. C. §3. The Court of Appeals found that the home

was "capable" of transportation because it could float, it could proceed under tow, and its shore connections (power cable, water hose, rope lines) did not "'rende[r]'" it "'practically incapable of transportation or movement.'" 649 F. 3d, at 1266 (quoting *Belle of Orleans*, *supra,* at 1312, in turn quoting *Stewart*, 543 U. S., at 494). At least for argument's sake we agree with the Court of Appeals about the last-mentioned point, namely that Lozman's shore connections did not "'render'" the home "'practically incapable of transportation.'" But unlike the Eleventh Circuit, we do not find these considerations (even when combined with the home's other characteristics) sufficient to show that Lozman's home was a "vessel."

The Court of Appeals recognized that it had applied the term "capable" broadly. 649 F. 3d, at 1266. Indeed, it pointed with approval to language in an earlier case, *Burks* v. *American River Transp. Co.*, 679 F. 2d 69 (1982), in which the Fifth Circuit said:

> "'No doubt the three men in a tub would also fit within our definition, and one probably could make a convincing case for Jonah inside the whale.'" 649 F. 3d, at 1269 (brackets omitted) (quoting *Burks*, *supra*, at 75).

But the Eleventh Circuit's interpretation is too broad. Not *every* floating structure is a "vessel." To state the obvious, a wooden washtub, a plastic dishpan, a swimming platform on pontoons, a large fishing net, a door taken off its hinges, or Pinocchio (when inside the whale) are not "vessels," even if they are "artificial contrivance[s]" capable of floating, moving under tow, and incidentally carrying even a fair-sized item or two when they do so. Rather, the statute applies to an "artificial contrivance . . . capable of being used . . . *as a means of transportation on water*." 1 U. S. C. §3 (emphasis added). "[T]ransportation" involves the "conveyance (of things or persons) from one place to

another." 18 Oxford English Dictionary 424 (2d ed. 1989) (OED). Accord, N. Webster, An American Dictionary of the English Language 1406 (C. Goodrich & N. Porter eds. 1873) ("[t]he act of transporting, carrying, or conveying from one place to another"). And we must apply this definition in a "practical," not a "theoretical," way. *Stewart*, *supra*, at 496. Consequently, in our view a structure does not fall within the scope of this statutory phrase unless a reasonable observer, looking to the home's physical characteristics and activities, would consider it designed to a practical degree for carrying people or things over water.

B

Though our criterion is general, the facts of this case illustrate more specifically what we have in mind. But for the fact that it floats, nothing about Lozman's home suggests that it was designed to any practical degree to transport persons or things over water. It had no rudder or other steering mechanism. 649 F. 3d, at 1269. Its hull was unraked, *ibid.*, and it had a rectangular bottom 10 inches below the water. Brief for Petitioner 27; App. 37. It had no special capacity to generate or store electricity but could obtain that utility only through ongoing connections with the land. *Id.*, at 40. Its small rooms looked like ordinary nonmaritime living quarters. And those inside those rooms looked out upon the world, not through watertight portholes, but through French doors or ordinary windows. *Id.*, at 44–66.

Although lack of self-propulsion is not dispositive, *e.g., The Robert W. Parsons*, 191 U. S. 17, 31 (1903), it may be a relevant physical characteristic. And Lozman's home differs significantly from an ordinary houseboat in that it has no ability to propel itself. Cf. 33 CFR §173.3 (2012) ("Houseboat means a *motorized* vessel . . . designed primarily for multi-purpose accommodation spaces with low

freeboard and little or no foredeck or cockpit" (emphasis added)). Lozman's home was able to travel over water only by being towed. Prior to its arrest, that home's travel by tow over water took place on only four occasions over a period of seven years. *Supra,* at 2. And when the home was towed a significant distance in 2006, the towing company had a second boat follow behind to prevent the home from swinging dangerously from side to side. App. 104.

The home has no other feature that might suggest a design to transport over water anything other than its own furnishings and related personal effects. In a word, we can find nothing about the home that could lead a reasonable observer to consider it designed to a practical degree for "transportation on water."

C

Our view of the statute is consistent with its text, precedent, and relevant purposes. For one thing, the statute's language, read naturally, lends itself to that interpretation. We concede that the statute uses the word "every," referring to "*every* description of watercraft or other artificial contrivance." 1 U. S. C. §3 (emphasis added). But the term "contrivance" refers to "something contrived for, or employed in contriving to effect a purpose." 3 OED 850 (def. 7). The term "craft" explains that purpose as "water carriage and transport." *Id.,* at 1104 (def. V(9)(b)) (defining "craft" as a "vesse[l] . . . for" that purpose). The addition of the word "water" to "craft," yielding the term "watercraft," emphasizes the point. And the next few words, "used, or capable of being used, as a means of transportation on water," drive the point home.

For another thing, the bulk of precedent supports our conclusion. In *Evansville & Bowling Green Packet Co.* v. *Chero Cola Bottling Co.*, 271 U. S. 19 (1926), the Court held that a wharfboat was *not* a "vessel." The wharfboat floated next to a dock; it was used to transfer cargo from

ship to dock and ship to ship; and it was connected to the dock with cables, utility lines, and a ramp. *Id.,* at 21. At the same time, it was capable of being towed. And it was towed each winter to a harbor to avoid river ice. *Id.,* at 20–21. The Court reasoned that, despite the annual movement under tow, the wharfboat "was not used to carry freight from one place to another," nor did it "encounter perils of navigation to which craft used for transportation are exposed." *Id.,* at 22. (See Appendix, *infra*, for photograph of a period wharfboat).

The Court's reasoning in *Stewart* also supports our conclusion. We there considered the application of the statutory definition to a dredge. 543 U. S., at 494. The dredge was "a massive floating platform" from which a suspended clamshell bucket would "remov[e] silt from the ocean floor," depositing it "onto one of two scows" floating alongside the dredge. *Id.,* at 484. Like more traditional "seagoing vessels," the dredge had, *e.g.*, "a captain and crew, navigational lights, ballast tanks, and a crew dining area." *Ibid.* Unlike more ordinary vessels, it could navigate only by "manipulating its anchors and cables" or by being towed. *Ibid.* Nonetheless it did move. In fact it moved over water "every couple of hours." *Id.,* at 485.

We held that the dredge was a "vessel." We wrote that §3's definition "merely codified the meaning that the term 'vessel' had acquired in general maritime law." *Id.,* at 490. We added that the question of the "watercraft's use 'as a means of transportation on water' is . . . practical," and not "merely . . . theoretical." *Id.,* at 496. And we pointed to cases holding that dredges ordinarily "served a waterborne transportation function," namely that "in performing their work they carried machinery, equipment, and crew over water." *Id.,* at 491–492 (citing, *e.g., Butler* v. *Ellis*, 45 F. 2d 951, 955 (CA4 1930)).

As the Court of Appeals pointed out, in *Stewart* we also wrote that §3 "does not require that a watercraft be used

*primarily* for that [transportation] purpose," 543 U. S., at 495; that a "watercraft need not be in motion to qualify as a vessel," *ibid.*; and that a structure may qualify as a vessel even if attached—but not "permanently" attached—to the land or ocean floor. *Id.,* at 493–494. We did not take these statements, however, as implying a universal set of sufficient conditions for application of the definition. Rather, they say, and they mean, that the statutory definition *may* (or may not) apply—not that it *automatically must* apply—where a structure has some other *primary* purpose, where it is stationary at relevant times, and where it is attached—but not permanently attached—to land.

After all, a washtub is normally not a "vessel" though it does not have water transportation as its primary purpose, it may be stationary much of the time, and it might be attached—but not permanently attached—to land. More to the point, water transportation was not the *primary purpose* of either *Stewart's* dredge or *Evansville's* wharfboat; neither structure was "in motion" at relevant times; and both were sometimes attached (though not permanently attached) to the ocean bottom or to land. Nonetheless *Stewart's* dredge fell within the statute's definition while *Evansville's* wharfboat did not.

The basic difference, we believe, is that the dredge was regularly, but not primarily, used (and designed in part to be used) to transport workers and equipment over water while the wharfboat was not designed (to any practical degree) to serve a transportation function and did not do so. Compare *Cope* v. *Vallette Dry Dock Co.*, 119 U. S. 625 (1887) (floating drydock not a "vessel" because permanently fixed to wharf), with *Jerome B. Grubart, Inc.* v. *Great Lakes Dredge & Dock Co.*, 513 U. S. 527, 535 (1995) (barge sometimes attached to river bottom to use as a work platform remains a "vessel" when "at other times it was used for transportation"). See also *ibid.* (citing *Great Lakes*

*Dredge & Dock Co.* v. *Chicago*, 3 F. 3d 225, 229 (CA7 1993) ("[A] craft is a 'vessel' if its purpose is to some reasonable degree 'the transportation of passengers, cargo, or equipment from place to place across navigable waters'")); *Cope*, *supra*, at 630 (describing "hopper-barge," as potentially a "vessel" because it is a "navigable structure[,] used for the purpose of transportation"); cf. 1 Benedict on Admiralty §164, p. 10–6 (7th rev. ed. 2012) (maritime jurisdiction proper if "the craft is a navigable structure intended for maritime transportation").

Lower court cases also tend, on balance, to support our conclusion. See, *e.g.*, *Bernard* v. *Binnings Constr. Co.*, 741 F. 2d 824, 828, n. 13, 832, n. 25 (CA5 1984) (work punt lacking features objectively indicating a transportation function not a "vessel," for "our decisions make clear that the mere capacity to float or move across navigable waters does not necessarily make a structure a vessel"); *Ruddiman* v. *A Scow Platform*, 38 F. 158 (SDNY 1889) (scow, though "capable of being towed . . . though not without some difficulty, from its clumsy structure" just a floating box, not a "vessel," because "it was not designed or used for the purpose of navigation," not engaged "in the transportation of persons or cargo," and had "no motive power, no rudder, no sails"). See also 1 T. Schoenbaum, Admiralty and Maritime Law §3–6, p. 155 (5th ed. 2011) (courts have found that "floating dry-dock[s]," "floating platforms, barges, or rafts used for construction or repair of piers, docks, bridges, pipelines and other" similar facilities are not "vessels"); E. Benedict, American Admiralty §215, p. 116 (3d rev. ed. 1898) (defining "vessel" as a "'machine adapted to transportation over rivers, seas, and oceans'").

We recognize that some lower court opinions can be read as endorsing the "anything that floats" approach. See *Miami River Boat Yard, Inc.* v. *60' Houseboat*, 390 F. 2d 596, 597 (CA5 1968) (so-called "houseboat" lacking self-propulsion); *Sea Village Marina, LLC* v. *A 1980 Carlcraft*

*Houseboat*, No. 09–3292, 2009 WL 3379923, *5–*6 (D NJ, Oct. 19, 2009) (following *Miami River Boat Yard*); *Hudson Harbor 79th Street Boat Basin, Inc.* v. *Sea Casa*, 469 F. Supp. 987, 989 (SDNY 1979) (same). Cf. *Holmes* v. *Atlantic Sounding Co.*, 437 F. 3d 441 (CA5 2006) (floating dormitory); *Summerlin* v. *Massman Constr. Co.*, 199 F. 2d 715 (CA4 1952) (derrick anchored in the river engaged in building a bridge is a vessel). For the reasons we have stated, we find such an approach inappropriate and inconsistent with our precedents.

