

## MINUTES

## Commission Meeting

April 27, 2010

The meeting of the Marine Resources Commission was held at the Marine Resources Commission main office at 2600 Washington Avenue, Newport News, Virginia with the following present:

Steven G. Bowman	Commissioner
Ernest L. Bowden, Jr. )	
J. Carter Fox )	
J. T. Holland )	
William E. Laine, Jr. )	
John R. McConaugha )	Associate Members
Richard B. Robins, Jr. )	
J. Kyle Schick )	
John E. Tankard, III )	
Jack G. Travelstead	Chief, Fisheries Management
David Grandis	Assistant Attorney General
John M. R. Bull	Director-Public Relations
Katherine Leonard	Recording Secretary
Jane McCroskey	Chief, Admin-Finance
Linda Farris	Bs. System Specialist, MIS
Rob O'Reilly	Deputy Chief, Fisheries Mgmt.
Jim Wesson	Head, Conservation-Replenishment
Joe Grist	Head, Plans and Statistics
Lewis Gillingham	Head, Saltwater Fishing Tournament
Joe Cimino	Fisheries Mgmt. Specialist, Sr.
Stephanie Iverson	Fisheries Mgmt. Specialist, Sr.
Alicia Nelson	Fisheries Mgmt. Specialist
Sonya Davis	Fisheries Mgmt. Specialist, Sr.
Laura M. Lee	Fisheries Mgmt. Specialist
Rick Lauderman	Chief, Law Enforcement
Warner Rhodes	Deputy Chief, Law Enforcement
Javier Arce	Marine Police Officer
Case Springfield	Marine Police Officer
David Deemer	Marine Police Officer
James Simms	Marine Police Officer

Bob Grabb	Chief, Habitat Mgmt. Div.
Tony Watkinson	Deputy Chief, Habitat Mgmt. Div.
Chip Neikirk	Environmental Engineer, Sr.
Ben McGinnis	Environmental Engineer, Sr.
Ben Stagg	Environmental Engineer, Sr.
Hank Badger	Environmental Engineer, Sr.
Elizabeth Murphy	Environmental Engineer, Sr.
Randy Owen	Environmental Engineer, Sr.
Jeff Madden	Environmental Engineer, Sr.
Jay Woodward	Environmental Engineer, Sr.
Dan Bacon	Environmental Engineer, Sr.
Justin Worrell	Environmental Engineer, Sr.
Bradley Reams	Project Compliance Technician

Virginia Institute of Marine Science (VIMS):

Lyle Varnell	Carl Hershner
Roger Mann	Scott Hardaway
Rom Lipicius	

VHD-Division of Shellfish Sanitation:

Robert Croonenberghs

Other present included:

Robert Beilhart	Dennis Knight	Eric Ancarrow	Kelli Ancarrow
Anthony Bavuso	Frank Ancarrow	Helen C. Kidwell	Arnold Farber
Tandy Farber	Jim White	Neville Reynolds	Mark Feltner
Dave Vachet	Joe Riegor	Dave Koubsky	Carol Collier
Mary Loesch	Tammy Gelles	Tracy West	Ira Brothman
Marsh Boswell	Bill Pickens	Gary VanTassel	Chuck Roadley
R. P. Ayres	Lea Rosenberg	Robert Bouvier	S. E. Veazey
Ellis W. James	Kenneth Heath	Hank Jones	Cory Nealon
Joe Palmer	Tim Wivell	Alice Shelton	Dan Dise
Chris Moore	Mark Swingle	Dennis Dent	Ed Dent
Glenn Salvador	Jerry DeCatur, Jr.	Dirk Sanford	Keith Like
Richard Green			

and others.

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Commissioner Bowman called the meeting to order at approximately 9:38 a.m. All Associate Members were present.

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At the request of Commissioner Bowman, Associate Member Robins gave the invocation and Bob Grabb the Chief of Habitat Management led the pledge of allegiance.

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**APPROVAL OF AGENDA:** Commissioner Bowman asked if there were any changes to the agenda. There were no amendments.

Commissioner Bowman asked for a motion. **Associate Member Robins moved to approve the agenda. Associate Member McConaugha seconded the motion. The motion carried, 9-0. The Chair voted yes.**

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**MINUTES:** Commissioner Bowman requested a motion for approval of the March 23, 2010 Commission meeting minutes, if there were no corrections or changes. There were none.

