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Roger D. Anderson
Virginia Institute of Marine Science

David Garten

Ted Smolen
Virginia Institute of Marine Science

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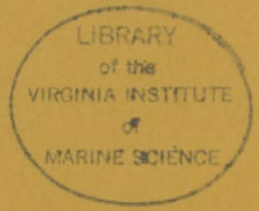
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LEGAL SYMPOSIUM ON WETLANDS

An Executive Summary

Roger D. Anderson
David Garten
Ted Smolen



Sea Grant—Coastal Zone Management in Virginia

VIRGINIA INSTITUTE OF MARINE SCIENCE
Gloucester Point, Virginia 23062

NOVEMBER 1974

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INTRODUCTION

In 1969 the Virginia Institute of Marine Science published a report stating that although marshlands represented only one-half of one percent of the total area of the state, 95 percent of Virginia's annual harvest of sport and commercial fisheries were dependent to some degree upon these valuable wetlands. The report went on to urge some form of public control over these vital areas in order to relieve some of the pressures created by dredging, filling, diking and bulkheading.

Recognizing the need to address this issue, the 1971 General Assembly passed House Joint Resolution Number 60, creating a Wetlands Study Commission. The Commission, chaired by Russell M. Carneal, recommended the passage of strong wetlands legislation providing for a locally administered permit program. Partly as a result of this, the Virginia Wetlands Act (Title 62.1, Chapter 2.1, Code of Virginia 1950) became effective in July of 1972.

During the two years that have passed since the inception of the Act, Wetlands Boards have been established in twenty-four counties and cities in Tidewater. Available evidence indicates that the objectives of the Act are being attained.

To date, most of the emphasis in the wetlands area has been placed upon the ecological aspects of the marshes. However, considerable interest and concern regarding other issues, particularly legal implications of wetlands, were brought to the attention of VIMS staff members. Therefore, the Virginia Institute of Marine Science sponsored a Wetlands Symposium for Members of the Bench and Bar on September 5, 1974 at the Institute.

Support for the workshop was provided through the Sea Grant and Coastal Zone Management programs of VIMS with the cooperation of Commissioner James Douglas and the Marine Resources Commission. Sea Grant supports research projects, helps strengthen cooperative activities between VIMS and other institutions and provides for advisory services and education at all levels. The Coastal Zone Management Program provides support to VIMS in order to study the complex problems of the coastal zone, including wetlands.

Workshop speakers commented on the legislative intent of the Act, its impact to date, the taking issue, wetlands activities in other states, values and uses of marshes, the attitudes of industry and the enforcement issue.





PROGRAM

- 9:00 INTRODUCTION Theodore F. Smolen,
Research Attorney
Virginia Institute of Marine Science (VIMS)
- 9:05 WELCOME William J. Hargis, Jr.,
Director
Virginia Institute of Marine Science
- 9:25 VIRGINIA'S WETLAND ACT,
THE LEGISLATIVE
INTENT Walther B. Fidler
Ryland and Fidler,
Warsaw, Virginia
- 10:00 WETLANDS LEGISLATION IN OTHER
JURISDICTIONS John Donaldson,
Marshall—Wythe Law School
at the College of William and Mary
- 10:50 FILM—"Billion
Dollar Marsh" Introduction by
Thomas Barnard,
Wetlands Research Section
of the Ecology Pollution Division (VIMS)
- 1:00 MARSH VALUES Gene Silberhorn,
Wetlands Research Section (VIMS)
- 1:15 CONSEQUENCES OF MARSH
USES George M. Dawes,
Wetlands Research Section (VIMS)
- 1:30 THE ENFORCEMENT
ISSUE James Moore,
Assistant Attorney General,
Richmond, Virginia
- 2:00 THE TAKING ISSUE David Favre,
Cornelius and Favre,
Newport News, Virginia
- 2:30 ADMINISTRATIVE ASPECTS OF THE
WETLANDS ACT Rutherford Lake,
Attorney and Chairman
of the Newport News Wetlands Board
- 3:15 INDUSTRY VIEWPOINT A. W. Hadder
Virginia Electric and Power Company, Richmond
- 3:45 PANEL DISCUSSION Moderator,
Theodore F. Smolen
Members:
David Favre
James Moore Rutherford Lake
Walther B. Fidler A. W. Hadder
John Donaldson Michael E. Bender