Further, our examination of the purposes of major federal maritime statutes reveals little reason to classify floating homes as "vessels." Admiralty law, for example, provides special attachment procedures lest a vessel avoid liability by sailing away. 46 U. S. C. §§31341–31343 (2006 ed. and Supp. IV). Liability statutes such as the Jones Act recognize that sailors face the special "'perils of the sea.'" *Chandris, Inc.* v. *Latsis*, 515 U. S. 347, 354, 373 (1995) (referring to "'vessel[s] in navigation'"). Certain admiralty tort doctrines can encourage shipowners to engage in port-related commerce. *E.g.*, 46 U. S. C. §30505; *Executive Jet Aviation, Inc.* v. *Cleveland*, 409 U. S. 249, 269–270 (1972). And maritime safety statutes subject vessels to U. S. Coast Guard inspections. *E.g.*, 46 U. S. C. §3301.

Lozman, however, cannot easily escape liability by sailing away in his home. He faces no special sea dangers. He does not significantly engage in port-related commerce. And the Solicitor General tells us that to adopt a version of the "anything that floats" test would place unnecessary and undesirable inspection burdens upon the Coast Guard. Brief for United States as *Amicus Curiae* 29, n. 11.

Finally, our conclusion is consistent with state laws in States where floating home owners have congregated in communities. See Brief for Seattle Floating Homes Association et al. as *Amici Curiae* 1. A Washington State

environmental statute, for example, defines a floating home (for regulatory purposes) as "a single-family dwelling unit constructed on a float, that is moored, anchored, or otherwise secured in waters, and is not a vessel, even though it may be capable of being towed." Wash. Rev. Code Ann. §90.58.270(5)(b)(ii) (Supp. 2012). A California statute defines a floating home (for tax purposes) as "a floating structure" that is "designed and built to be used, or is modified to be used, as a stationary waterborne residential dwelling," and which (unlike a typical houseboat), has no independent power generation, and is dependent on shore utilities. Cal. Health & Safety Code Ann. §18075.55(d) (West 2006). These States, we are told, treat structures that meet their "floating home" definitions like ordinary land-based homes rather than like vessels. Brief for Seattle Floating Homes Association 2. Consistency of interpretation of related state and federal laws is a virtue in that it helps to create simplicity making the law easier to understand and to follow for lawyers and for nonlawyers alike. And that consideration here supports our conclusion.

D

The City and supporting *amici* make several important arguments that warrant our response. First, they argue against use of any purpose-based test lest we introduce into "vessel" determinations a subjective element—namely, the owner's intent. That element, they say, is often "unverifiable" and too easily manipulated. Its introduction would "foment unpredictability and invite gamesmanship." Brief for Respondent 33.

We agree with the City about the need to eliminate the consideration of evidence of subjective intent. But we cannot agree that the need requires abandonment of all criteria based on "purpose." Cf. *Stewart*, 543 U. S., at 495 (discussing transportation purpose). Indeed, it is difficult,

if not impossible, to determine the use of a human "contrivance" without some consideration of human purposes. At the same time, we have sought to avoid subjective elements, such as owner's intent, by permitting consideration only of objective evidence of a waterborne transportation purpose. That is why we have referred to the views of a reasonable observer. *Supra,* at 1. And it is why we have looked to the physical attributes and behavior of the structure, as objective manifestations of any relevant purpose, and not to the subjective intent of the owner. *Supra,* at 5–6. We note that various admiralty treatises refer to the use of purpose-based tests without any suggestion that administration of those tests has introduced too much subjectivity into the vessel-determination process. 1 Benedict on Admiralty §164; 1 Admiralty and Maritime Law §3–6.

Second, the City, with support of *amici*, argues against the use of criteria that are too abstract, complex, or open-ended. Brief for Respondent 28–29. A court's jurisdiction, *e.g.*, admiralty jurisdiction, may turn on application of the term "vessel." And jurisdictional tests, often applied at the outset of a case, should be "as simple as possible." *Hertz Corp.* v. *Friend*, 559 U. S. ___, ___ (2010) (slip op., at 1).

We agree with the last-mentioned sentiment. And we also understand that our approach is neither perfectly precise nor always determinative. Satisfaction of a design-based or purpose-related criterion, for example, is not always sufficient for application of the statutory word "vessel." A craft whose physical characteristics and activities objectively evidence a waterborne transportation purpose or function may still be rendered a nonvessel by later physical alterations. For example, an owner might take a structure that is otherwise a vessel (even the *Queen Mary)* and connect it permanently to the land for use, say, as a hotel. See *Stewart*, *supra,* at 493–494. Further,

changes over time may produce a new form, *i.e.*, a newly designed structure—in which case it may be the new design that is relevant. See *Kathriner* v. *Unisea, Inc.*, 975 F. 2d 657, 660 (CA9 1992) (floating processing plant was no longer a vessel where a "large opening [had been] cut into her hull").

Nor is satisfaction of the criterion always a necessary condition, see Part IV, *infra*. It is conceivable that an owner might *actually use* a floating structure not designed to any practical degree for transportation as, say, a ferry boat, regularly transporting goods and persons over water.

Nonetheless, we believe the criterion we have used, taken together with our example of its application here, should offer guidance in a significant number of borderline cases where "capacity" to transport over water is in doubt. Moreover, borderline cases will always exist; they require a method for resolution; we believe the method we have used is workable; and, unlike, say, an "anything that floats" test, it is consistent with statutory text, purpose, and precedent. Nor do we believe that the dissent's approach would prove any more workable. For example, the dissent suggests a relevant distinction between an owner's "clothes and personal effects" and "large appliances (like an oven or a refrigerator)." *Post,* at 8 (opinion of SOTOMAYOR, J.). But a transportation function need not turn on the size of the items in question, and we believe the line between items being transported from place to place (*e.g.*, cargo) and items that are mere appurtenances is the one more likely to be relevant. Cf. Benedict, American Admiralty §222, at 121 ("A ship is usually described as consisting of the ship, her tackle, apparel, and furniture . . .").

Finally, the dissent and the Solicitor General (as *amicus* for Lozman) argue that a remand is warranted for further factfinding. See *post*, at 10–12; Brief for United States as *Amicus Curiae* 29–31. But neither the City nor Lozman

makes such a request. Brief for Respondent 18, 49, 52. And the only potentially relevant factual dispute the dissent points to is that the home suffered serious damage during a tow. *Post*, at 10–11. But this would add support to our ultimate conclusion that this floating home was not a vessel. We consequently see nothing to be gained by a remand.

## IV

Although we have focused on the phrase "*capable* of being used" for transportation over water, the statute also includes as a "vessel" a structure that is *actually* "used" for that transportation. 1 U. S. C. §3 (emphasis added). And the City argues that, irrespective of its design, Lozman's floating home was *actually* so used. Brief for Respondent 32. We are not persuaded by its argument.

We are willing to assume for argument's sake that sometimes it is possible actually to use for water transportation a structure that is in no practical way designed for that purpose. See *supra,* at 12–13. But even so, the City cannot show the actual use for which it argues. Lozman's floating home moved only under tow. Before its arrest, it moved significant distances only twice in seven years. And when it moved, it carried, not passengers or cargo, but at the very most (giving the benefit of any factual ambiguity to the City) only its own furnishings, its owner's personal effects, and personnel present to assure the home's safety. 649 F. 3d, at 1268; Brief for Respondent 32; Tr. of Oral Arg. 37–38. This is far too little *actual* "use" to bring the floating home within the terms of the statute. See *Evansville*, 271 U. S., at 20–21 (wharfboat not a "vessel" even though "[e]ach winter" it "was towed to [a] harbor to protect it from ice"); see also *Roper* v. *United States*, 368 U. S. 20, 23 (1961) ("Unlike a barge, the S. S. *Harry Lane* was not moved in order to transport commodities from one location to another"). See also *supra*, at 6–11.

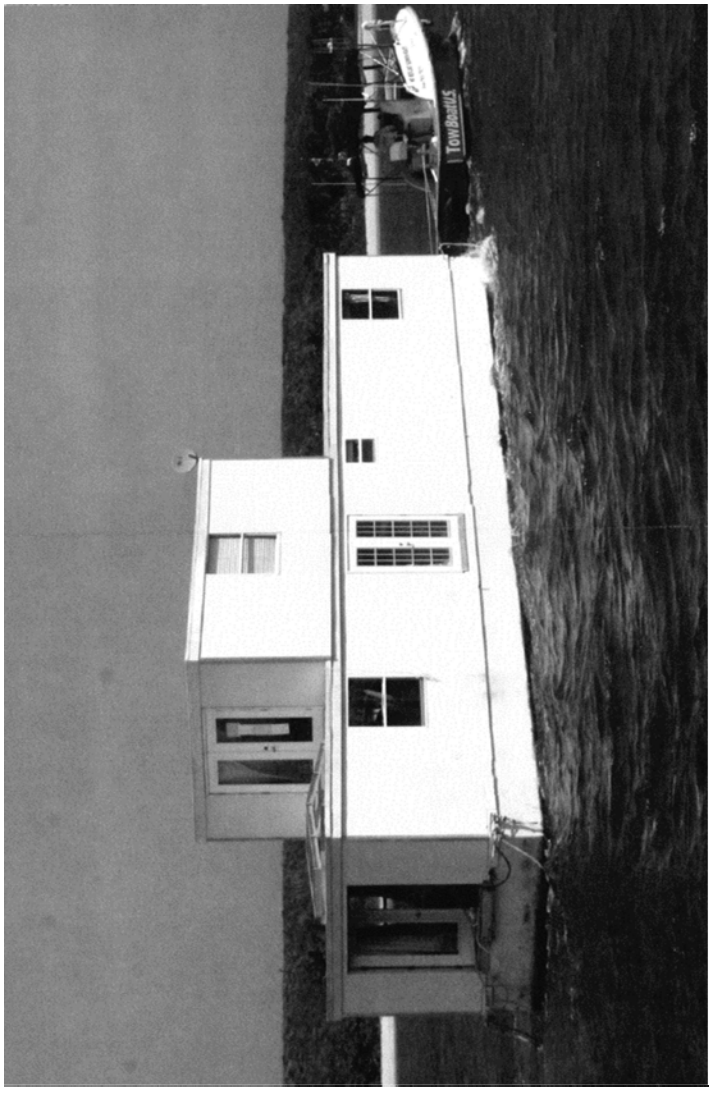
V

For these reasons, the judgment of the Court of Appeals is reversed.