**Associate Member Laine moved to approve the minutes, as circulated. Associate Member Tankard seconded the motion. The motion carried, 8-0-1. The Chair voted yes. Associate Member Fox abstained since he was absent at the March 23, 2010 meeting.**

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Commissioner Bowman at this time swore in the VMRC staff and VIMS staff that would be speaking or presenting testimony during the meeting.

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**2. PERMITS** (Projects over \$50,000 with no objections and with staff recommendation for approval).

Tony Watkinson, Deputy Chief, Habitat Management Division, summarized the ten items for the Board. His comments are a part of the verbatim record.

Commissioner Bowman asked for questions of staff. Associate Member Fox asked if there were any fees for the Sims Metal Management item. Mr. Watkinson responded that this was maintenance and no fees were required. Associate Member Robins asked about Item 2G, The Living River Restoration Trust, as to whether it was additional work.

Jay Woodward, Environmental Engineer, Sr., was present and his comments are a part of the verbatim record. Mr. Woodward said that previously a small amount of dredging was approved and this was just sediment removal, north of the previous site.

Commissioner Bowman opened the public hearing. There were no public comments and the public hearing was closed. He asked for action by the Board.

**Associate Member Robins moved to approve the page two items. Associate Member Schick seconded the motion. The motion carried, 9-0. The Chair voted yes.**

**2A. VIRGINIA INSTITUTE OF MARINE SCIENCE, #10-0319,** requests authorization to construct eight (8) riprap breakwaters totaling 990 linear feet, a 116-foot long riprap jetty extension, a 105-foot long riprap spur with 60 linear feet of flank protection, 95 linear feet of riprap revetment and to place 10,000 cubic yards of sandy material landward of the structures, as beach nourishment, along their shoreline situated along the York River on both sides of Gloucester Point in Gloucester County.

Permit Fee.....	\$100.00
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**2B. STAFFORD COUNTY, #06-2815,** requests authorization to modify an existing permit to construct an open-piled supported footbridge over Austin Run instead of a clear span bridge as proposed. The new bridge will be shifted to the east by 300 feet and will be 8-foot wide, crossing over approximately 33 linear feet of Austin Run, associated with the Government Island Historical Trail Improvement Project in Stafford County.

No applicable fees – Permit Modification

**2C. PRINCE WILLIAM COUNTY DEPARTMENT OF TRANSPORTATION, #10-0174,** requests authorization to impact 117 linear feet of Cow's Branch by installing four (4) additional box culverts beneath Route 1, associated with the Route 1 widening project in Prince William County.

Permit Fee.....	\$100.00
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**2D. LYNCHBURG DEPARTMENT OF UTILITIES, #10-0079,** requests authorization to install approximately 5,950 linear feet of riprap streambank stabilization along selected portions of the southwest bank of the James River between Pigeon Creek and the terminus of Dearing Street in the City of Lynchburg.

Permit Fee.....	\$100.00
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**2E. DEPARTMENT OF THE NAVY #10-0273**, requests authorization to install approximately 136 linear feet of steel sheet-pile bulkhead extending 2.0 to 4.4 feet channelward of an existing, deteriorated bulkhead; and to remove a deteriorated wharf and replace it within the same approximate footprint with a new open-pile wharf structure composed of concrete deck supported on concrete piles, at Berth 15 at the Norfolk Naval Shipyard situated along the Southern Branch of the Elizabeth River in the City of Portsmouth.

Permit Fee.....	\$100.00
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**2F. CITY OF PORTSMOUTH, #10-0325**, requests authorization to install triple 5-foot wide by 4-foot high by 151-foot long box culverts, with wingwalls and a riprap apron at the upstream inlet, to replace a failing open-bottom metal arch culvert which crosses beneath a parking lot off Portsmouth Boulevard in the City of Portsmouth. The culvert conveys upland drainage and tidal flow from Baines Creek.