PARTICIPANTS

SPEAKERS

John Donaldson
Marshall-Wythe Law School, Williamsburg

David Favre
Cornelius & Favre, Newport News

Walther B. Fidler
Ryland & Fidler, Warsaw

A. W. Hadder,
Virginia Electric and Power Co., Richmond

Rutherford C. Lake, Jr.
Chairman, Newport News Wetlands Board

James E. Moore
Assistant Attorney General, Richmond

Margaret Harrison
Chairman, James City County Wetlands Board

Manning Gasch, Jr.
Hunton, Williams, Gay & Gibson, Richmond

Daniel Hagemeister
Commonwealth's Attorney, Hampton

Frederick L. Kelly
Chesapeake Bay Foundation

J. Madison Macon, Jr.
Commonwealth's Attorney, Charles City County

Robert McCartney
York County Wetlands Board

James E. Odom
Chairman, Mathews County Wetlands Board

Robert R. Ripley, Jr.
Commonwealth's Attorney, York County

Spencer McMath Rogers
Environmental Officer, Virginia Marine Resources Commission

W. M. Scaife
Scaife, Dalton, Rackley, Fredericksburg

Russell C. Scott
Virginia Marine Resources Commission

E. J. Sulzberger, Jr.
Chairman, Hampton Wetlands Board

Carl W. Tobias
Hunton, Williams, Gay & Gibson, Richmond

William Swan
Assistant City Attorney, Norfolk

GUESTS

Mrs. Hunter B. Andrews
Secretary, Hampton Wetlands Board

Robert D. Bonner
Member, Hampton Wetlands Board

F. Paul Blanock,
Commonwealth's Attorney, Mathews County

Edward Baird
Assistant U. S. Attorney, Eastern District of Virginia

David Barclay
Chesapeake Bay Foundation

William W. Berry, IV
Assistant City Attorney, Virginia Beach

Donald Bowman
Bowman & Hudgins, Mathews

A. Paul Burton
City Attorney, Hampton

Cyril D. Calley
Deputy City Attorney, Alexandria

Joseph F. Dalton
Chairman, Northumberland Wetlands Board

James E. Douglas, Jr.
Commissioner, Virginia Marine Resources Commission

Paul B. Ebert
Commonwealth's Attorney, Prince William County

Mrs. Diana W. Eitelman
Law Clerk, Hampton

Douglas Fredericks
Norfolk, Virginia

- STAFF -

Virginia Institute of Marine Science

Roger D. Anderson

Thomas Barnard

Michael E. Bender

Robert J. Byrne

W. Jackson Davis

George Dawes

David Garten

William J. Hargis, Jr.