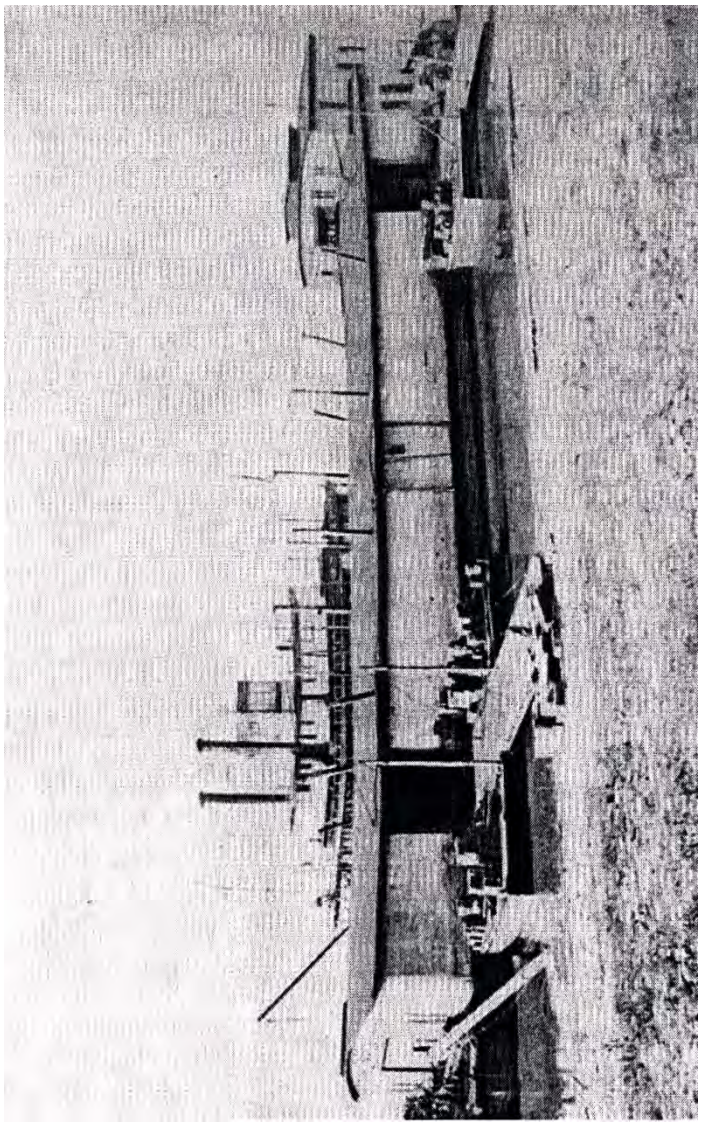
*It is so ordered.*

Appendix to opinion of the Court

# APPENDIX




Petitioner's floating home. App. 69.



50- by 200-foot wharf boat in Evansville, Indiana, on Nov. 13, 1918. H. R. Doc. No. 1521, 65th Cong., 3d Sess., Illustration No. 13 (1918).

# SUPREME COURT OF THE UNITED STATES

No. 11–626

FANE LOZMAN, PETITIONER *v.* THE CITY OF RIVIERA BEACH, FLORIDA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[January 15, 2013]

JUSTICE SOTOMAYOR, with whom JUSTICE KENNEDY joins, dissenting.

I agree with much of the Court's reasoning. Our precedents fully support the Court's reasoning that the Eleventh Circuit's test is overinclusive; that the subjective intentions of a watercraft's owner or designer play no role in the vessel analysis of 1 U. S. C. §3; and that an objective assessment of a watercraft's purpose or function governs whether that structure is a vessel. The Court, however, creates a novel and unnecessary "reasonable observer" reformulation of these principles and errs in its determination, under this new standard, that the craft before us is not a vessel. Given the underdeveloped record below, we should remand. Therefore, I respectfully dissent.

## I

The relevant statute, 1 U. S. C. §3, "sweeps broadly." *Stewart* v. *Dutra Constr. Co.*, 543 U. S. 481, 494 (2005). It provides that "[t]he word 'vessel' includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." This broad phrasing flows from admiralty law's long recognition that vessels come in many shapes and sizes. See E. Benedict, American Admiralty §218, p. 121

(1870 ed.) ("[V]essel, is a general word, many times used for any kind of navigation"); M. Cohen, Admiralty Jurisdiction, Law, and Practice 232 (1883) ("[T]he term 'vessel' shall be understood to comprehend every description of vessel navigating on any sea or channel, lake or river . . . ").

Our test for vessel status has remained the same for decades: "Under §3, a 'vessel' is any watercraft practically capable of maritime transportation . . . ." *Stewart*, 543 U. S., at 497; see also *Evansville & Bowling Green Packet Co.* v. *Chero Cola Bottling Co.*, 271 U. S. 19, 22 (1926); *Cope* v. *Vallette Dry Dock Co.*, 119 U. S. 625, 627 (1887). At its core, vessel status has always rested upon the objective physical characteristics of a vessel (such as its structure, shape, and materials of construction), as well as its usage history. But over time, several important principles have guided both this Court and the lower courts in determining what kinds of watercraft fall properly within the scope of admiralty jurisdiction.

Consider the most basic of requirements. For a watercraft to be "practically capable" of maritime transportation, it must first be "capable" of such transportation. Only those structures that can simultaneously float and carry people or things over water are even presumptively within §3's reach. Stopping here, as the Eleventh Circuit essentially did, results in an overinclusive test. Section 3, after all, does not drag every bit of floating and towable flotsam and jetsam into admiralty jurisdiction. Rather, the terms "capable of being used" and "practical" have real significance in our maritime jurisprudence.

"[A] water craft is not 'capable of being used' for maritime transport in any meaningful sense if it has been permanently moored." *Stewart*, 543 U. S., at 494. So, to take an obvious example, a floating bridge over water does not constitute a vessel; such mooring is clearly permanent. Cf. *The Rock Island Bridge*, 6 Wall. 213, 216 (1867). Less

dramatically, a watercraft whose objective physical connections to land "evidence a permanent location" does not fall within §3's ambit. See, *e.g., Evansville*, 271 U. S., at 22 ("[The wharfboat] served at Evansville as an office, warehouse and wharf, and was not taken from place to place. The connections with the water, electric light and telephone systems of the city evidence a permanent location"); *Dunklin* v. *Louisiana Riverboat Gaming Partnership*, No. 00–31455, 2001 WL 650209, *1, n. 1 (CA5, May 22, 2001) (*per curiam*) (describing a fully functional casino boat placed "in an enclosed pond in a cofferdam"). Put plainly, structures "permanently affixed to shore or resting on the ocean floor," *Stewart*, 543 U. S., at 493–494, have never been treated as vessels for the purposes of §3.

Our precedents have also excluded from vessel status those watercraft "rendered practically incapable of transportation or movement." *Id.*, at 494. Take the easiest case, a vessel whose physical characteristics have been so altered as to make waterborne transportation a practical impossibility. *Ibid.* (explaining that a "floating processing plant was no longer a vessel where a 'large opening [had been] cut into her hull,' rendering her incapable of moving over the water" (quoting *Kathriner* v. *UNISEA, Inc.*, 975 F. 2d 657, 660 (CA9 1992)). The longstanding admiralty exception for "dead ships," those watercraft that "require a major overhaul" for their "reactivation," also falls into this category. See *Roper* v. *United States*, 368 U. S. 20, 21 (1961) (finding that a liberty ship "deactivated from service and 'mothballed' " is not a "vessel in navigation"); see generally Rutherglen, Dead Ships, 30 J. Maritime L. & Comm. 677 (1999).[1] Likewise, ships that "have been

[1]The converse category of ships "not yet born" is another historical exclusion from vessel status. See *Tucker* v. *Alexandroff*, 183 U. S. 424, 438 (1902) ("A ship is born when she is launched, and lives so long as her identity is preserved. Prior to her launching she is a mere congeries of wood and iron—an ordinary piece of personal property—as

withdrawn from the water for extended periods of time" in order to facilitate repairs and reconstruction may lose their status as vessels until they are rendered capable of maritime transport. *Stewart*, 543 U. S., at 496. Cf. *West* v. *United States*, 361 U. S. 118, 120, 122 (1959) (noting that "the *Mary Austin* was withdrawn from any operation whatever while in storage with the 'moth-ball fleet' " and that "[t]he *Mary Austin*, as anyone could see, was not in maritime service. She was undergoing major repairs and complete renovation . . . ").

Finally, our maritime jurisprudence excludes from vessel status those floating structures that, based on their physical characteristics, do not "transport people, freight, or cargo from place to place" as one of their purposes. *Stewart*, 543 U. S., at 493. "Purpose," in this context, is determined solely by an objective inquiry into a craft's function. "[N]either size, form, equipment nor means of propulsion are determinative factors upon the question of [vessel status]," though all may be considered. *The Robert W. Parsons*, 191 U. S. 17, 30 (1903). Moreover, in assessing a particular structure's function, we have consistently examined its past and present activities. *Stewart*, 543 U. S., at 495; *Cope*, 119 U. S., at 627. Of course, a seaborne craft is not excluded from vessel status simply because its "primary purpose" is not maritime transport. *Stewart*, 543 U. S., at 497. We held as much in *Stewart* when we concluded that a dredge was a vessel notwithstanding that its "primary purpose" was "dredging rather than transportation." *Id.,* at 486, 495. So long as one purpose of a craft is transportation, whether of cargo or people or both, §3's practical capability requirement is satisfied.

Certainly, difficult and marginal cases will arise. For-

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distinctly a land structure as a house, and subject only to mechanics' liens created by state law and enforceable in the state courts").

tunately, courts do not consider each floating structure anew. So, for example, when we were confronted in *Stewart* with the question whether a dredge is a §3 vessel, we did not commence with a clean slate; we instead sought guidance from previous cases that had confronted similar structures. See *id.*, at 490, and n. 5; see also *Norton* v. *Warner Co.*, 321 U. S. 565, 571–572 (1944) (likewise surveying earlier cases).

In sum, our precedents offer substantial guidance for how objectively to determine whether a watercraft is practically capable of maritime transport and thus qualifies as a §3 vessel. First, the capacity to float and carry things or people is an obvious prerequisite to vessel status. Second, structures or ships that are permanently moored or fixed in place are not §3 vessels. Likewise, structures that are practically incapable of maritime transport are not vessels, whether they are ships that have been altered so that they may no longer be put to sea, dead ships, or ships removed from navigation for extended periods of time. Third, those watercraft whose physical characteristics and usage history reveal no maritime transport purpose or use are not §3 vessels.

## II

The majority does not appear to disavow the legal principles described above. The majority apparently accepts that permanent mooring suffices to take a ship out of vessel status, *ante,* at 8, 12,[2] and that "[a] craft whose

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[2] In discussing permanent mooring, as well as *Stewart*'s rejection of primary-purpose and state-of-transit tests for vessel status, *Stewart* v. *Dutra Constr. Co.*, 543 U. S. 481, 495 (2005), the majority states that our holdings "say, and they mean, that the statutory definition [given by §3] *may* (or may not) apply—not that it *automatically must* apply—where a structure has some other *primary* purpose, where it is stationary at relevant times, and where it is attached—but not permanently attached—to land." *Ante*, at 8. This must mean, by negative implication, that a permanently moored structure never falls within §3's

physical characteristics and activities objectively evidence a waterborne transportation purpose or function may still be rendered a nonvessel by later physical alterations," *ante,* at 12–13.[3] No one argues that Lozman's craft was permanently moored, see App. 32 (describing the "deteriorated" ropes holding the craft in place), or that it had undergone physical alterations sufficient to take it out of vessel status, see Tr. of Oral Arg. 13 (Lozman's counsel arguing that the craft was never a vessel in the first place). Our precedents make clear that the Eleventh Circuit's "anything that floats" test is overinclusive and ignores that purpose is a crucial factor in determining whether a particular craft is or is not a vessel. Accordingly, the majority is correct that determining whether Lozman's craft is a vessel hinges on whether that craft had any maritime transportation purpose or function.

The majority errs, though, in concluding that the purpose component of the §3 test is whether "a reasonable observer, looking to the [craft]'s physical characteristics and activities, would not consider it to be designed to any practical degree for carrying people or things on water." *Ante,* at 1. This phrasing has never appeared in any of our cases and the majority's use of it, despite its seemingly objective gloss, effectively (and erroneously) introduces a subjective component into the vessel-status inquiry.