Permit Fee.....	\$100.00
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**2G. THE LIVING RIVER RESTORATION TRUST, #10-0278**, requests authorization to dredge a maximum of 20,000 cubic yards of PAH-contaminated sediment from the Southern Branch of the Elizabeth River adjacent to the Hess Corporation property at Money Point in Chesapeake. The material will be removed mechanically with a sealed dredge bucket, within a turbidity curtain and oil boom, and transported via sealed barges to an approved offload site for upland disposal. The entire 3.6 acres of subaqueous area will be covered with up to 24 inches of clean sand material after the dredging as part of an ongoing sediment remediation and habitat restoration project. Recommend approval with our standard dredging conditions and the assessment of a royalty in the amount of \$4,000.00 for the dredging of State-owned subaqueous bottom at the minimum allowable rate of \$0.20 per cubic yard.

Royalty Fees (dredge 20,000 cu. yds. @ \$0.20/cu. yd.).....	\$4,000.00
Permit Fee.....	\$ 100.00
<b>Total Fees.....</b>	<b>\$4,100.00</b>

**2H. NORTHROP GRUMMAN SHIPBUILDING, INC, #10-0519**, requests authorization to install additional horizontal timbers, vertical timber spacers, and connectors supported by additional pilings at four locations on the south side of Pier 6 to allow sufficient berthing space for submarines adjacent to their property situated along the James River in Newport News.

Permit Fee.....	\$100.00
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**2I. LINDERA, LLC, #09-1591**, requests authorization to restore approximately 1,314 linear feet of Bolling Branch and an unnamed tributary through the installation of cross vanes, J-hooks, and riffles; and install a 16-foot by 34-foot timber bridge a minimum of three (3) feet above ordinary high water over Bolling Branch as part of the Bolling Branch Mitigation Bank in Fauquier County. Staff recommends a royalty in the amount of \$544.00 for the encroachment over 544 square feet of State-owned submerged land at a rate of \$1.00 per square foot.

Royalty Fees (encroachment 544 sq. ft. @ \$1.00/sq. ft.).....	\$544.00
Permit Fee.....	\$100.00
<b>Total Fees.....</b>	<b>\$644.00</b>

**2J. SIMS METAL MANAGEMENT, #10-0329**, requests authorization to maintenance dredge by clamshell method approximately 45,000 cubic yards of bottom material, and an additional 10,000 cubic yards on an annual basis, to restore/maintain depths within their existing mooring basin of -15-foot MLW including a one-foot overdredge tolerance at their commercial property situated along the James River in the City of Richmond. Recommend approval with our standard dredge conditions and an instream work time-of-year restriction of February 15 through June 30 to protect anadromous fishes.

No applicable fees – Maintenance Dredging

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**3. CONSENT ITEMS:** (After-the-fact permit applications with monetary civil charges and triple permit fees that have been agreed upon by both staff and the applicant and need final approval from the Commission).

**3A. MIKE DEGEN, #09-1613**, requests after-the-fact authorization to retain four (4) stone groins impacting 72 square feet of subaqueous bottom adjacent to his property situated along Potomac Creek in Stafford County. The applicant has agreed to the payment of \$600.00 Civil Charge and \$75.00 triple permit fee in lieu of any further enforcement action.

Tony Watkinson, Deputy Chief, Habitat Management, gave the presentation. His comments are a part of the verbatim record.

Mr. Watkinson explained that on July 21, 2009, Stafford County Wetlands Board personnel reported that several riprap groins had been installed at 51 Louie Lane. Staff

conducted a site visit and determined that the rock groins were installed without the proper permits. During the site visit, staff was informed that Mr. Degen had just purchased the property and that he was not aware that he needed the permits to place rock on State-owned subaqueous bottom. Mr. Degen also stated that there were small rock groins at the property previously and that he was just maintaining them even though the footprint was slightly larger. Mr. Degen did subsequently apply for after-the-fact authorization to retain the rock groins.

Mr. Watkinson said that staff had completed a full public interest review regarding the installation of the rock groins, including contacting both adjoining property owners and running the required newspaper advertisement. Neither adjoining property owners had voiced objection to the as-built project. Given the nature of the project, had Mr. Degen applied to rebuild/enlarge the groins in advance, staff would likely have recommended approval. In light of that, staff recommended approval of the after-the-fact permit application with triple permit fees (\$75.00) and a \$600.00 civil charge based on minimal impact and minor degree of non-compliance. The applicant had agreed to the fees and civil charges in lieu of further enforcement action, as permitted by Code.

Commissioner Bowman asked if the applicant was present. The applicant was not present.