J. Claiborne Jones

James Lanier

James Mercer

Ken Moore

John Pleasants

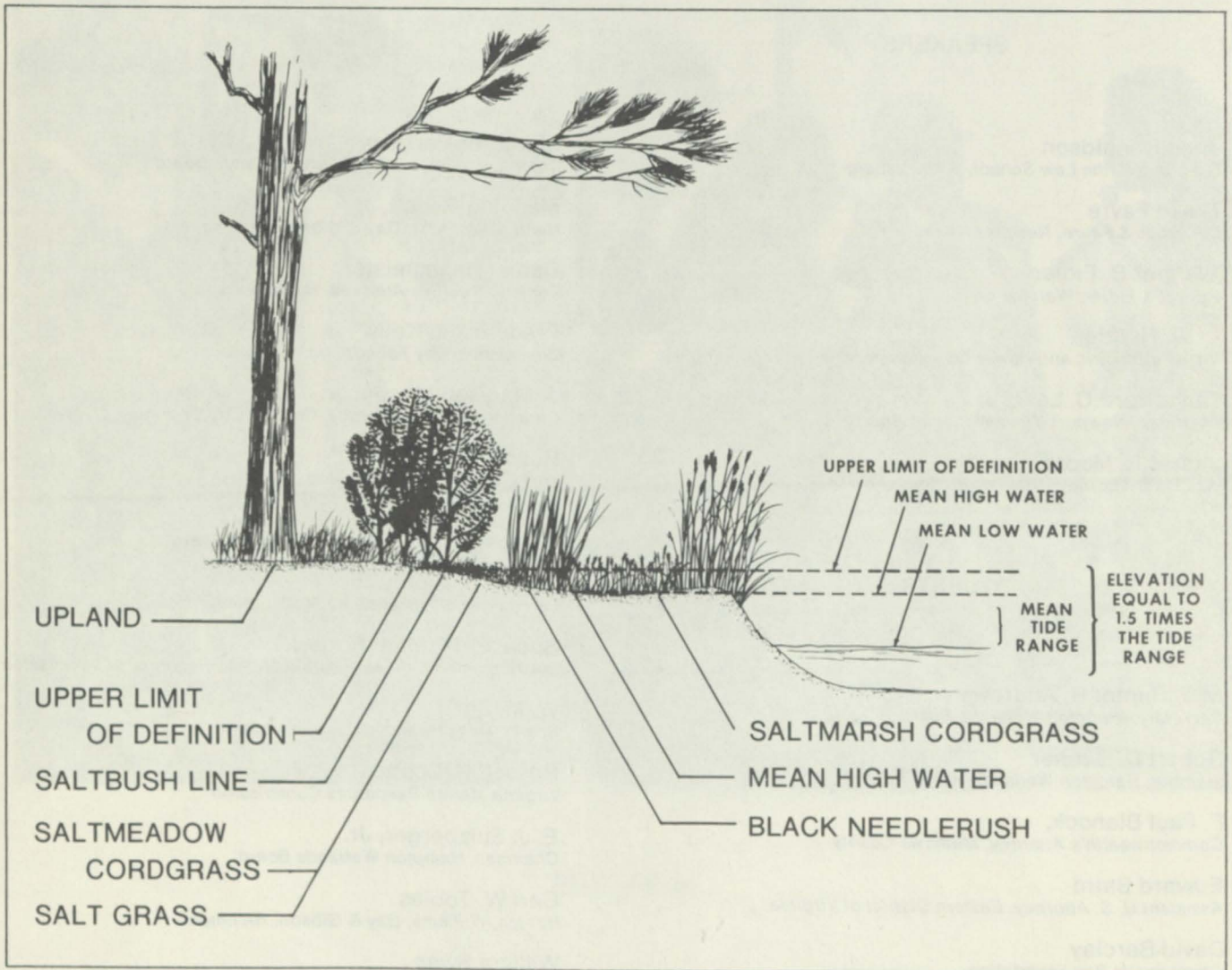
Gene Silberhorn

Theodore F. Smolen

Claudia Walthall

John Zeigler

THE VIRGINIA WETLANDS ACT OF 1972



The Virginia Wetlands Act of 1972 established a resources management system designed to implement the General Assembly's policy to:

"Preserve the wetlands and to prevent their despoliation and destruction and to accommodate necessary economic development in a manner consistent with wetlands preservation."

Wetlands boards which are created pursuant to the Wetlands Act are key parts of the management system. Their members possess first-hand knowledge of the local physical environment and its history. They are committed — it's their environment.

In considering applications for uses or activities in the wetlands, wetlands boards are bound by a clear charge to insure that the anticipated public and private benefit exceeds the anticipated public and private detriment, and that any development is accomplished in a manner consistent with wetlands preservation.

In exercising their judgement in accordance with the foregoing charge, wetlands boards consider many factors including economic, social, aesthetic, recreational and cultural ones. They also reflect community desires and preserve options for the future.

The Wetlands Act defines "wetlands" as all that land lying between and contiguous to mean low water and to an elevation above mean low water equal to the factor 1.5 times the mean tide range at the site of the proposed project; and upon which is growing any one or more of some 35 forms of marsh vegetation such as cordgrass, saltmeadow hay, saltgrass, black needlerush, wax myrtle and groundsel tree. Thus, this area is legally defined in both physical and biological terms.

The definition was arrived at after lengthy research by VIMS, assisted by the Virginia Marine Resources Commission, which included survey measurements of marshes as well as analyses of

definitions adopted by other states. Observations disclosed that the upper limits of the definition included essential marsh vegetation but did not encroach on agricultural land, hard-surfaced roadways, lawns, pastures or other areas which are not basic parts of the marine environment.