For one thing, in applying this test the majority points to some characteristics of Lozman's craft that have no relationship to maritime transport, such as the style of the craft's rooms or that "those inside those rooms looked out upon the world, not through water-tight portholes, but

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definition.

[3] Presumably, this encompasses those kinds of ships "otherwise rendered practically incapable of transportation or movement." *Stewart*, 543 U. S., at 494. That is, ships which have been altered so they cannot travel the seas, dead ships, and ships removed from the water for an extended period of time. *Supra,* at 3–4.

through French doors or ordinary windows." *Ante,* at 5. The majority never explains why it believes these particular esthetic elements are important for determining vessel status. In fact, they are not. Section 3 is focused on whether a structure is "used, or capable of being used, as a means of transportation on water." By importing windows, doors, room style, and other esthetic criteria into the §3 analysis, the majority gives our vessel test an "I know it when I see it" flavor. *Jacobellis* v. *Ohio*, 378 U. S. 184, 197 (1964) (Stewart, J., concurring). But that has never been nor should it be the test: A badly designed and unattractive vessel is different from a structure that lacks any "practical capacity" for maritime transport. In the majority's eyes, the two appear to be one and the same.

The majority's treatment of the craft's past voyages is also strange. The majority notes that Lozman's craft could be and was, in fact, towed over long distances, including over 200 miles at one point. *Ante,* at 2–6. But the majority determines that, given the design of Lozman's craft, this is "far too little *actual* 'use' to bring the floating home within the terms of the statute." *Ante,* at 14. This is because "when it moved, it carried, not passengers or cargo, but at the very most (giving the benefit of any factual ambiguity to the City) only its own furnishings, its owner's personal effects, and personnel present to assure the home's safety." *Ante,* at 13–14.

I find this analysis confusing. The majority accepts that the record indicates that Lozman's craft traveled hundreds of miles while "carrying people or things." *Ante,* at 1. But then, in the same breath, the majority concludes that a "reasonable observer" would nonetheless conclude that the craft was not "designed to any practical degree for carrying people or things on water." *Ibid.* The majority fails to explain how a craft that apparently did carry people and things over water for long distances was not "practically capable" of maritime transport.

This is not to say that a structure capable of such feats is necessarily a vessel. A craft like Lozman's might not be a vessel, for example, if it could only carry its owner's clothes and personal effects, or if it is only capable of transporting itself and its appurtenances. *Jerome B. Grubart, Inc.* v. *Great Lakes Dredge & Dock Co.*, 513 U. S. 527, 535 (1995) ("[M]aritime law . . . ordinarily treats an 'appurtenance' attached to a vessel in navigable waters as part of the vessel itself"). But if such a craft can carry large appliances (like an oven or a refrigerator) and all of the other things we might find in a normal home in addition to the occupants of that home, as the existing record suggests Lozman's craft may have done, then it would seem to be much more like a mobile home (and therefore a vessel) than a firmly rooted residence. The simple truth is that we know very little about the craft's capabilities and what did or did not happen on its various trips. By focusing on the little we do know for certain about this craft (*i.e.,* its windows, doors, and the style of its rooms) in determining whether it is a vessel, the majority renders the §3 inquiry opaque and unpredictable.

Indeed, the little we do know about Lozman's craft suggests only that it was an unusual structure. A surveyor was unable to find any comparable craft for sale in the State of Florida. App. 43. Lozman's home was neither obviously a houseboat, as the majority describes such ships, *ante,* at 5–6, nor clearly a floating home, *ante,* at 10–11. See App. 13, 31, 79 (sale, lease, and surveying documents describing Lozman's craft as a "houseboat"). The only clear difference that the majority identifies between these two kinds of structures is that the former are self-propelled, while the latter are not. *Ante,* at 5–6. But even the majority recognizes that self-propulsion has never been a prerequisite for vessel status. *Ante,* at 5 (citing *The Robert W. Parsons*, 191 U. S., at 31); see *Norton*, 321 U. S., at 571. Consequently, it is unclear why

Lozman's craft is a floating home, why all floating homes are not vessels,[4] or why Lozman's craft is not a vessel. If windows, doors, and other esthetic attributes are what take Lozman's craft out of vessel status, then the majority's test is completely malleable. If it is the craft's lack of self-propulsion, then the majority's test is unfaithful to our longstanding precedents. See *The Robert W. Parsons*, 191 U. S., at 30–31. If it is something else, then that something is not apparent from the majority's opinion.

Worse still, in straining to find that Lozman's craft was a floating home and therefore not a vessel, the majority calls into question the conclusions of numerous lower courts that have found houseboats that lacked self-propulsion to be §3 vessels. See *ante,* at 9–10 (citing *Miami River Boat Yard, Inc.* v. *60' Houseboat*, 390 F. 2d 596, 597 (CA5 1968); *Sea Village Marina, LLC* v. *A 1980 Carlcraft Houseboat*, No. 09–3292, 2009 WL 3379923, *5–*6 (D NJ, Oct. 19, 2009); *Hudson Harbor 79th Street Boat Basin, Inc.* v. *Sea Casa*, 469 F. Supp. 987, 989 (SDNY 1979)). The majority incorrectly suggests that these cases applied an " 'anything that floats' " test. *Ante,* at 9. These cases suggest something different. Many of these decisions in assessing the crafts before them looked carefully at these crafts' structure and function, and determined that these ships had capabilities similar to other long-established vessels, suggesting a significant maritime

[4] To be clear, some floating homes are obviously not vessels. For example, some floating homes are structures built upon a large inverted pyramid of logs. Brief for Seattle Floating Homes Assn. et al. as *Amici Curiae* 14. Cf. App. 38 (Lozman's craft was buoyed by an empty bilge space). These kinds of floating homes can measure 4,000 or 5,000 square feet, see Brief for Seattle Floating Homes Assn. et al. as *Amici Curiae* 4, and may have connections to land that require the aid of divers and electricians to remove, *ibid.* These large, immobile structures are not vessels and have physical attributes directly connected to their lack of navigational abilities that suggest as much. But these structures are not before us; Lozman's craft is.

transportation function. See *Miami River Boat Yard*, 390 F. 2d, at 597 (likening houseboat at issue to a "barg[e]"); *Sea Village Marina*, 2009 WL 3379923, *7 ("According to the available evidence, [the houseboats in question] float and can be towed to a new marina without substantial effort . . . "); *Hudson Harbor*, 469 F. Supp., at 989 (houseboat "was capable of being used at least to the extent that a 'dumb barge' is capable of being used" and comparable to a "yach[t]"). Their holdings are consistent with older cases, see, *e.g., The Ark*, 17 F. 2d 446, 447 (SD Fla. 1926), and the crafts at issue in these cases have been widely accepted as vessels by most treatises in this area, see 1 S. Friedell, Benedict on Admiralty §164, p. 10–6, n. 2 (7th ed. rev. 2012); 1 T. Schoenbaum, Admiralty & Maritime Law §3–6, p. 153, n. 10 (5th ed. 2011); 1 R. Force & M. Norris, The Law of Seamen §2:12, p. 2–82 (5th ed. 2003). The majority's suggestion that rejecting the Eleventh Circuit's test necessitates jettisoning these other precedents is simply wrong. And, in its rejection, the majority works real damage to what has long been a settled area of maritime law.[5]

## III

With a more developed record, Lozman's craft might be distinguished from the houseboats in those lower court

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[5]The majority's invocation of two state environmental and tax statutes as a reason to reject this well-established lower court precedent is particularly misguided. See *ante,* at 10–11. We have repeatedly emphasized that the "regulation of maritime vessels" is a "uniquely *federal* are[a] of regulation." *Chamber of Commerce of United States of America* v. *Whiting*, 563 U. S. __, __ (2011) (plurality opinion) (slip op., at 19) (emphasis added); see also *United States* v. *Locke*, 529 U. S. 89, 99 (2000) (explaining that "the federal interest [in regulating interstate navigation] has been manifest since the beginning of our Republic and is now well established"). Our previous cases did not turn to state law in determining whether a given craft is a vessel. There are no good reasons to do so now.

cases just discussed. For example, if Lozman's craft's previous voyages caused it serious damage, then that would strongly suggest that it lacked a maritime transportation purpose or function. There is no harm in remanding the case for further factfinding along the lines described above, cautioning the lower courts to be aware that features of Lozman's "incomparable" craft, see App. 43, may distinguish it from previous precedents. At most, such a remand would introduce a relatively short delay before finally ending the years-long battle between Lozman and the city of Riviera Beach.

On the other hand, there is great harm in stretching the facts below and overriding settled and likely correct lower court precedents to reach the unnecessary conclusion that Lozman's craft was not a vessel. Without an objective application of the §3 standard, one that relies in a predictable fashion only on those physical characteristics of a craft that are related to maritime transport and use, parties will have no *ex ante* notion whether a particular ship is a vessel. As a wide range of *amici* have cautioned us, numerous maritime industries rely heavily on clear and predictable legal rules for determining which ships are vessels.[6] The majority's distorted application of our

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[6] For example, without knowing whether a particular ship is a §3 vessel, it is impossible for lenders to know how properly to characterize it as collateral for a financing agreement because they do not know what remedies they will have recourse to in the event of a default. Brief for National Marine Bankers Assn. as *Amicus Curiae* 14–15. Similarly, cities like Riviera Beach provide docking for crafts like Lozman's on the assumption that such crafts actually are "vessels," App. 13–21 (Riviera Beach's wet-slip agreement referring to Lozman's craft as a "vessel," "boat," or "houseboat"), that can be "remove[d]" upon short notice, *id.,* at 17 (requiring removal of the craft on three days' notice). The majority makes it impossible for these marinas to know whether the "houseboats" that fill their slips are actually vessels and what remedies they can exercise in the event of a dispute. See *id.,* at 15 ("In addition to any other remedies provided for in this Agreement,

settled law to the facts of this case frustrates these ends. Moreover, the majority's decision reaches well beyond relatively insignificant boats like Lozman's craft, *id.,* at 79 (listing purchase price of Lozman's craft as $17,000), because it specifically disapproves of lower court decisions dealing with much larger ships, see *ante,* at 10 (questioning *Holmes* v. *Atlantic Sounding Co.*, 437 F. 3d 441 (CA5 2006) (finding a 140-foot-long and 40-foot-wide dormitory barge with 50 beds to be a §3 vessel)).

IV

It is not clear that Lozman's craft is a §3 vessel. It is clear, however, that we are not in a good position to make such a determination based on the limited record we possess. The appropriate response is to remand the case for further proceedings in light of the proper legal standard. See Brief for United States as *Amicus Curiae* 29–31. The Court resists this move and in its haste to christen Lozman's craft a nonvessel delivers an analysis that will confuse the lower courts and upset our longstanding admiralty precedent. I respectfully dissent.

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the Marina, as a provider of necessities to this *vessel*, has a maritime lien on the *vessel* and may bring a civil action *in rem* under 46 United States Code 31342 in Federal Court, to arrest the *vessel* and enforce the lien . . . " (emphasis added)). Lozman's behavior over the years is emblematic of this problem. For example, in 2003, prior to his move to Riviera Beach, Lozman had his craft towed from one marina to another after a dispute arose with the first marina and he was threatened with eviction. App. 76–78. The possibility that a shipowner like Lozman can depart so easily over water and go beyond the reach of a provider of necessaries like the marina in response to a legal dispute is exactly the kind of problem that the Federal Maritime Lien Act, 46 U. S. C. §31342, was intended to address. See *Dampskibsselskabet Dannebrog* v. *Signal Oil & Gas Co. of Cal.*, 310 U. S. 268, 272–273 (1940).

