

**NORTHAMPTON COUNTY
WETLANDS BOARD**
Minutes
March 21, 2012

This was the regular meeting of the Northampton County Wetlands Board held on Wednesday, March 21, 2012 in the Board Chambers located at 16404 Courthouse Road in Eastville, Virginia for the purpose of conducting regular business.

Those members present were Chair Marshall Cox, Vice-Chair Bowdoin Lusk Nancy Wells Drury, Dot Field and John Chubb. The member absent was Mark Gates and William Brown.

Also attending were Melissa Kellam, Zoning Administrator/Agent to the Board; and Kay Downing, Secretary to the Board.

The meeting was called to order at 10:00 a.m., and a quorum established.

Public hearing:

It is noted for the record that a field visit had been conducted to this property by those members present along with Ms. Kellam earlier in the day.

A. VMRC 2011-1853: Brass, Inc., has applied for an after-the-fact permit to place approximately 92 linear feet of concrete rubble along an eroding shoreline. Approximately 50% of the material has been placed and the bank graded to accommodate the placement. The property is located at 9461 Red Bank Court on Red Bank Creek and is described as Tax Map 32, double circle A, parcel 15.

The Chair asked Ms. Kellam which bank area was being addressed in this matter – the stone area or filter cloth area. Ms. Kellam noted that the area where the stone had been placed.

Ellen Grimes, agent for the applicant, stated that the application pertained to some area of both banks. She stated that she did not investigate if the land had been disturbed under the filter cloth on the left side of the pier. It was her opinion that the filter cloth had been tacked down and that a little toe had been tug along with some minor grading. She also noted that the area on the right side of the pier was almost completed by placing another stone layer.

Ms. Grimes then showed the Board photos of the area taken by Katrina Hickman in November of 2011. After viewing the photos, the Board noticed that more work had been done to the site without authorization from the county since the photos had been taken. Ms. Grimes acknowledged that she had not been back to the property recently.

The Chair called for public comments at this time. Ms. James Kelly, IV, owner of Broadwater Seafood, expressed his concern that his clam hatchery may be impacted by what is occurring on

the Brass property. He explained that work was being done on weekends with an excavator without a permit and that silt from this land disturbance may cause damage to his hatchery during the growing season which ends in June. He was also concerned about where the stone is coming from as it could affect water quality.

There being no other public comments the Chair closed the public portion of the hearing.

Ms. Field noted that there are other issues involved in this case. It appears that the violation has been violated since work continues to be done without a permit.

The Chair was concerned about the height of the stone being placed on the property and Mr. Chubb expressed his opinion that the vegetation over-hang along the shoreline should be addressed as well.

Ms. Drury agreed that extra rock or stone is not necessary and should be removed to a minimum of 12 feet or so.

Ms. Field suggested that some fill may be warranted in order to promote plantings, but grading is unnecessary as there is no erosion in her opinion.

Mr. Lusk expressed his concern that the clam hatchery should be protected from detrimental impacts caused by this project.

When asked, Ms. Grimes noted that the current encroachment of the stone is excessive but there is some erosion even though there is no fetch. She has suggested that the stone be removed on the right side of the pier. Also, she voiced concern about impacts to the nearby clam hatchery.

Ms. Grimes expressed her opinion that Mr. Murray was unaware of what the contractor has been doing.

Ms. Field suggested that sea oxi or other appropriate native marsh grasses be planted to stabilize the area. She also suggested that the concrete located above the filter cloth should be removed on the right hand side and then plantings be installed on the left side. It was her opinion that the cloth should be left in place and to control that area with more plantings with minimal disturbance. Planting now would be best in order to ensure survivability.

Ms. Kellam suggested that a silt fence be installed at the slope and a turbidity curtain be placed in the water to prevent siltation.

Mr. Chubb suggested that some of the existing trees near the shoreline be removed or at least the over-hang canopy be trimmed.

