

SHELLFISH MANAGEMENT DIVISION EVALUATION

LYNNHAVEN OYSTER Co, LLC, JOINT PERMIT APPLICATION # 2020-

1974, request authorization to install up to 2,100 floating cage aquaculture modules within the boundaries of oyster planting ground lease # 19155 (now lease # 22772) within Broad Bay, near Seashore State Park in the City of Virginia Beach. The request is protested by a number of local residents and property owners.

Narrative

Staff received a Joint Permit Application from Lynnhaven Oyster Co, LLC, on November 1, 2020.

The request was subjected to our normal public interest review to include a newspaper public notice and notification of nearby leaseholders and highland property owners. Staff did not immediately receive any objections. The City of Virginia Beach has a waterfront improvement authorization process for certain requests along or within the nearshore area. Staff contacted the city to determine the status of this request under that program review. VMRC does not normally move forward with permit approval until such time as the applicant has received such local approvals, if required. The City of Virginia Beach indicated initially that they were reviewing the request. After staff again requested the status of the application in 2021, staff received a response from the Director of the Department of Planning & Community Development for the city in a letter dated July 16, 2021. In that letter, it was recommended that additional public outreach be conducted given the size and location of the proposed project. VMRC staff responded that the legal requirements of the Code of Virginia and VMRC notification policies had been followed. Staff further noted that the city could certainly notify more parties through their own authorization process if deemed necessary. The city did then send out such a notification to an expanded number of parties. This resulted in a number of protests to VMRC in the fall of 2021. The objections received included concerns about impacts to navigation, recreational uses of the area, viewshed, property values, and the concerns about the placement of a commercial operation within a residential area of Broad Bay. Eventually, in the spring of 2022 staff received information that the city would not be exerting any jurisdiction for the request, and noted their position regarding the request had been previously stated in the letter dated July 16, 2022 (received by VMRC on July 21, 2021). The request received some renewed public exposure when media reports concerning oyster reef construction within the Lynnhaven River system occurred. Such reporting resulted in the City's Bayfront Advisory Commission requesting VMRC staff to attend their July 21, 2022 meeting to brief the Commission on both the oyster reef issues and explain VMRC leasing and permitting regarding aquaculture, to include the pending float application. Since that meeting staff has received a number of additional protests, as well as, a number of letters of support for the request. (The number of both protests and letters of support was still changing hourly when this report was finalized).

Issues

Review of aquaculture apparatus within the water column and/or on the water surface presents additional challenges beyond previous methods of shellfish cultivation within the Commonwealth. With the increased interest in using both the water column and surface waters for shellfish propagation, in addition to bottom culture methods, additional user conflicts have arisen.

Staff considers each Joint Permit Application request on a case-by-case basis, considering the requirements of the Code of Virginia. The use of cages, floats and nets, for shellfish propagation, has resulted in increased public awareness of such activity and highlighted the necessity for a more comprehensive review of these methods of shellfish aquaculture propagation. This request, like others received in populated areas has raised concerns regarding public trust lands to include user conflicts, property values, aesthetics, navigation impacts, and suitable bottom types. Stewardship of public trust lands, while weighing the public and private benefits versus detriments, requires a balanced approach to the review of such permit requests.

For this particular application, staff is keenly aware that all of Broad Bay is used for a variety of activities, to include current ongoing aquaculture activity on a number of existing leases. Shellfish are being cultivated using traditional on bottom methods and the use of on-bottom enclosures in various locations. The area currently requested in this application is within an existing lease that is being used for such bottom enclosures. When leases are used for on-bottom enclosures the area where such enclosures are located must be marked appropriately to warn the boating public of the activity. Since the area has previously been marked and used for such activity, the boating public has been aware of potential navigation restrictions in this same area for some time. Staff is not aware of any past complaints about the use of this area for such activity. The underlying lease was transferred from Lynnhaven Oyster Co, LLC to First Landing Seafood, LLC in 2021. It is staff understanding that the principals of each LLC area related.

There is a heavily used public boat ramp at First Landing State Park, however boats must maneuver to the west after launching to reach the “Narrows” channel into Broad Bay from the ramp. This federal project channel is west of the proposed request. Staff has received some comments concerning the presence of an existing lease (held in the name of a company owned by the same principals as for this application) and the fact that the federal channel runs through said lease. Typically, VMRC does not lease shellfish grounds where there is a Congressionally approved federal dredge project channel, However, the lease at this location has been in continuous ownership (with a number of transfers over the years) since 1947. The federal project channel was created in 1962, therefore the lease footprint precedes the creation of the federal navigation channel. There is also a Virginia Department of Wildlife Resources regulation regarding activities that are restricted within this channel (4VAC15-370-60). Again, the proposed floats are requested at some distance from the channel. The area requested is also