Commissioner Bowman asked for questions.

Associate Member Schick asked if the applicant did the construction himself. Dan Bacon, Environmental Engineer, Sr., responded that a Brad Martin who had been involved in other projects had done the construction.

Commissioner Bowman asked for comments, pro or con, from the public regarding this project. There were none.

Commissioner Bowman stated that the matter was before the Commission.

**Associate Member Robins moved to approve item 3A. Associate Member Tankard seconded the motion. The motion carried, 9-0.**

Civil Charge .....	\$600.00
Permit Fee (ATF – Triple).....	\$ 75.00
Total Fees .....	\$675.00

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**3B. CITY OF COLONIAL HEIGHTS, #07-2190,** requests after-the-fact authorization to retain a public use pier that was constructed larger than the previously permitted dimensions. The applicant has agreed to pay triple permit fees and a civil charge of \$1,200.00.

Tony Watkinson, Deputy Chief, Habitat Management, gave the presentation. His comments are a part of the verbatim record.

Mr. Watkinson explained that the pier and boatramp are located within Rosyln Landing Park, at 300 Dimmock Parkway, along the Appomattox River, in the City of Colonial Heights. A Joint Permit Application was submitted by the City on September 27, 2007. A public interest review was conducted and the permit was issued on October 16, 2007.

Mr. Watkinson said that during a routine compliance check staff discover that the pier had not been constructed according to the permitted dimensions. The pier, as constructed, is 7 feet 10 inches wide by 55 feet long and contains an L-head that measures 7.8 feet by 8.1 feet. The authorized dimensions were for a 6-foot wide by 42-foot long pier and no L-head.

Mr. Watkinson stated that staff contacted the City with this information and was informed that they were unaware of the discrepancy. The project apparently was constructed with volunteer labor. Apparently an onsite decision to modify the project had taken place. Upon notification by staff of the discrepancy and permitted dimensions, the City requested after-the-fact authorization to retain the structure, as constructed.

Mr. Watkinson said that staff conducted another public interest review and received no objections. No other state agencies have commented on the request.

Mr. Watkinson explained that since this was a public use pier, staff believed the as-built dimensions were acceptable. In fact, had the applicant requested the current configuration in the original application, staff would likely have recommended approval.

Mr. Watkinson stated that the City of Colonial Heights had agreed to pay a triple permit fee and a \$1,200.00 civil charge in lieu of any additional enforcement action. Staff recommended approval of the after-the-fact permit conditioned on a triple permit fee of \$300.00 and the City's agreement to pay a civil charge of \$1,200.00 based on moderate deviation from the permit issued and minimal environmental impact, in lieu of any further enforcement, as permitted by Code.

Commissioner Bowman asked if the applicant or a representative were present. The applicant was not present or represented. He asked for action by the Board.

**Associate Member Tankard moved to approve item 3B with fees and civil charges. Associate Member Holland seconded the motion. The motion carried, 9-0.**

Civil Charge.....	\$1,200.00
Permit Fee (ATF - Triple).....	\$ 300.00
Total Fees.....	\$1,500.00

(Note: \$100.00 of the triple permit fee paid previously.)

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**4. CLOSED MEETING FOR CONSULTATION WITH, OR BRIEFING BY, COUNSEL.**

Associate Member Robins moved that the meeting be recessed and the Commission immediately reconvene in closed meeting for the purposes of consultation with legal counsel and briefings by staff members pertaining to actual or probable litigation, or other specific legal matters requiring legal advice by counsel as permitted by Subsection (A), Paragraph (7) of § 2.2-3711 of the Code of Virginia, pertaining to item(s):

Hollowell versus VMRC

**Associate Member Tankard seconded the motion. The motion carried, 9-0. The Chair voted yes.**

**Associate Member Robins moved for the following:**

**WHEREAS**, the Commission has convened a closed meeting on this date pursuant to an affirmative recorded vote and in accordance with the provisions of The Virginia Freedom of Information Act; and

**WHEREAS**, § 2.2-3712.D of the Code of Virginia requires a certification by this Commission that such closed meeting was conducted in conformity with Virginia law;

**NOW, THEREFORE**, the Commission hereby certifies that, to the best of each member’s knowledge,

- (i) only public business matters lawfully exempted from open meeting requirements under Virginia law, and
- (ii) only such public business matters as were identified in the motion by which the closed meeting was convened were heard, discussed or considered in the closed meeting by the Commission.