The roles of wetlands as an integral part of our marine environment are many and varied. They have significant functions in erosion control, sediment entrapment, wildlife habitat, fish and shellfish production and recreational activities of man. The marshes are truly complex systems and the biological, chemical, and physical factors interacting in them often are not fully understood. However, one entity which seems to function in nearly all aspects of the dynamics of marsh is the vegetation growing there.

The wetlands vegetation provides not only habitat for the animals found in marshes but also an effective wave energy absorbing structure and an efficient water filter. The dense root systems help contain soil particles and prevent their erosion. The grasses slow the flow of water across the marsh and heavier particles settle to the surface of the marsh where they are retained. However, detritus materials and dissolved organic substances are suspended in the water which floods the marsh and flow out of these areas on the

receding tides to become incorporated in the complex food webs of the aquatic environment.

The vegetation production in marshes equals or exceeds nearly all agricultural crops on an acre per acre basis with the exception of a few such as sugarcane. The natural richness of these areas is significant in maintaining the productivity of estuarine and coastal waters. Areas which have lost their wetlands to other types of activities have also lost their productive fish and shellfish grounds, their wildlife and the diversity of the natural environment.

Coastal wetlands of Virginia represent only one percent of the total area of the state, and marshes only one-half of one percent. Yet 95 percent of Virginia's annual harvest of commercial and sport fish from tidal waters is dependent in part on wetlands. Ducks, rails, snipe and many other kinds of birds could not survive without wetlands. Muskrat, otter, beaver and mink dwell in and depend upon our wetlands too.

These are only some of the reasons why it is "the public policy of this Commonwealth to preserve the wetlands and to prevent their despoliation and destruction and to accommodate necessary economic development in a manner consistent with wetlands preservation" (Code of Virginia, Sec. 62.1-13.1).

WETLANDS SYMPOSIUM HIGHLIGHTS

WELCOME

The Wetlands Symposium was opened by Theodore F. Smolen, research attorney at the Virginia Institute of Marine Science. Smolen's concern for wetlands protection was a key factor in the development of the conference. Smolen, welcoming the attendees, expressed his thanks for their concern over the coastal margin and its attendant resources.

William J. Hargis, Jr., VIMS director, joined in welcoming the participants to the Institute. Hargis pointed out the Institute's longstanding commitment to the wise development and utilization of the Commonwealth's marine resources. Reflecting the Institute's position as a scientific agency, Hargis pointed to the leadership of the Marine Resources Commission (MRC) in managing the wetlands of Virginia. Both Hargis and James E. Douglas, MRC Commissioner, have actively pursued marine resource development at a national level. Hargis serves as vice-chairman of the National Advisory Committee on Oceans and Atmosphere (NACOA) and Douglas is chairman of the Atlantic States Marine Fisheries Commission (ASMFC).

SPEAKERS REFLECT VALUE OF WETLANDS

Central to the theme of the symposium was recognition of the value of Virginia's coastal mar-

gin. Of particular interest to attendees was the need to place greater emphasis on the value of wetlands in order to preserve a unique resource threatened by burgeoning pressures on the coastal zone.

After introductory remarks, the speakers set out to review the value, role and scope of the wetlands and Wetlands Act of 1972, respectively. Walther B. Fidler, an early proponent of the Wetlands Act, traced the history of the legislation, noting its early impact. At one point, Fidler reflected, "the Act has not been sufficiently tested in the courts to this date." However, as Fidler went on to point out, the legislation has been well received at all levels, a tribute to the importance of the act and its handling at the local and state levels. The overall perspective of Fidler's remarks reflected the soundness of the Act.

John E. Donaldson, professor of law at the Marshall-Wythe School of Law at the College of William and Mary, reviewed the historical development of wetlands legislation, particularly on the Atlantic seaboard. Though the federal government has moved forward with the Coastal Zone Management Act of 1972, it has been the sovereign states that have individually had to lay on their coastal margin. Donaldson reflected the precedents set in Maine and Massachusetts as forerunners to Virginia's 1972 legislation. Donaldson expressed

his interest in the increased understanding of wetlands phenomena by local wetlands boards and private individuals. Donaldson's overview provided a unique historical perspective to contemporary legislative activity in United States coastal states.