Issues (cont'd)

near the state park, however, there are no residential properties within over 1,000 feet of the proposal. The stated objections received include, navigation concerns, recreational use of the area, viewshed concerns, property value concerns, and the approval of a commercial operation within a generally residential area. Additionally, some protestants note that this is the first such floating aquaculture enclosure request within the city and any approval of this request will result in more similar requests and potential approvals. Letters of support include the additional beneficial water filtering from oysters contained in the floats, job creation in Virginia Beach, locally grown shellfish that will be available to local restaurants and retail operations, increasing the production of historically well-known Lynnhaven River oysters, potential shoreline erosion mitigation benefits, and the small footprint (2.8%) of the request compared to the total subaqueous bottomlands of Broad Bay and even less of the entire Lynnhaven River system (0.05%).

Staff has received no opposition to the project from any other state agency. The U. S. Army Corps of Engineers issued authorization for the proposal under their Regional Permit # 19 (18-RP-19). That authorization was issued on January 21, 2021.

Much of the area of this permit request is over an existing lease that current (and prior) leaseholder uses for on-bottom shellfish propagation. Therefore, much of this same area already has active work areas marked with corner boundary markers and required signage to alert the boating public of shellfish aquaculture activity within the area. Navigation in this area should be done with caution based on the current use of the leased area particularly during low tide. The lease was transferred in 2021 from Lynnhaven Oyster Co, LLC, to First Landing Seafood, LLC. Staff has received information that the current leaseholder is agreeable to the placement of floating aquaculture apparatus over their lease.

Staff does have some concerns about the northwestern and northeastern most of the proposed cells (#14 and # 1). While not within the channel alignment from the public boat ramp, Cell # 14 is the closest to that channel area and vessels may well head in a more northerly direction as they reach this distance exiting from the park boat ramp (particularly if heading towards Long Creek). Therefore, staff recommends removal of cell 14 entirely from the array. Cell # 1 encroaches into the historic park district line (likely a remnant of the former shoreline) per the Department of Historic Resources. Staff also recommends removing Cell # 1 entirely from the array. Additionally, staff, working with the Virginia Department of Health Shellfish Safety Division, has some concerns about bird concentration on such floating apparatus and potential impacts to water quality. The submission of a plan to discourage such bird roosting is recommended for a field of floats of this size. Such plans can include bird exclusion devices or submerging of shellstock for a period of time before harvest to direct consumer market.

While such floating enclosures may not be well suited to many locations within the Lynnhaven River system, for a variety of reasons, this location is far from any residential

Issues (cont'd)

development, adjacent to a state park where no such development will occur, and is within a relatively shallow, nearshore non-channel area of Broad Bay. While any approval at this location will impact some direct navigation and recreational use (particularly by motorized boats), kayak and small self-propelled navigation will still be possible both around and through the module areas of the proposed cells. The applicant has proposed alleyways between the rows of modules at a minimum of twenty feet in width. Therefore, this location appears to be one where such activity can co-exist with many other uses of the area and adjoining highlands. Any approval of this request should not be construed as then requiring an automatic approval recommendation from staff for any future such floating aquaculture enclosure requests within the Lynnhaven River system. Staff further notes that the placement of floating aquaculture floats at this

nearshore location may actually serve to attenuate wave action and could lessen any ongoing erosion along this reach of the park shoreline caused by either boat wakes and or storm events.

Additionally, any approval should include a number of permit conditions as recommended in staff's summary and recommendation, along with any other conditions the Commission may deem are necessary based on received comments.

Summary/Recommendations

Therefore, after careful review and consideration of the objections raised by local residents, and other interests, comments concerning support of the request, consideration of the public trust doctrine, and after considering all of the factors of §28.2-1205A of the Code of Virginia, staff recommends approval of the request with the following recommendations and permit conditions.

1. A permit condition that any approved area be properly marked with signage to warn the boating public of the aquaculture activity and the enclosures. Additionally, the use of reflective tape marking on float area boundary markers and/or signs is encouraged.
2. A permit condition that the applicant post an appropriate bond or letter of credit/surety as determined by the agency based on the final number of enclosures within any approved area and that such bond must remain active for the entire life of any issued permit. For the 2,100 requested floating modules the bond amount will be \$31,500 (2,100 modules X \$15 = \$31,500).
3. That a royalty for any approved area shall be assessed at the rate of \$0.005 per square foot of the permitted area. Based on the application, which requests a total area of 995,000 square feet (21.69 acres), the proposed annual royalty will be \$4,725.00.
4. Staff recommends deleting cell # 1 and cell # 14 entirely and if approved that the applicant provide a revised drawing of the new alignment, with coordinates of the revised footprint and a revised square footage of impact.
5. If approved, and before final permit issuance, that the permittee shall provide, and receive staff approval of, a bird congregation mitigation plan regarding the floating gear.