**Associate Member Laine seconded the motion. Commissioner Bowman held a Roll Call vote:**

**AYES: Bowden, Bowman, Fox, Holland, McConaugha, McLeskey, Robins, Schick, and Tankard.**

**NAYS: NONE**

**ABSENT DURING VOTE: NONE**

**ABSENT DURING ALL OR PART OF CLOSED MEETING: NONE**

**Motion carried, 9-0. The Chair voted yes.**

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**Katherine Leonard, Recording Secretary**

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- 5. L. SCOTT TRAINUM, #09-0806**, requests authorization to construct a riprap, sill and breakwater shoreline stabilization project at property situated at the confluence of Cabin Creek and the Poquoson River in York County. The project is protested by multiple property owners.

Commissioner Bowman explained that a request for a continuance had been received from Mr. Reichle, attorney for the protestors. He added that the opposing Attorney was present and objected to the continuance of this case. He suggested hearing from both sides before making a decision.

Scott L. Reichle, attorney with Patten, Wornom, Hatten, and Diamonstein and representing the protestants was present and his comments are a part of the verbatim record. He said he would like to give justifications for a continuance being granted and said he represented property owners across the Creek. He stated that he had been recently retained and did not participate in the wetlands portion. He stated that he had called staff and requested additional time to evaluate the matter and as soon as it was scheduled for the meeting he submitted a request for continuance. He said that they were requesting time so as to get Dr. David Basco of ODU to evaluate the project and the method proposed to be used. He provided a handout of an e-mail from Dr. Basco explaining his need for time to do so. He explained the evaluation process of Dr. Basco and also noted that Dr. Basco was very busy with his teaching at this time since school was still in session. He said that Scott Hardaway and Mr. VanLandingham had been consulted and provided a handout. He explained that Mr. Vanlandingham would look at Dr. Basco's findings. He said the issue here was navigation and it was right that the Wetlands Board had considered it. He said his clients were notified only 10 days prior to this meeting that the application for permit was on the agenda. He said they did not see a need for advice of counsel or an expert witness for the Wetlands Board hearing and certainly had not expected a reversal of the Wetlands Board decision by the Commission.

He said after that they felt they needed an attorney and an expert witness. He said the Commission made its decision based on science and there was a need to acquire an independent evaluation which would provide the Commission with additional information on which to base its decision. He said the impacts of this project would last a long time and as the property was not developed, allowing a 60-day continuance would not hurt. He said if the Commission decided to proceed then he wanted to reserve time to speak. His comments are a part of the verbatim record.

John Daniel, Attorney for Scott Trainum, was present and his comments are a part of the verbatim record. Mr. Daniel stated that he hated to oppose a continuance with the equity of circumstance, but he was compelled to do so. He said that this had been going on for a long time and the notification in the newspaper appeared in July 2009, which meant they had enough time to prepare. He said this was a home site in the location. He said there was the Chesapeake Bay Board meeting, three wetlands hearings and the hearing at VMRC in which they all had participated. He said he sympathized with them when they thought they did not need an expert, but he must oppose the continuance as there had been eight hearings to date. He said they had appealed the Wetlands Board decision and it was reversed. He said they knew that the subaqueous matter was to come today and he was prepared to proceed. He said a notice was sent to all and there was ample opportunity to all. He stated that he believed that if it were to be approved today, there would be an appeal. He said the last month's decision had already been appealed. He said he was asking for equity on behalf of his client.

After some questions and discussion with staff regarding the time line of the process and the fact that navigation was not a part of what the Wetlands Board must consider, Commissioner Bowman said the matter was before the Commission.

**Associate Member Fox stated that he felt that both sides needed legal attorneys and he was inclined to continue the matter for 30 days. Commissioner Bowman stated this was a motion and requested a second. There was no second, therefore, the motion failed.**

**Associate Member Robins moved to deny the request and to hear the matter today. Associate Member Schick seconded the motion. Associate Member Robins said with the timeline discussed with staff, the majority of the protestants had been involved in the process since it was applied for and had ample time to rebut. He said the VIMS recommendation was issued October 2009 and six months was also sufficient time to rebut. He said the Commission must consider the rights of the applicant, as well. The motion carried, 8-1. The Chair voted yes. Associate Member Fox voted no.**

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Randy Owen, Environmental Engineer, Sr., gave the presentation. His comments are a part of the verbatim record.