**APPENDIX F:**

**VIRGINIA MARINE RESOURCE COMMISSION v. CHICOTEAGUE INN and RAYMOND BRITTON**

PUBLISHED

COURT OF APPEALS OF VIRGINIA

Present: Chief Judge Felton, Judges Elder, Frank, Humphreys, Kelsey, Petty, Beales, Alston, McCullough, Huff and Chafin
Argued at Richmond, Virginia

VIRGINIA MARINE RESOURCES COMMISSION

v. Record No. 0086-12-1

CHINCOTEAGUE INN AND RAYMOND BRITTON

OPINION BY
JUDGE GLEN A. HUFF
JANUARY 8, 2013

UPON A REHEARING EN BANC

FROM THE CIRCUIT COURT OF ACCOMACK COUNTY
Frederick B. Lowe, Judge

Paul Kugelman, Jr., Assistant Attorney General (Kenneth T. Cuccinelli, II, Attorney General; Elizabeth A. Andrews, Senior Assistant Attorney General; David C. Grandis, Assistant Attorney General, on briefs), for appellant.

Jon C. Poulson for appellees.

This matter comes before this Court on a rehearing en banc from a published panel decision rendered on August 14, 2012. See Va. Marine Res. Comm'n v. Chincoteague Inn, 60 Va. App. 585, 731 S.E.2d 6 (2012). The Virginia Marine Resources Commission ("VMRC") initially appealed an order of the Circuit Court of Accomack County ("circuit court") holding that VMRC lacked jurisdiction to order Chincoteague Inn ("Inn") to remove a vessel from over state-owned subaqueous bottomland. The three-judge panel of this Court reversed the circuit court holding that federal maritime law did not preempt VMRC's authority to regulate state-owned subaqueous bottomland and, therefore, VMRC had authority to order the removal of the vessel.

By order dated September 18, 2012, we granted the Inn's petition for rehearing en banc. Va. Marine Res. Comm'n v. Chincoteague Inn, 60 Va. App. 719, 732 S.E.2d 45 (2012). Upon

rehearing en banc, we hold that the circuit court did not err in holding that VMRC lacked jurisdiction to order the removal of a temporarily moored vessel from over state-owned subaqueous bottomlands. Therefore, we affirm the judgment of the circuit court.

## I. BACKGROUND

At some point prior to June 8, 2010, the Inn borrowed a barge from BIC, Inc., moored it to the dock outside the Inn along the Chincoteague Channel, outfitted it with a new deck, tables, and chairs, and installed and connected the barge to shore power and water. The Inn did this with the intent of using the vessel[1] for four months as additional seating for its restaurant.

On June 8, 2010, another restaurant owner notified VMRC staff that the Inn had made this addition. VMRC staff conducted a site inspection on June 11, 2010, and determined that part of the vessel was over state-owned subaqueous bottomland. On June 15, 2010, VMRC sent a notice to comply to the Inn, through Raymond Britton ("Britton"), the manager of the Inn, regarding the portion of the vessel that was over state-owned subaqueous bottomland without a permit. Specifically, the letter notified the Inn that the "western 54-foot by 13.6-foot portion" of the "71.5-foot long by 13.6-foot wide floating platform/pier and a 30-foot by 33.5-foot floating platform with a 22-foot by 12-foot roof structure that is open on three sides" was within VMRC's jurisdiction and needed to be removed within ten days of receipt of the letter. The letter stated further that the matter would be placed before the full Commission for an enforcement action if the Inn failed to comply within the time specified.

The Inn then submitted a joint permit application ("application") to the Commission on June 18, 2010, for an after-the-fact-permit for the entire vessel. By e-mail on June 22, 2010, VMRC notified the Inn that they would not process the Inn's application until the structure was

[1] At oral argument, VMRC conceded that the barge in question was a "vessel." "The word 'vessel' includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." 1 U.S.C. § 3.

removed. VMRC sent a second e-mail to the Inn on June 24, 2010, asking whether the Inn was going to withdraw its application, reiterating that VMRC could not proceed with the application until the vessel was removed, and restating that the Inn's failure to remove the vessel would result in a VMRC enforcement action. VMRC staff conducted another site inspection on June 28, 2010, and found that the vessel had not been removed and was secured to the pier with mooring lines.

On August 24, 2010, the Commission held a hearing on the Inn's failure to comply. At the hearing, Britton testified that he had been in marine construction for about twenty-five years and that his company, BIC, Inc., owned several barges, one of which is the vessel at issue, and that the barges were moored at the Inn when they were not in use. With regard to the subject vessel, Britton testified that they installed new decking and a handrail on it. Britton also testified there was additional seating on the barge and two gangways from the restaurant to the barge, each connected to the restaurant so that the gangways could be raised. Britton then stated that on July 19, 2010, they disconnected the water and electricity lines, pulled the gangways up, removed the vessel from her slip by use of its push boat, traveled down the Chincoteague Channel to the old drawbridge, returned to the slip, moored it to the Inn's dock, and reconnected the lines all within thirty-two minutes.

During the hearing, there was division among the Commissioners as to whether the barge was a vessel and whether the Commission had any authority over the vessel – regardless of whether it was a barge or floating platform. At the conclusion of the hearing, the Commission concluded that the "floating structure" was an unlawful use of state-owned subaqueous bottomland, pursuant to Code § 28.2-1203, and directed the Inn to remove the portion of the vessel under VMRC's jurisdiction within ten days. The Commission made no express finding that the structure was a vessel. On August 26, 2010, the Commission sent a letter to the Inn

setting forth its holding and directing the removal of the portion of the vessel over state-owned subaqueous bottomlands.

On September 16, 2010, VMRC notified the Inn that it was violating the Commission's order due to its failure to remove the vessel within the established time frame. VMRC then referred the matter to the Attorney General to petition the appropriate circuit court for an order requiring removal of part of the vessel as well as the assessment of civil penalties.

The Inn mailed its notice of appeal to VMRC on September 23, 2010. On appeal to the circuit court, the Inn argued that VMRC lacked jurisdiction under Code § 28.2-1203 to regulate a temporarily moored vessel floating over state-owned subaqueous bottomland and that federal maritime law precludes state regulation over a vessel in navigation.[2] In response, VMRC argued that the Commonwealth owned the subaqueous bottomland and VMRC had jurisdiction to regulate the vessel because VMRC's scope of authority included regulating encroachments over state-owned subaqueous bottomlands pursuant to Code § 28.2-1203.

On October 14, 2011, the circuit court heard argument and accepted the Inn's position, ruling that VMRC lacked jurisdiction over the vessel as its mooring was not a permanent attachment to land and it was capable of being moved from place to place in navigable waters. The circuit court then deferred ruling on the Inn's request for fees and costs. In its final order issued on December 20, 2011, the circuit court found that VMRC erred in determining that it had

[2] A temporarily moored maritime vessel is a vessel in navigation. See Stewart v. Dutra Constr. Co., 543 U.S. 481, 490, 493-94, 496 (2005) (noting that the focus of whether a vessel is "in navigation" is on whether the watercraft is "capable of being used" for maritime transport and whether such use is a practical possibility or merely a theoretical one); see also, Chandris, Inc. v. Latsis, 515 U.S. 347, 373 (1995) ("'[A] vessel does not cease to be a vessel when she is not voyaging, but is at anchor, berthed, or at dockside.'" (quoting DiGiovanni v. Traylor Bros., Inc., 959 F.2d 1119, 1121 (1st Cir. 1992))); Leathers v. Blessing, 105 U.S. 626, 629 (1882) ("[A]lthough the transit of the vessel was completed, she was still a vessel occupied in the business of navigation at the time. The facts, that she was securely moored to the wharf, and had communication with the shore by a gang-plank, did not make her a part of the land or deprive her of the character of a water-borne vessel.").

jurisdiction over the vessel and was not in compliance with the statutory authority and/or jurisdiction limitations set forth in Code § 2.2-4027. The circuit court also awarded the Inn its fees and costs since it had "substantially prevailed."

On August 14, 2012, a panel of this Court reversed the circuit court's decision holding that VMRC had jurisdiction to order the removal of the vessel, and reversing and remanding for the circuit court to determine the issues presented in the Inn's petition for appeal to the circuit court, including the scope of Code § 28.2-1203. Va. Marine Res. Comm'n, 60 Va. App. at 599, 731 S.E.2d at 13. On appeal, the panel held that the issue was "whether federal maritime law preempts the state's ability to order the removal of the structure" while noting that VMRC never ruled on federal preemption. Id. at 591, 731 S.E.2d at 9. Based on four factors, the panel held that federal law did not preempt VMRC from ordering the removal of the vessel pursuant to its right to regulate encroachments upon or over the state-owned subaqueous bottomlands. Id. at 597-99, 731 S.E.2d at 12. The panel also vacated the circuit court's award of fees and costs to the Inn, and remanded for a determination of fees and costs, if any, based on Code § 2.2-4030. Id. at 599, 731 S.E.2d at 12-13.

On September 18, 2012, this Court granted the Inn's petition for a rehearing en banc with regard to the issues raised by the Inn in the petition, stayed the mandate of the panel's decision, and reinstated the appeal. Va. Marine Res. Comm'n, 60 Va. App. at 720, 732 S.E.2d at 46. This appeal followed.

## II. STANDARD OF REVIEW

Judicial review of an agency decision is authorized by Code § 2.2-4027 of the Virginia Administrative Process Act. "Judicial review of an agency decision is limited to determining '1. [w]hether the agency acted in accordance with law; 2. [w]hether the agency made a procedural error which was not harmless error; and 3. [w]hether the agency had sufficient

evidential support for its findings of fact.'" Commonwealth ex rel. Va. State Water Control Bd. v. Blue Ridge Envtl. Def. League, Inc., 56 Va. App. 469, 480, 694 S.E.2d 290, 296 (2010) (alteration in original) (quoting Johnston-Willis, Ltd. v. Kenley, 6 Va. App. 231, 241, 369 S.E.2d 1, 6 (1988)), aff'd, 283 Va. 1, 720 S.E.2d 138 (2012).

"'On reviewing the claims of error, an agency's factual determination is given substantial judicial deference, and is reviewed 'only for whether they have support in substantial evidence.'" Id. (quoting Mazloumi v. Dep't of Envtl. Quality, 55 Va. App. 204, 208, 684 S.E.2d 852, 854 (2009)). On appeal of an agency's determination of law,

> "where the question involves an interpretation which is within the specialized competence of the agency and the agency has been entrusted with wide discretion by the General Assembly, the agency's decision is entitled to special weight in the courts[, and] . . . 'judicial interference is permissible only for relief against arbitrary or capricious action that constitutes a clear abuse of delegated discretion.'"

Evelyn v. Commonwealth, 46 Va. App. 618, 624, 621 S.E.2d 130, 133 (2005) (alteration in original) (quoting Johnston-Willis, 6 Va. App. at 244, 369 S.E.2d at 8).