BILLION DOLLAR MARSH

Thomas Barnard, a staff member of the wetlands research section at VIMS, made a brief presentation prior to the showing of the British Broadcasting Company (BBC) film, *Billion Dollar Marsh*. Barnard explained how BBC crews came to Virginia to film the great marshes formed along the rivers and channels and along Chesapeake Bay. This film, available through the VIMS Department of Information and Education, has been shown to thousands of Virginians and is an integral part of the orientation VIMS and VMRC provide to local wetlands boards.

MARSH VALUES

Gene Silberhorn, a botanist in the VIMS wetlands section, has been responsible for much of the marsh inventory work. An authority on marsh vegetation, Silberhorn related how vegetation plays multiple roles including food source, protective cover nursery ground and sediment trap. The audience was impressed with Silberhorn's concern for vegetative protection, since he frequently equated the ecological significance to other values. This was reinforced in the remarks offered by George M. Dawes, also of the VIMS staff. Dawes, who has assumed major responsibility for contact with local wetlands boards, made reference to the impact of Virginia's legislation. According to Dawes, only a few acres of marsh per year are currently being lost as compared to unrestricted development up to the '72 legislation. Dawes related his services to local citizens as an extension program with a built-in research capability.

ENFORCEMENT

James E. Moore, assistant attorney general, discussed the enforcement issues. According to Moore, under the Wetlands Act, the Marine Resources Commission and the local wetlands board have the authority to investigate all projects which alter wetlands—whether proposed or ongoing. The Commission and the local board also have the authority to prosecute all violations of the act. Any such violation is a misdemeanor.

Moore also noted that in addition to criminal penalties, the code also provides for injunctive relief. Under this section, a court may enjoin any activity violative of the Act and may order that person to take all steps necessary to restore, protect and preserve the wetlands involved.

THE TAKING ISSUE

The "taking issue" may arise when a freeholder who owns marshlands has a permit application turned down and the property owner feels that this action constitutes a confiscation of his property by the state to the extent that the marsh may not be used by him as he sees fit.

David Favre, with Cornelius and Favre of Newport News, expressed three concerns over the taking issue.

First, the taking issue, relative to the Virginia Wetlands Act, is viable in the Commonwealth of Virginia and will remain so until the Supreme Court can rule upon it.

Second, many recent cases in this area and other land use areas have upheld strict control as being necessary to protect the viability of our various environments.

The third point made by Favre was that while the actual legal basis for expansion of the "police power" varies considerably, the unifying factor is an understanding that Man's continued individual, economically-motivated decisions are often not in the best interest of the environment, and that Man's welfare is indeed intertwined with the health of the economy in which he finds himself.

Favre expressed continued need by the legal profession to follow the judicial review of these issues.

ADMINISTRATIVE ASPECTS—WETLANDS ACT

Rutherford Lake, an attorney and chairman of the Newport News Wetlands Board, discussed the administrative problems of managing local wetlands. Lake's experience includes some extremely crucial management decisions since Newport News is faced with widespread development along the James River. Lake noted how a local board has had to deal with economic growth of the city in concert with a growing ecological ethic.

INDUSTRY VIEWPOINT

Representing industry on the program was A. W. Hadder, a member of Virginia Electric Power Company's Environmental Services Department. Hadder stated that most wetlands activities appear to be those of private individuals. However, of the industrial activity, Hadder estimated that as many as 95 percent of the permits to date were those applied for by VEPCO. According to Hadder, VEPCO's approach to wetlands is based on the net cost or benefit to society. Also, by complying with the National Environmental Policy Act of 1969 and the respective state statutes, industry's approach is not "thou shall not touch," but rather planned development and compliance to environmental safeguards.

VIRGINIA INSTITUTE OF MARINE SCIENCE

The Virginia Institute of Marine Science (VIMS), founded in 1940, is the oceanographic agency and institution of the Commonwealth responsible for research, advisory services and education in the marine sciences. VIMS' major facilities are located at Gloucester Point on the York River across from Yorktown.

RESEARCH

In its research capacity, VIMS is studying off-shore circulation; offshore geology; biological, chemical and physical interaction of bay and ocean waters; erosion, plankton (microscopic plants and animals); finfish and shellfish; pollution (heavy metals, pesticides, oil, waste heat); engineering (wastewater management, bridge-tunnel locations and physical and mathematical models of the James, York and Rappahannock rivers as well as the Chesapeake Bay); mariculture, and diseases and parasites of marine animals and plants including finfish, oysters, crabs, and the highly important shallow-water seagrass called eelgrass. Over 200 research projects are currently underway.