Ms. Grimes then suggested that coir logs be installed out in front of the existing toe except on the right side and to place 2 to 3 inches of fill to support plantings behind the logs. The logs will eventually deteriorate and pose no problems to water quality, but will protect and promote establishment of young plantings on both side but not in front of the concrete.

Mr. Lusk suggested that the lower concrete layer be left in place to protect water quality.

Ms. Grimes suggested that coir logs be installed on the left hand side of the bank. Ms. Field agreed noting that it would cause minimal disturbance of the area.

Mr. Lusk expressed his opinion that no other disturbance of the area should occur until the clam hatchery growing season has ended and it may prevent more run-off.

The Chair suggested that the Board receive new project drawings incorporating those suggestions discussed today.

Mr. Lusk noted that stone on the southern side should be no more than 10 to 12 feet from the top of the bank and to remove all other excess then plant vegetation and remove all other stone on the other side.

How the project would be revised using today's suggestions was discussed between the Board and Ms. Grimes. She envisioned the creation of a small breakwater along with a living shoreline.

Mr. Lusk stated that no other work should be done at the property until after June 15th to protect water quality and the local hatchery. He added that the Board would like revised drawings and clarification as to the origins of the stone.

Ms. Grimes added that vegetation morbidity and mortality rate criteria would be incorporated into the redraw as well.

Action:

Motion was made by Mr. Lusk that this application be tabled until revised drawings are submitted to the Board and that a new "stop work" order be issued as well. Second was made by Ms. Drury and the motion carried unanimously.

Ms. Kellam stated that staff would investigate the origins of the rock for the Board's information.

Old Business

By consensus the Board agreed to discuss its recommendation on the draft Shoreline General Permit as presented by VMRC at the next regular meeting to be held in April.

Statements from the Public

The Chair then called for public comments.

Mr. Granville Hogg addressed the Board again concerning the protocol and decisions made by the Board related to a wetlands violation that occurred in the Kings Creek Landing Subdivision. He distributed written comments that are attached as part of these official minutes. Mr. Hogg emphasized that Mr. Robert Cole with the Army Corp of Engineers (ACOE) had made no violation determination. He requested that staff provide evidence of the violation as depicted in the six photographs. He also noted that the Board had conducted its field inspection long after the alleged violation had occurred.

After receiving Mr. Hogg's written comments and verbal comments a point of order was clarified that the Board must receive public comments but are not obligated to entertain or to respond to such comments during the meeting.

The Chair expressed his opinion that the Board has every right to its decision that a violation had occurred based on the information presented and the field visit conducted at the property.

Ms. Kellam explained that a violation can be considered more than simply “ruts” made in the wetlands area.

The Chair stated that his own conclusion was that a violation had occurred based on the evidence presented by staff, clarification of the code language, and because of field visit observations.

Mr. Lusk noted that it was staff’s opinion that a violation had occurred and that matter was investigated thoroughly by the Board. Careful consideration was given to the technicalities of the code language as to what constitutes a violation and that a special field visit was made to the area so that the Board could see the sight firsthand. Only after that, it was determined that a violation had occurred.

Ms. Kellam noted that the local Wetlands Board has authority over wetlands as well as the ACOE. The Board has the right to determine all types of violations involving wetlands.

Mr. Lusk noted that although Mr. Hogg is commenting as a private citizen, the Kings Creek Landing Property Owners Association is the actual property owner of where the violation occurred.

Ms. Kellam explained that if the Board chooses to address Mr. Hogg’s comments then the KCL POA should be copied. She added that this was a minor violation that has already been addressed and the Board has covered this matter in detail. She added that anyone can appeal the decision of the Board to civil court.

Mr. Chubb stated that Mr. Hogg can review all of staff’s findings, reports, and photos related to this matter as it is public record. He added that based on those staff findings, reports, photos and field inspection the Board did determine that a wetlands violation had occurred even though the field inspection occurred well after the event.