"However, courts do not defer to an agency's interpretation '[i]f the issue falls outside the area generally entrusted to the agency, and is one in which the courts have special competence, i.e., the common law or constitutional law . . . .'" Commonwealth ex rel. Va. State Water Control Bd., 56 Va. App. at 481, 694 S.E.2d at 296 (alteration in original) (quoting Johnston-Willis, 6 Va. App. at 243-44, 369 S.E.2d at 8). "An agency's 'legal interpretations of statutes' is accorded no deference because '[w]e have long held that pure statutory interpretation is the prerogative of the judiciary, and thus, Virginia courts do not delegate that task to executive agencies.'" Id. (quoting The Mattaponi Indian Tribe v. Commonwealth Dep't of Envtl. Quality, 43 Va. App. 690, 707, 601 S.E.2d 667, 676 (2004), aff'd in part, rev'd in part sub nom, Alliance

to Save the Mattaponi v. Commonwealth Dep't of Envtl. Quality ex rel. State Water Control Bd., 270 Va. 423, 621 S.E.2d 78 (2005)).

> [W]here the issue involves a legal determination or statutory interpretation, this Court does a *de novo* review, especially if the statutory language is clear. We are required to construe the law as it is written. An erroneous construction by those charged with its administration cannot be permitted to override the clear mandates of a statute. When an agency's statutory interpretation conflicts with the language of the statute or when the interpretation has not been consistently and regularly applied, the usual deference to an agency's interpretation should be withheld.

Id. at 481-82, 694 S.E.2d at 296-97 (alteration in original) (internal quotation marks omitted) (citations omitted) (quoting Shippers' Choice of Va., Inc. v. Smith, 52 Va. App. 34, 37-38, 660 S.E.2d 695, 696-97 (2008), rev'd on other grounds, 277 Va. 593, 674 S.E.2d 842 (2009)).

## III. ANALYSIS

On appeal, VMRC contends that the circuit court's ruling that VMRC lacked jurisdiction over the vessel should be reversed because the Commission has jurisdiction to order cessation of encroachments over state-owned subaqueous bottomlands and this jurisdiction is not preempted by federal maritime law particularly as it relates to floating additions to restaurants. The Inn argues, however, that the circuit court did not err because the scope of Code § 28.2-1203 does not create jurisdiction in VMRC to regulate a vessel either in transit or temporarily moored over state-owned subaqueous bottomland so as to require it to be permitted under Code §§ 28.2-1203 and -1204, or removed.

Before addressing whether federal law preempts state law, we must first determine if the statute grants VMRC jurisdiction to order the removal of a temporarily moored vessel. Thus, the threshold issue in this case is whether Code § 28.2-1203 provides VMRC jurisdiction over vessels temporarily moored over state-owned subaqueous bottomlands. In making this

determination, we must look to the language of the statute and the legislature's intent in enacting it. Evelyn, 46 Va. App. at 629-30, 621 S.E.2d at 136.

> "In construing statutes, courts are charged with ascertaining and giving effect to the intent of the legislature." Crown Cent. Petroleum Corp. v. Hill, 254 Va. 88, 91, 488 S.E.2d 345, 346 (1997). "That intention is initially found in the words of the statute itself, and if those words are clear and unambiguous, we do not rely on rules of statutory construction or parol evidence, unless a literal application would produce a meaningless or absurd result." Id. (citations omitted). "[W]ords and phrases used in a statute should be given their ordinary and usually accepted meaning unless a different intention is fairly manifest."

Id. (quoting Woolfolk v. Commonwealth, 18 Va. App. 840, 847, 447 S.E.2d 530, 534 (1994)). Thus, "'[w]hen the language of a statute is unambiguous, we are bound by the plain meaning of that language. . . . If[, however,] a statute is subject to more than one interpretation, we must apply the interpretation that will carry out the legislative intent behind the statute.'" Scott v. Commonwealth, 58 Va. App. 35, 48, 707 S.E.2d 17, 24 (2011) (quoting Evans v. Evans, 280 Va. 76, 82, 695 S.E.2d 173, 176 (2010)).

Although Code § 28.2-1203 is part of the law that has been codified by the General Assembly and entrusted to VMRC to apply, the outcome of this appeal turns on the statutory interpretation of Code § 28.2-1203. Therefore, we do not give the agency's interpretation of its jurisdiction under the statute any deference. See Commonwealth ex rel. Va. State Water Control Bd., 56 Va. App. at 481, 694 S.E.2d at 296 (quoting The Mattaponi Indian Tribe, 43 Va. App. at 707, 601 S.E.2d at 676). Furthermore, while the statute is penal, it "has a primarily regulatory, non-penal purpose and should be construed liberally in favor of the public interest rather than against it." Evelyn, 46 Va. App. at 631, 621 S.E.2d at 137.

In 1953, the United States Congress ceded title and ownership of lands beneath navigable waters within a state's boundaries to that respective state, as well as the natural resources within

such lands and waters.[3] Submerged Lands Act, 43 U.S.C. § 1311; see also Taylor v. Commonwealth, 102 Va. 759, 770, 47 S.E. 875, 879 (1904) (recognizing that "the navigable waters and the soil under them, within the territorial limits of a State, are the property of the State, to be controlled by the State, in its own discretion, for the benefit of the people of the State." (citing McCready v. Virginia, 94 U.S. 391 (1877))). Pursuant to Code § 28.2-1200,

> [a]ll the beds of the bays, rivers, creeks and the shores of the sea within the jurisdiction of the Commonwealth, not conveyed by special grant or compact according to law, shall remain the property of the Commonwealth and may be used as a common by all the people of the Commonwealth for the purpose of fishing, fowling, hunting, and taking and catching oysters and other shellfish.

See also Taylor, 102 Va. at 765-70, 47 S.E. at 877-80 (noting that the predecessor to this code section was not "an arbitrary assumption of right upon the part of the State," but was merely a declaration of the common law).

Article XI, Section I of the Constitution of Virginia established the following policy regarding waters owned by the Commonwealth:

> [t]o 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.

In furtherance of this policy, Article XI, Section II of the Constitution of Virginia provides that "the General Assembly may undertake the . . . protection of its atmosphere, lands, and waters from pollution, impairment, or destruction, by agencies of the Commonwealth . . . ."

[3] In doing so, however, the federal government reserved the power to regulate the bottomlands for the "constitutional purposes of commerce, navigation, national defense, and international affairs, . . . ." Submerged Lands Act of 1953, 43 U.S.C. § 1314(a) (2006).

In 1962, jurisdiction over the Commonwealth's permit program to regulate encroachments on or over state-owned bottomlands was transferred from the Office of the Attorney General to VMRC. To that end, Code § 28.2-101 specifically provides that VMRC's jurisdiction

> 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.* The Commission shall have jurisdiction over all commercial fishing and all marine fish, marine shellfish, marine organisms, and habitat in such areas. In waters of the Albemarle and Currituck watersheds, the Commission's fisheries management jurisdiction is limited to the recreational and commercial harvest of blue crabs. The Commission's jurisdiction shall also include the power to exercise regulatory authority over all structures and improvements built or proposed by riparian property owners in the Potomac River appurtenant to the shore of the Commonwealth.

(Emphasis added).

Code § 28.2-1204 sets forth VMRC's authority over submerged lands to

> 1. Issue permits for all reasonable uses of state-owned bottomlands not authorized under subsection A of [Code] § 28.2-1203, including but not limited to, dredging, the taking and use of material, and the placement of wharves, bulkheads, and fill by owners of riparian land in the waters opposite their lands, provided such wharves, bulkheads, and fill do not extend beyond any lawfully established bulkhead lines;
>
> 2. Issue permits to recover underwater historic property pursuant to [Code] §§ 10.1-2214 and 28.2-1203; and
>
> 3. Establish bulkhead and private pier lines on or over the bays, rivers, creeks, streams, and shores of the ocean which are owned by or subject to the jurisdiction of the Commonwealth for this purpose, and to issue and publish maps and plats showing these lines; however, these lines shall not conflict with those established by the United States Army Corps of Engineers.

Code § 28.2-1203(A), titled "[u]nlawful use of subaqueous beds; penalty," provides, in pertinent part,

> [i]t 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 Commission . . . .

In exercising its authority to grant or deny a permit, Code § 28.2-1205(A) directs VMRC to be guided by Article XI, Section I of the Constitution of Virginia, to consider the public and private benefits of proposed projects as well as the effects of the projects on a list of factors, and to exercise its authority consistent with the public trust doctrine as defined by common law. In Virginia, the public trust doctrine is as follows:

> "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."

Palmer v. Commonwealth Marine Res. Comm'n, 48 Va. App. 78, 88-89, 628 S.E.2d 84, 89-90 (2006) (quoting Virginia Marine Resources Commission, Subaqueous Guidelines, 21 Va. Reg. Regs. 1708 (Feb. 21, 2005)). Thus, in determining the legislative intent, consideration of the public trust doctrine is proper. See Evelyn, 46 Va. App. at 631 n.3, 621 S.E.2d at 137 n.3 ("Thus, the Constitution makes clear it is entirely appropriate for the VMRC and judiciary to consider the legislature's express duty to 'safeguard the public right to the use and enjoyment of the subaqueous lands of the Commonwealth held in trust by it for the benefit of the public as conferred by the public trust doctrine and the Constitution of Virginia,' Code § 28.2-1205(A), when interpreting and applying *all* legislative enactments, including Code §[] 28.2-1203 . . . .").

It is within this context that we examine the meaning of Code § 28.2-1203. As noted above, Code § 28.2-101 specifically provides that VMRC has jurisdiction over state-owned subaqueous bottomlands. Pursuant to Code §§ 28.2-1203, and -1204, VMRC's jurisdiction includes its authority to require permits from any person who "build[s], dump[s], trespass[es] *or encroach[es] upon or over,* or take[s] or use[s] any materials from the beds of the bays, ocean,

rivers, streams, or creeks which are the property of the Commonwealth, . . . ." (Emphasis added). While Code § 28.2-1203(A) makes it unlawful, absent the issuance of a permit, for a person to "encroach upon or over" state-owned subaqueous bottomlands, it does not define the term "encroach."

Webster's Third International Dictionary defines "encroach" as "to enter by gradual steps or by stealth into the possessions or rights of another" or "to advance beyond desirable or normal limits." Webster's Third International Dictionary 747 (2002). Black's Law Dictionary also defines "encroach" as "[t]o enter by gradual steps or stealth into the possessions or rights of another," but also defines it as "[t]o gain or intrude unlawfully upon another's lands, property, or authority." Black's Law Dictionary 607 (9th ed. 2009). Thus, when applying the plain meaning of the word in conjunction with the legislative intent behind the statute, one must be unlawfully over the state-owned bottomlands such that it violates the right of "all the people of the Commonwealth" to use the bottomlands "for the purpose of fishing, fowling, hunting, and taking and catching oysters and other shellfish," Code § 28.2-1200, and prohibits the Commonwealth from properly managing the bottomlands in order for the action to constitute an encroachment under Code § 28.2-1203.[4]

Although a portion of the vessel was temporarily moored over state-owned bottomlands, it was not unlawfully encroaching over the bottomlands such that it violated the rights of the people of the Commonwealth to use the bottomlands. Neither did it interfere with VMRC's

[4] Although not referenced during oral argument and only mentioned in passing on brief, VMRC's authority to regulate a "trespass . . . upon or over" state-owned subaqueous bottomlands would similarly fail. Code § 28.2-1203. Webster's Third International Dictionary defines "trespass" as follows: "to enter unlawfully upon the land of another." Webster's, supra, at 2439. Black's Law Dictionary defines "trespass" as "[a]n unlawful act committed against the person or property of another; esp., wrongful entry on another's real property." Black's, supra, at 1642. Accordingly, VMRC's jurisdiction over "trespass" would require an unlawful contact or connection to or over the bottomland, neither of which occurred here for the same reasons set forth above.

management of state-owned bottomlands or fish and shellfish habitats. The focus of Code § 28.2-1203 is to ensure the continued use and enjoyment of the bottomlands consistent with the Commonwealth's policy as well as the public trust doctrine. To that end, VMRC is authorized to regulate and require permits where such use of the bottomlands is in contravention of Code § 28.2-1203. The statute, however, does not require an individual temporarily mooring a vessel over bottomlands, without more, to first obtain a permit nor did the legislature intend a temporarily moored vessel to constitute an "encroachment" requiring a permit. If that were the case, every vessel owner would be in jeopardy whenever they were temporarily moored over state-owned bottomlands.