ADVISORY SERVICES

The Institute acts as advisor to numerous state, interstate, federal and industry agencies, departments, commissions and committees, as well as

to any private citizen or citizens group. The more formalized advisory efforts at VIMS are directed at commercial fisheries, wetlands management and marine recreation. These areas have important roles in the total concept of Coastal Zone Management in which the state and federal governments are now becoming involved.

Advisory efforts are most often channeled through personal contacts, reports and publications, seminars and workshops. The primary purpose of advisory activities is to promote rational and efficient use of human and marine resources by providing two-way communications between marine scientists and the people of the Commonwealth, whom they serve.

EDUCATION

VIMS serves as the school of Marine Science of the College of William and Mary and the Department of Marine Science of the University of Virginia, offering both master's and doctor's degrees in the marine sciences, engineering and marine affairs. As part of its public education program, VIMS provides instruction in marine science, affairs and conservation to thousands of elementary, secondary and college students each year. Summer extension courses are offered to high school teachers through the Virginia Resource Use Education Council, which conducts courses at Madison College, Virginia State College and the College of William and Mary.

VIRGINIA MARINE RESOURCES COMMISSION

The Marine Resources Commission (MRC) is charged with maintaining the delicate balance between the ability of nature to replenish and sustain itself and the economic and social needs of man.

To fulfill this obligation, the Commission strives towards a practical partnership between government and citizen which will enable all segments of society to work towards and reach common goals.

Although the Commission has always exhibited an interest and watched the marine environment closely, it wasn't until 1972 that the Environmental Division was formally created to handle all permits for projects involving encroachment upon the stated-owned subaqueous bottom or alteration of wetlands.

The primary jurisdiction over wetlands is granted to local government. Where a local wetlands board exists, this division reviews their decisions

to insure a uniform statewide application of the Wetlands Act. Where a local board does not exist, this division processes applications to alter wetlands pursuant to the Wetlands Act.

Every application, whether for encroachment of state-owned bottom or for alteration of wetlands, and whether local jurisdiction or Commission jurisdiction, is reviewed to determine whether the proposed project is in the public interest. In many instances, MRC engineers, often with the assistance of VIMS, work with individual property owners and other applicants to find acceptable methods by which an applicant can achieve the purpose of his proposed project with minimal destruction of the fragile marine environment.

In addition to the Environmental Division, other divisions of the Commission are:

Enforcement. This division is charged with enforcing all of the laws of the Commonwealth relating to the fish and shellfish in tidal waters. All

licenses for commercial and non-commercial tidal fishing are issued through district inspectors, agents and enforcement personnel.

The division works closely with the State Health Department and the State Water Control Board in policing the removal of shellfish from polluted areas and transplanting to clean waters.

Enforcement Division personnel also assist the Commission of Game and Inland Fisheries and the U. S. Coast Guard in enforcing the small boating safety acts. In addition, Commission patrol vessels are on constant call to aid the small boating enthusiast in event of breakdown or accident. Enforcement personnel also assist the federal government in surveillance of foreign fishing activity off Virginia's coast.

Engineering. The Commonwealth owns and controls the bottoms of its many tidal rivers, creeks, bays and estuaries. The Engineering Division, acting for the Commonwealth, works with private citizens to make full use of these bottoms by leasing them for the purpose of planting and pro-

pagating of shellfish. The division also surveys and maintains records of the public grounds of the Baylor Survey. In addition, surveys and maps of the Commission's shell planting program are maintained for the Conservation and Repletion Division.

Conservation and Repletion. The Repletion Division uses taxes collected from the shucking of oysters and the taking of oysters from public grounds to replenish the resource through the planting of cultch material and transplanting of seed oysters. This division is in active partnership with industry to maintain and increase the harvest of the oyster.

All divisions of the Commission work closely with various governmental agencies and private organizations on other programs which include artificial reef building, seafood marketing and compiling and maintaining data on the amounts and values of seafoods caught or landed in the Commonwealth.