

**Virginia Soil and Water Conservation Board
Agricultural Stewardship Case #1002
Thursday, April 19, 2018
Virginia Horse Center, Lexington, Virginia**

TIME AND PLACE

The hearing held in the matter of Ms. Vicky Portney vs. Virginia Department of Agriculture and Consumer Services convened at 10:00 a.m. on Thursday, April 19, 2018 at the Virginia Horse Center in Lexington, Virginia

VIRGINIA SOIL AND WATER CONSERVATION BOARD MEMBERS PRESENT

Richard A. Street, Chair	Stephen Lohr
Barry L. Marten, Vice Chair	Cindy Smith
Mario Albritton	Adam Wilson
Chuck Arnason	Clyde Cristman, DCR Director, Ex Officio
Gray Coyner	David Kriz for John A. Bricker, NRCS, Ex Officio
Janette Kennedy	Dr. Bobby Grisso, VCE, Invitee

DEPARTMENT OF CONSERVATION AND RECREATION STAFF MEMBERS PRESENT

Rochelle Altholz, Deputy Director for Administration and Finance
Michael Fletcher, Board and Constituent Services Liaison
Kimberly Freiburger, Policy Analyst
Darryl Glover, Director, Division of Soil and Water Conservation
Melissa Jackson, Budget Manager
Lisa McGee, Policy Director
Sharon Partee, Finance Director
Isaac Sarver, Deputy for Board and Constituent Services
Christine Watlington, Policy and Regulatory Coordinator
Amy Walker, Conservation District Coordinator
Matthew Gooch, Office of the Attorney General

VIRGINIA DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES STAFF PRESENT

Darrell Marshall
Tim Higgs
Kevin Schmidt
Justin Bell, Office of the Attorney General

REPRESENTATIVES FOR THE APPELLANT PRESENT

Vicky Portney
David Armstrong

OTHERS PRESENT

Martha Moore, Virginia Farm Bureau Federation
Dr. Kendall Tyree, Virginia Association of Soil and Water Conservation Districts

ESTABLISHMENT OF A QUORUM

With nine (9) members of the Board present, a quorum was established.

CALL TO ORDER AND INTRODUCTION

Chairman Street called the hearing to order at 10:00 a.m. He called on Ms. McGee to give an overview of the matter before the Board.

PURPOSE AND ROLL CALL

Chairman Street advised that this was an appeal hearing held at the request of Ms. Vicky Portney in accordance with the Administrative Process Act of the Code of Virginia and pursuant to the Code of Virginia §3.2-405.

Chairman Street asked for the calling of the roll. All nine members of the Virginia Soil and Water Conservation Board were present.

STATEMENT OF PARTICULARS

Ms. McGee provided the following regarding the Statement of Particulars.

As to Complaint #1002:

1. VDACS received a complaint alleging that agricultural activities on the property owned by Ms. Portney were causing water pollution from nutrient and sediment deposition.
2. An investigation was performed by Mr. Tim Higgs and Mr. Darrell Marshall from the Virginia Department of Agriculture and Consumer Services and Ms. Megen Dalton from the Shenandoah Valley Soil and Water Conservation District.

As to the Commissioner's Determination and Conclusions of Law

1. The findings from that investigation are as follows: Cattle have unlimited access to the South Fork Shenandoah River causing sediment and nutrient enrichment through access and during time spent standing in the river.
2. The Commissioner concluded, "the agricultural activity was found to be one that is causing or will cause water pollution. In accordance with the Agricultural Stewardship Act, measures must be taken to correct the issues associated with the livestock access areas along the river bank."
3. Ms. Portney is required to develop an Agricultural Stewardship Plan that addresses the pollution problems associated with the agricultural operation and to submit the plan to VDACS for approval within 60 days of receiving notice, approximately February 13, 2018.
4. The Agricultural Stewardship Plan requires best management practices that will correct the pollution problems associated with the sediment and nutrient deposition along the South Fork Shenandoah River where cattle have unlimited access.
5. Implementation of the Agricultural Stewardship Plan must begin prior to June 13, 2018 and completed prior to June 13, 2019.

IDENTIFICATION OF PARTIES

The following individuals were identified and administered the oath.