Furthermore, if the statute authorized VMRC to require a permit for a vessel every time it was temporarily moored, it would be impossible for VMRC to implement as vessels can move and stop over the bottomlands numerous times in one day. In addition, under VMRC's sweeping conception of "encroachment," any owner of a vessel temporarily moored over state-owned bottomland who did not obtain a permit from VMRC would be subject to a fine of up to $25,000 per day and prosecution for a Class 1 misdemeanor. See Code §§ 28.2-1203(B) (Class 1 misdemeanor); -1211 (injunction against violations of Code § 28.2-1203); -1212 (monitoring, inspections, compliance, and restoration); -1213 (penalties). Accordingly, this Court declines to utilize such a broad interpretation as it would produce an absurd result in contravention to the legislature's intent, and holds that a vessel, such as the one at issue, temporarily moored over state-owned bottomlands is not an encroachment – an unlawful intrusion – requiring a permit.

## IV. CONCLUSION

Based on the foregoing, this Court holds that the circuit court did not err in holding that VMRC lacked jurisdiction under Code § 28.2-1203 to order the removal of the temporarily moored vessel. Because we hold that the circuit court did not err in its ruling on jurisdiction, we

need not address whether federal law preempts state law as there is no state law applicable. Accordingly, we affirm the circuit court's order including its award of fees and costs to the Inn.

Affirmed.

Elder, Frank, Humphreys, and Petty, JJ., dissenting.

We dissent for the reasons stated in the panel opinion. See Va. Marine Res. Comm'n v. Chincoteague Inn, 60 Va. App. 585, 731 S.E.2d 6 (2012).

***VIRGINIA:***

*In the Court of Appeals of Virginia on* **Tuesday** *the* **18th** *day of* **September, 2012**.

Virginia Marine Resources Commission, Appellant,

against Record No. 0086-12-1
Circuit Court No. 001-CL0000399

Chincoteague Inn and
Raymond Britton, Appellees.

Upon a Petition for Rehearing En Banc

Before Chief Judge Felton, Judges Elder Frank, Humphreys, Kelsey, Petty, Beales, Alston, McCullough, Huff and Chafin

On August 27, 2012 came the appellees, by counsel, and filed a petition requesting that the Court set aside the judgment rendered herein on August 14, 2012, and grant a rehearing *en banc* on the issue(s) raised in the petition.

On consideration whereof, the petition for rehearing *en banc* is granted with regard to the issue(s) raised therein, the mandate entered herein on August 14, 2012 is stayed pending the decision of the Court *en banc*, and the appeal is reinstated on the docket of this Court.

The parties shall file briefs in compliance with Rule 5A:35(b). The appellant shall attach as an addendum to the opening brief upon rehearing *en banc* a copy of the opinion previously rendered by the Court in this matter. It is further ordered that the appellees shall file twelve additional copies of the appendix previously filed in this case. In addition, any party represented by counsel shall file twelve electronic copies of their brief (and the appendix, if the party filing the appendix is represented by counsel) with the clerk of

this Court. The electronic copies must be filed on twelve separate CDs or DVDs and must be filed in Adobe Acrobat Portable Document Format (PDF).[1]

A Copy,

Teste:

Cynthia L. McCoy, Clerk

By: *original order signed by a deputy clerk of the Court of Appeals of Virginia at the direction of the Court*

Deputy Clerk

[1] The guidelines for the creation and submission of a digital brief package can be found at www.courts.state.va.us, in the Court of Appeals section under "Resources and Reference Materials."

COURT OF APPEALS OF VIRGINIA

Present: Judges Elder, Frank and Humphreys
Argued at Chesapeake, Virginia

VIRGINIA MARINE RESOURCES COMMISSION

v. Record No. 0086-12-1

OPINION BY
JUDGE ROBERT P. FRANK
AUGUST 14, 2012

CHINCOTEAGUE INN AND RAYMOND BRITTON

FROM THE CIRCUIT COURT OF ACCOMACK COUNTY
Frederick B. Lowe, Judge

Paul Kugelman, Jr., Assistant Attorney General (Kenneth T. Cuccinelli, II, Attorney General; Elizabeth A. Andrews, Senior Assistant Attorney General; David C. Grandis, Assistant Attorney General, on briefs), for appellant.

Jon C. Poulson for appellees.

Appellant, the Virginia Marine Resources Commission (VMRC), appeals from an order of the circuit court of Accomack County, holding that VMRC lacked jurisdiction to order appellee, the Chincoteague Inn (the Inn), to remove a floating platform from over state-owned bottomland. VMRC argues the circuit court erred in ruling that VMRC considered the floating addition a vessel where VMRC made no such determination. VMRC also alleges the circuit court erred in holding that VMRC had no jurisdiction to order the removal of the floating platform. Finally, VMRC assigns error to the circuit court's award of fees and costs to the Inn. For the reasons stated, we reverse and remand.

## PROCEDURAL HISTORY

On June 15, 2010, VMRC wrote to Raymond Britton, as manager of the Inn, notifying him that he needed to remove a portion of an unauthorized floating platform next to the Inn,

because the platform was in violation of Code § 28.2-1212(B). VMRC subsequently brought the matter before its Commission for enforcement action.

On August 24, 2010, the Commission held a hearing and heard argument. By letter dated August 26, 2010, VMRC informed the Inn that the Commission found the floating addition to be an unlawful use of state-owned bottomland, in violation of Code § 28.2-1203, and ordered the portion of the platform over state-owned bottomland to be removed within ten days.

The Inn mailed a notice of appeal on September 23, 2010. On October 14, 2011, the circuit court of Accomack County heard the appeal and ruled the VMRC lacked jurisdiction over the floating platform. At that time, the circuit court deferred ruling on the Inn's request for fees and costs.

The circuit court issued its final order on December 20, 2011, finding that VMRC lacked jurisdiction to order the removal of the floating platform. The circuit court also ruled that the Inn had substantially prevailed and awarded attorney's fees and costs.

## BACKGROUND

In June of 2010, VMRC learned that a large floating platform had been placed adjacent to the Inn and was reportedly over state-owned bottomland. VMRC conducted a site inspection on June 11, 2010 and determined that at least part of the platform was not over state-owned bottomland. On June 15, VMRC sent the Inn a notice to comply, through Britton, regarding the unauthorized portion of the floating platform. The notice gave the Inn ten days to remove the illegal portion of the platform.

On June 22, VMRC sent another letter to the Inn, stating that failure to remove the floating platform would result in VMRC enforcement action. A site inspection on June 28 showed that the platform had not been removed.

VMRC held a hearing on August 24. At the hearing, Britton testified that the floating platform had a bar, tables, and a gangplank leading to the Inn's restaurant. Britton intended to use the platform for four months, to accommodate seasonal restaurant and bar overflow. Britton also testified that the platform was a barge normally used in his construction business and therefore was a vessel, noting that on July 19, 2010, the barge was disconnected from electric and water lines, taken out of its slip by its normal push boat, taken up Chincoteague Channel to the old drawbridge, then returned to its slip and reconnected, all in 32 minutes.

After considerable debate over whether the Commission had jurisdiction over a vessel, the Commission ultimately concluded that the "floating structure" was an unlawful use of state-owned bottomland and directed the Inn to remove the offending portion of the platform under VMRC's jurisdiction within ten days. The Commission never made a finding that the structure was a vessel.

On September 16, 2010, VMRC notified the Inn that because it had not removed the platform from the Inn, it was violating the Commission's order. VMRC then referred the matter to the Attorney General to petition the appropriate circuit court for an order requiring removal of part of the platform, as well as the assessment of civil penalties.

The Inn mailed a notice of appeal to VMRC on September 23, 2010. On appeal to the circuit court, Britton argued that VMRC lacked jurisdiction over a temporarily moored barge or vessel because federal maritime law preempts state regulation over any vessel. On October 14, 2011, the circuit court heard argument and accepted the Inn's position, ruling that VMRC lacked jurisdiction over the platform adjacent to the Inn, as it was moored and docked, not permanently

attached to land, and because it was capable of being moved from place to place in navigable waters.

This appeal follows.[1]

## ANALYSIS

VMRC first contends the circuit court erred when it ruled that VMRC considered the floating addition a vessel where VMRC made no such determination and where making this determination is beyond the scope of a circuit court's review of an administration case decision. The Inn argues that this issue is waived. We agree with the Inn that this argument was not preserved in the circuit court. At oral argument, VMRC conceded the issue was not preserved and that the structure in question was a vessel.

VMRC next contends the circuit court erred in finding that VMRC did not have any jurisdiction to order the removal of the portion of the floating addition over state-owned bottomland.[2]

Here, we review whether the circuit court correctly ruled VMRC had no jurisdiction because the structure in question is a vessel. The issue, as framed by both parties and as presented at oral argument, is whether federal maritime law preempts the state's ability to order the removal of the structure. The Commission never ruled on federal preemption.

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[1] VMRC alleges that the Inn's brief contains unsupported facts and inadequate citation to the record, in violation of Rule 5A:21(c). We have thoroughly reviewed the record in this case, not merely the briefs of the parties. Our analysis is not based on the Inn's statement of facts, but on the record. See Ward v. Charlton, 177 Va. 101, 107, 12 S.E.2d 791, 792 (1941).

[2] On appeal, the Inn supports the circuit court's decision, contending that Code § 28.2-1203 applies only to fixed structures. It is not clear from the circuit court's ruling whether Code § 28.2-1203 barred the Commission from exercising jurisdiction. The arguments before the circuit court were 1) the scope of Code § 28.2-1203 and 2) whether state regulations were preempted by federal maritime law. The scope of Code § 28.2-1203 would appropriately be addressed by the circuit court on remand.

The preemption issue is one of law. Code § 2.2-4027 of the Virginia Administrative Process Act (VAPA) allows judicial review of an agency decision.

> Under VAPA, the circuit court reviews an agency's action in a manner "'equivalent to an appellate court's role in an appeal from a trial court.'" J. P. v. Carter, 24 Va. App. 707, 721, 485 S.E.2d 162, 169 (1997) (quoting Sch. Bd. v. Nicely, 12 Va. App. 1051, 1061-62, 408 S.E.2d 545, 551 (1991)). "In this sense, the General Assembly has provided that a circuit court acts as an appellate tribunal." Gordon v. Allen, 24 Va. App. 272, 277, 482 S.E.2d 66, 68 (1997) (citation omitted). "The burden is upon the party complaining of the agency action to demonstrate an error of law subject to review." Johnston-Willis, Ltd. v. Kenley, 6 Va. App. 231, 241, 369 S.E.2d 1, 6 (1988) (citing Code § 9-6.14:17; Roanoke Memorial Hospitals v. Kenley, 3 Va. App. 599, 603, 352 S.E.2d 525, 527 (1987)).