The Chair commented that very few Boards in the state actually conduct field visits as this Board does. He then stated that while he could not claim to be perfect in everything or in every decision he was not inclined to change his mind on this matter noting that there was only one perfect man and he was crucified.

Ms. Kellam reminded the Board that the work done in the Kings Creek Landing Subdivision was unauthorized and no permit was involved; therefore, this matter could not be appealed to the Virginia Marine Resources Commission.

Mr. Hogg noted that according to Ms. Hickman the alleged violation occurred on March 21, 2011 and her photographs were taken on March 23, 2011.

Mr. Hogg also stated that he had questions about the November 16th minutes. The Chair noted that minutes will be considered later on the agenda.

New Business

Election of officers was then conducted. Ms. Drury nominated the current slate of officers to serve an additional term. There being no other nominations a vote was taken and the nominations were approved. Therefore, Mr. Cox shall remain as Chair, Mr. Lusk shall remain as Vice-Chair, and Mrs. Downing will continue to serve as Secretary to the Board.

The Board then discussed a request from Karla Hehl involving payment of her civil charge related to the violation that had occurred on Holly Bluff Island. Ms. Hehl has requested that an installment plan be initiated as she is unable to pay the entire amount in one single payment.

Since this is the first civil charge case paid to the county, the Chair suggested that the county attorney be consulted as to payment options and where such monies are to go. Ms. Kellam understood that the funds would go into the county's general operating fund unless a separate account is set up and approved by the Board of Supervisors as with the wetlands mitigation account. It was also her understanding that civil charges would not qualify for inclusion into the wetlands mitigation account as that is a separate account not pertaining to violation matters.

Mr. Chubb suggested that Ms. Hehl be allowed one year at the most but that the county attorney's recommendation be reviewed first. Others disagreed noting that a year was too long a payment period.

Ms. Kellam added that the project was granted a one-year permit and the Board will revisit the matter in October to make sure the project has been installed correctly. If the project is not completed by that time the matter will come before the Board again.

At the conclusion of discussion it was decided that staff is to consult with the county attorney on this matter and report back to the Board.

Agent to the Board Chair Report

Ms. Kellam reported that there may be one application for the April meeting. However, staff has not yet received a completed application.

By consensus the Board agreed to meet in April to receive revised drawings from Brass, Inc., to consider recommendations from counsel concerning Ms. Hehl's request, and to comment on the living shoreline draft language.

Enforcement Agent Report

In the absence of Ms. Hickman, Ms. Kellam reported there was nothing new to come before the Board at this time.

Consideration of minutes

The minutes of the November 16, 2011 meeting were approved as submitted upon motion by Mr. Lusk and second by Ms. Field. The motion carried unanimously.

Mr. Hogg asked if he could make comments concerning the November 16, 2011 minutes. He then read from his written comments as submitted earlier, specifically from the bottom of page 2 and all of page 3, which are attached as part of the official record. It was his opinion that since KCL POA has rebutted Ms. Hickman’s statement, Mr. Chubb’s review of the matter and motion as stated in the November 16 minutes may need to be revisited which is up to the Board. He also noted that it has never been decided or clarified that an actual application was required which is now being investigated.

The minutes of the January 18, 2012 were unanimously approved as submitted upon motion by Ms. Drury and second by Mr. Chubb.

Adjournment

There being no other business the meeting was adjourned at 11:15 p.m.

Chair

Secretary

(Page 1, Mr. Hogg's written comments)

In review of the complaint against King's Creek Landing there are several unique circumstances I wish to summarize:

1. The claimed infraction occurred in March; the notice of potential violation was delivered approximately 60 days later.
2. The responsible party requested Northampton County to specifically identify the area at issue and to be heard by this Board for 7 months. (March to September)
3. A Board member requested why it took so long before the violation was viewed. The record indicates it wasn't due to any delay by the responsible party.
4. In September the Wetlands Board Ruled there was a violation, however, staff had not identified what the infraction was, however there was a claim to a technical violation.
5. Robert Coles, USCOE, visited the site and was not able to confirm there was a violation.
6. Due to an oversight, the matter was reheard in November. Based on the statement made by staff that KCLPOA admitted there was a violation, a motion was made to re-affirm the September Wetlands Board decision. The motion voted upon and passed. After the vote was taken staff was asked to specifically identify the violation. Staff indicated the violation was the ruts in the marsh.