- Ms. Vicky Portney
- Mr. David Armstrong
- Mr. Darrell Marshall
- Mr. Justin Bell

PROPOSED FINDINGS OF FACT

Mr. Marshall presented the case for the Virginia Department of Agriculture and Consumer Services. He provided pictures and a review of the site visit prior to the Commissioner's determination.

Mr. Bell noted that VDACS recommended the following:

Recommend that the board affirm the decision of the Commissioner that "the agricultural activity was found to be one that is causing or will cause water pollution," thus requiring a stewardship plan be submitted to VDACS for approval within 60 days of this decision (prior to June 18, 2018). Implementation of that plan must begin within 6 months of this decision (October 18, 2018) and be completed within 18 months of this decision (October 18, 2019).

Ms. Portney presented the following proposed findings of fact.

1. Cattle have access to the South Fork, Shenandoah River
2. The Commissioner of the Virginia Department of Agriculture and Consumer Services did not establish that cattle are causing sediment or nutrient enrichment to the South Fork Shenandoah River.
3. The Commissioner did not establish that the agricultural activity is causing or will cause water pollution.
4. The Commissioner failed to establish that substantial evidence exists to prove that the agricultural activity is creating or will create pollution to the South Fork, Shenandoah River, in accordance with the Agricultural Stewardship Act, Va. Code § 3.2402C.
5. The Commissioner failed:
 - a. To determine whether the pollution alleged is a threat to human health, animal health, aquatic life, water quality, or recreational or other beneficial uses, in accordance with the Agricultural Stewardship Act, Va. Code § 3.2402C; and
 - b. To inform the complainant and owner of such determination if the pollution alleged is not such a threat, in accordance with the Agricultural Stewardship Act, Va. Code § 3.2492F.
6. Appellant is not required to submit an agricultural stewardship plan under the Agricultural Stewardship Act, Va. Code § 3.2402C.

BOARD ACTION

Mr. Coyner moved that cattle do have unrestricted access to the South Fork of the Shenandoah River and that the potential for pollution is inherent in the action of the cattle of the river.

Mr. Wilson seconded.

Mr. Street called for the vote and restated the motion to say that the cattle do have unrestricted access to the river. He called for the vote.

Mr. Gooch noted that the second part of Mr. Coyner's motion addressed the pollution and that Mr. Street had omitted that when he restated the motion.

BOARD ACTION

Mr. Coyner moved that the potential for pollution is inherent in the action of the cattle being in the river. Ms. Smith seconded. Motion carried unanimously.

BOARD ACTION

Ms. Kennedy moved that the presence of cattle in the stream is a threat to human, animal, and aquatic life. Mr. Lohr seconded. Motion carried unanimously.

The Board rejected the remaining proposed findings of fact of Ms. Portney.

BOARD ACTION

Mr. Coyner moved that the Board affirm the decision of the Commissioner that “the agricultural activity was found to be one that is causing or will cause water pollution,” thus requiring a stewardship plan be submitted to VDACS for approval within 60 days of this decision (prior to June 18, 2018).

Implementation of that plan must begin within 6 months of this decision (October 18, 2018) and be completed within 18 months of this decision (October 18, 2019).

Ms. Kennedy seconded and the motion carried unanimously.

BOARD DECISION

Mr. Street noted that it was the decision of the Virginia Soil and Water Conservation Board that the Commissioner’s decision issued to Ms. Portney as it relates to Agriculture Stewardship Act Case #1002 is affirmed.

CONCLUSION OF THE HEARING

Mr. Street read the following:

Ms. Portney, as it relates to your appeal OF Agriculture Stewardship Case #1002:

These matters have been held in accordance with §2.2-4000 through §2.2-4032 and §3.2-405 of the *Code of Virginia* as amended.

You have the right to have these decision(s) reviewed by a court of competent jurisdiction pursuant to *Code of Virginia* §2.2-4026 and §3.2-405.

These decisions will be memorialized in writing by the Department of Conservation and Recreation staff for signature and forwarded to both parties pursuant to *Code of Virginia* §2.2-4023.

The hearing concluded at 11:46 a.m.