Commonwealth v. Blue Ridge Envtl. Def. League, Inc., 56 Va. App. 469, 479-80, 694 S.E.2d 290, 295-96 (2010).

Under the "substantial evidence" standard, the reviewing court may reject an agency's factual findings only when, on consideration of the entire record, a reasonable mind would necessarily reach a different conclusion. Alliance to Save the Mattaponi v. Commonwealth Dep't of Envtl. Quality ex rel. State Water Control Bd., 270 Va. 423, 441, 621 S.E.2d 78, 88 (2005) (citing Aegis Waste Solutions v. Concerned Taxpayers, 261 Va. 395, 404, 544 S.E.2d 660, 665 (2001)).

Although we are bound on appeal to the trial court's findings of historical fact, Dep't of Med. Assistance Servs. v. Beverly Healthcare of Fredericksburg, 41 Va. App. 468, 490, 585 S.E.2d 858, 869 (2003), we review questions of law *de novo*. See Clark v. Marine Res. Comm'n, 55 Va. App. 328, 334-35, 685 S.E.2d 863, 866 (2009) (citing Moreau v. Fuller, 276 Va. 127, 133, 661 S.E.2d 841, 845 (2008)).

> [J]udicial review of a legal issue requires little deference, unless it . . . falls within an agency's area of particular expertise. Whether the issue is one of law or fact or substantial evidence, we are directed to take account of the role for which agencies are created

> and public policy as evidenced by the basic laws under which they operate. Thus, the degree of deference afforded an agency decision depends upon not only the nature of the issue, legal or factual, but also upon whether the issue falls within the area of experience and specialized competence of the agency.

Appalachian Voices v. Air Pollution Control, 56 Va. App. 282, 289, 693 S.E.2d 295, 298 (2010) (internal citations and quotations omitted).

VMRC challenges the circuit court's ruling that the Commission had no jurisdiction to order the removal of a portion of the floating structure. Specifically, VMRC contends it does have jurisdiction to order cessation of encroachments over state-owned bottomlands and that federal maritime jurisdiction does not preempt state jurisdiction. The Inn responds that the structure is a moored vessel and is subject exclusively to federal admiralty or maritime law. The Inn further argues that any state attempt to regulate a moored vessel is preempted by federal law if the state law is inconsistent with federal law.[3]

Essentially, our analysis is whether the vessel in question is state- or federally-regulated. We begin by acknowledging that "the operation of a boat on navigable waters, no matter what its size or activity, is a traditional maritime activity to which the admiralty jurisdiction of the federal courts may extend." St. Hilaire Moye v. Henderson, 496 F.2d 973, 979 (8th Cir. 1974). However, assuming maritime law is applicable, it does not necessarily follow that state regulations are preempted. According to McCready v. Commonwealth, 68 Va. (27 Gratt.) 985, aff'd, 94 U.S. 391 (1876), the navigable waters within the state's territorial limits, as well as the soil beneath those waters, are the property of the state and may be controlled by the state in its

[3] The Inn, in its brief, argues the Commission erred in certain findings, i.e. the structure did not encroach on state bottomlands, and it was not a permanent structure or improvement constructed on or over state bottomlands. We do not address these allegations because the Inn did not assign cross-error to them, and under Rule 5A:21(b), an appellee's brief must contain any additional assignments of error it wishes to present.

discretion for the benefit of the people, as long as the state does not interfere with the authority of the federal government in regulating commerce and navigation.

Article XI, § I of the Virginia Constitution expresses this Commonwealth's policy to protect its waters from pollution and impairment for the benefit, enjoyment, and general welfare of the people. To that end, Code § 28.2-101 provides, *inter alia*, that VMRC's jurisdiction "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." Further, Code § 28.2-1203(A) provides, *inter alia*

> 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 Commission . . . .

Code § 28.2-1200 states in part:

> All the beds of the bays, rivers, creeks and the shores of the sea within the jurisdiction of the Commonwealth, not conveyed by special grant or compact according to law, shall remain the property of the Commonwealth and may be used as a common by all the people of the Commonwealth for the purpose of fishing, fowling, hunting, and taking and catching oysters and other shellfish.

The federal government has enacted a statutory scheme defining the roles of federal and state governments in regulating navigable waters.

43 U.S.C. § 1311(a) states in part:

> It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is

> located, and the respective grantees, lessees, or successors in interest thereof.[4]

Section (d) states:

> Authority and rights of United States respecting navigation, flood control and production of power. Nothing in this subchapter or subchapter 1 of this chapter shall affect the use, development, improvement, or control by or under the constitutional authority of the United States of said lands and waters for the purposes of navigation or flood control or the production of power, or be construed as the release or relinquishment of any rights of the United States arising under the constitutional authority of Congress to regulate or improve navigation, or to provide for flood control, or the production of power.

Within this statutory framework, we now determine whether federal maritime jurisdiction, under the facts of this case, preempts state law. The Inn contends that the operation of a vessel on navigable waters is a traditional maritime activity and that VMRC's order of removal is repugnant to the right of navigation.

The United States Supreme Court, in Yamaha Motor Corp. v. Calhoun, 516 U.S. 199 (1996), provides us with the criteria to determine this issue. In Yamaha, the appellee decedent was killed while riding a jet ski manufactured by Yamaha. The decedent's parents brought an admiralty action for damages, invoking Pennsylvania's wrongful death and survival statutes. Yamaha responded that the state remedies could not be applied because the decedent died on navigable waters, contending that federal maritime wrongful death law provided the exclusive basis for recovery. The conflict between maritime law and Pennsylvania's wrongful death statute was the extent of damages.

[4] 43 U.S.C. § 1313 exempts federally-owned lands from § 1311, retaining all the federal government's navigational servitude and rights in and powers of regulation and control over those lands for the constitutional purposes of commerce, navigation, national defense, and international affairs.

The Supreme Court held:

> Because this case involves a watercraft collision on navigable waters, it falls within admiralty's domain. See Sisson v. Ruby, 497 U.S. 358, 361-367 (1990); Foremost Ins. Co. v. Richardson, 457 U.S. 668, 677 (1982). "With admiralty jurisdiction," we have often said, "comes the application of substantive admiralty law." East River S. S. Corp. v. Transamerica Delaval Inc., 476 U.S. 858, 864 (1986). The exercise of admiralty jurisdiction, however, "does not result in automatic displacement of state law." Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 545 (1995).

Yamaha, 516 U.S. at 206.

The Yamaha Court recognized that vindication of maritime policies demanded uniform adherence to a federal rule, with no leeway for variation or supplementation by state law. See id. at 210. State law cannot interfere "with the harmonious operation of maritime law." Id. However, the United States Supreme Court concluded that the damages available for the decedent's death were properly governed by state law, because Congress has not prescribed damages for wrongful death of a non-seafarer in territorial waters.

State of Maryland Dept. Natural Resources v. Kellum, 51 F.3d 1220 (4th Cir. 1995), addressed whether Maryland's strict liability statute was preempted by federal admiralty law, which premised liability on negligence. Kellum's barge went aground on and damaged state-owned oyster grounds. Maryland brought an action as an admiralty or maritime claim, alleging strict liability under Maryland law. The Fourth Circuit concluded the injury to the oyster ground resulted from an occurrence unique to maritime law, namely the stranding of a vessel. Id. at 1223. It concluded "the result for such a maritime tort is in admiralty and grounded on maritime theories of negligence and damages." Id. Maritime law governing a traditional maritime tort "requires findings of fault and causation as predicates for liability." Id. at 1224. However, the application of the Maryland "strict liability" statute eliminates the need for fault. Further, the Fourth Circuit found that federal law requires that damages be allocated

proportionally according to fault. State "strict liability" eliminates the federally-mandated proportionality analysis.

The Fourth Circuit concluded state law made changes to the substantive maritime law. While states can modify or supplement federal maritime law, states cannot "flatly contradict it or deprive any person of a substantive federal right." Id. at 1226. The Kellum Court found that Maryland law changed substantive maritime law and concluded that federal maritime law preempted state law. See also Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953) (superseded on other grounds) (In a personal injury suit, state contributory negligence law was preempted by federal maritime law of comparative negligence); Garrett v. Moore-McCormack, 317 U.S. 239 (1942) (In an action brought pursuant to the Jones Act, federal law preempted a state regulation on the burden of proof, a substantive right of the petitioner).

From these cases, we conclude that we must look at a number of factors to determine whether state law is preempted by federal maritime law.

1. Whether state law works a material prejudice to the characteristic features of general maritime law;

2. Whether state law interferes with the proper harmony and uniformity of federal law;

3. Whether state law attempts to change substantive maritime law;

4. Whether state law flatly contradicts federal law or deprives any person of a substantive federal right.

In this case, the Inn cites to no predicate facts from which we can conclude that the Commonwealth's right to regulate encroachment over its bottomlands is preempted by federal law. In fact, the Inn argued to the circuit court that federal maritime jurisdiction automatically preempts state law. Neither at the circuit court hearing, nor in its brief, did the Inn address any of the factors set forth above.

We must remember the structure is solely used for additional seating for the restaurant, due to seasonal increases in patrons. VMRC's order to remove the vessel in no way works a material prejudice, or any prejudice to the characteristic features of general maritime law, nor does it interfere with the proper harmony and uniformity of federal law in its international and interstate relations. The sole effect of the order is a decrease in the Inn's revenue and number of patrons that can be seated at any given time during the tourist season. VMRC's removal order only affects a single vessel and has no broader implications. It did not interfere with the barge's navigation in navigable waters.

VMRC's order does not attempt to change substantive maritime law which generally regulates maritime transactions,[5] customs, duties, and trade, regulating navigation of navigable waters, injury to person or property caused by a vessel on navigable waters, Longshore and Harbor Workers Compensation Act, 33 U.S.C. § 901, Death on the High Seas Act, 46 U.S.C. § 30301, and the Jones Act, 46 U.S.C. § 688. This list is not exhaustive but illustrative of the nature of federal maritime law.

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[5] "Maritime transactions", as defined herein, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Colombia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

9 U.S.C. § 1.

Federal maritime law does not preempt VMRC from ordering the removal of the vessel. In fact, the Federal Submerged Lands Act, 43 U.S.C. § 1311, recognizes the state's ownership of lands beneath navigable waters and allows the states to "manage, administer, lease, develop and use said lands and natural resources . . . and subject to the provisions hereof . . . ." 43 U.S.C. § 1311 carves out an exception to this general grant, dealing with navigation, flood control, and production of power, none of which applies here. In conformity with 43 U.S.C. § 1311, Code § 28.2-1203 prohibits the encroachment upon or over rivers, ocean, and streams of the Commonwealth.

Thus we conclude that, under the facts of this case, federal maritime law did not preempt VMRC's authority to order the removal of the vessel.

Finally, VMRC assigns error to the circuit court's award of fees and costs to the Inn. The parties appear to agree that this issue rises or falls with our resolution of the other issues presented on appeal. Because we reverse and remand this case to the circuit court, we vacate the circuit court's award of fees and costs and remand for a determination of fees and costs, if any, based on Code § 2.2-4030.

## CONCLUSION

Having found that the circuit court erred in holding that VMRC did not have jurisdiction to order the removal of the vessel, we reverse and remand for the circuit court to determine the issues presented in the Inn's petition for appeal before the circuit court, to include the scope of Code § 28.2-1203.

Reversed and remanded.