Now that it has been determined what Northampton County's issue is and King's Creek Landing has delivered to the Wetlands Board a letter denying any admission to a violation, I am requesting the Wetlands Board to review the photographs staff has presented. I have stated there are no ruts as claimed. The photographs are taken when the tide is high. If there was such a rut you would not be able to see it as the water level is well above the level of the marsh. In addition, USCOE, the agency that oversees the wetlands, has stated to me that USCOE does not regulate ruts. They regulate the depositing of fill in the wetlands. As I have previously stated, Robert Coles, USCOE, has stated to me that he could not confirm there was a violation. There has been no effort to **affirm** or present evidence to the contrary.

There is a need to have an accurate record of what information the Wetlands Board considered in arriving at the decision. Staff presented six (6) photographs. Please identify any photograph where the Wetlands Board believes they see ruts in the tidal wetlands as claimed.

(Page 2, Mr. Hogg's written comments)

Based on the DRAFT MINUTES of the November 16,2011 meeting,

Para. 21 Mr. Hogg conveyed a message from Mr. Robert Cole, USACOE, if the Board has any questions regarding this situation or the Corps authority he should be contacted directly. Mr. Hogg related that Mr. Cole has visited the property and found no violation.

Para.24 Ms. Kellam indicated the violation was sited due to the change in the wetlands elevation caused by the ruts during removal of the dead tree.

Para. 28 Ms. Hickman stated, " ... that equipment or vehicle tracks were found in both the tidal and non-tidal wetlands which is illegal."

Para 37 Mr. Lusk stated that a violation had technically occurred based on the photos and the field visit.

Para. 49 Ms. Hickman explained that the violation of going into the tidal wetlands with some sort of equipment and dragging the fallen tree out of the wetlands, thereby creating ruts which changed the elevation and ecology of the wetlands. The downed tree was dragged along through property belonging to the POA and eventually pulled out of the wetlands through an opening shared by lots 19 and 20.

Please provide the public with the specific photographs that show any ruts or change in elevation of the wetlands. Please provide the Date and Time the photo is taken. Because lot 20 is upland and not near the area of activity please provide the photographs demonstrating any activity on Lot 20.

Para. 27 Mr. Hogg stated that the KCLPOA had agreed to mitigate the wetland violation for economic reasons only.

Para. 32 Ms. Hickman stated that the POA agreed that a violation had occurred and also agreed to follow the mitigation plan recommended after being properly notified by staff.

Para. 35 Mr. Hogg then stated that it would be expensive to get this matter adjudicated properly. It was his opinion that the POA had decided it was easier to mitigate than to spend money to have the violation determination overturned.

Para. 36 Mr. Chubb reviewed the events ... and that the KCLPOA has not stated otherwise that a violation had taken place on the premises.

Ms. Hickman was delivered a letter from King's Creek Landing Property Owners Association dated January 18,2012, affirming Mr. Hogg's comment, KCLPOA mitigated the area due to economic reasons and spirit of cooperation not due to a violation.

"Because it was our understanding that any appeal could lead to protracted hearings and possible costly litigation, KCL representation worked

(Page 3, Mr. Hogg's written comments)

together with you to make the fixes that you suggested. The KCL Board, while not agreeing with a violation participation, agreed to provide the necessary action, as outlined by you, for the enrichment of the environment. "

Since KCLPOA has rebutted Ms. Hickman's statement Mr. Chubb's review of the events and motion may need to be revisited.