Mr. Owen explained that the project is located at 102 Creek Circle in the Seaford area of York County. The property, a vacant lot in the York Point Subdivision, is bordered by a man-made canal to the east, the Poquoson River to the south-southwest (SSW) and Cabin Creek to the west-northwest (WNW). The property previously existed as a low-lying marsh headland (1953) that was filled by a previous owner. In fact, the entire subdivision began around 1963 with the excavation of three canals into the tidal marsh. The dredged spoils were placed on the adjacent marsh to create numerous home sites.

Mr. Owen explained further that given the fill nature of the property, Mr. Trainum's shoreline was littered with construction debris, primarily large slabs of broken concrete, asphalt and brick. The shoreline was experiencing moderate erosion.

Mr. Owen said that prior to submittal of the Joint Permit Application (JPA), Mr. Trainum's agent, Mr. Neville Reynolds with Vanasse Hangen Brustlin Inc. (VHB), met onsite with a representative from Virginia's Department of Conservation and Recreation – Shoreline Erosion Advisory Service (SEAS). Mr. Reynolds also consulted with the Virginia Institute of Marine Science – Shoreline Studies Program and with the York County Wetlands Board staff for additional advisory assistance.

Mr. Owen stated that the Joint Permit Application (JPA) was a request for authorization to repair an existing riprap revetment within a manmade canal, to install approximately 125 linear feet of new riprap, two headland breakwaters, one riprap spur, three sills and the placement of beach nourishment material to facilitate planting of *Spartina alterniflora*, *Spartina patens* and select dune grasses for shoreline stabilization and habitat improvement on the property.

Mr. Owen said that the York County Wetlands Board considered the project at three separate hearings, finally denying the project, as proposed, at its February 11, 2010, meeting. The Commission, at its March 23, 2010, meeting, reversed the Board's decision on appeal, finding that the decision to deny the project was arbitrary, unsupported by the evidence on the record considered as a whole, and that the public and private benefits of the project outweighed the public and private detriments.

Mr. Owen noted that to date, staff had received nineteen letters and/or emails in opposition to the project. Sixteen speakers spoke against the project at the York County Wetlands Board hearings. Eight of those speakers also participated at the Commission's March 23, 2010, meeting.

Mr. Owen explained that the protestants' primary concerns centered on the magnitude of the project, the distance offshore of the proposed structures and the potential risk of the nourishment material to move and ultimately shoal the navigable channels leading into

the man-made canal, the Poquoson River and Cabin Creek. They argued that erosion along the Trainum shoreline was minimal or not evident, that a riprap revetment would provide adequate shoreline protection, and that the proposed breakwater/sill project was unnecessary. They further testified that Mr. Reynolds had incorrectly characterized the storm wave climate typical of the area.

Mr. Owen said that Mr. Reynolds indicated that the proposed project would replace the existing construction debris shoreline with an engineered shore protection plan based on a living shoreline design. He did not dispute that a revetment would protect the Trainum property from further erosion, but maintained that the proposed breakwater/sill project would provide similar protection along with a more natural edge and, therefore, providing better habitat than that of a typical riprap revetment. He concluded that the living shoreline approach for shoreline stabilization was consistent with the best management practices that were being encouraged by the regulatory and advisory agencies in Virginia.

Mr. Owen stated that in a May 11, 2009 letter, SEAS advised that the existing broken concrete revetment was failing and should be replaced. They, as did the Virginia Institute of Marine Science Center for Coastal Resource Management (CCRM) program in their October 3, 2009 Shoreline Application Report, confirmed that Mr. Trainum's property was eroding, in part due to its inadequate shoreline treatment. VIMS concluded that the proposed "offshore breakwater with beach nourishment for the Poquoson River shoreline was consistent with the preferred approach for moderate to high energy sandy shorelines."

Mr. Owen noted that the project would not impact any public or privately leased shellfish ground; nor any submerged aquatic vegetation.

Mr. Owen said that in this case, it appeared that either a breakwater or sill structure was an appropriate shoreline treatment for the Poquoson River shoreline portion of the Trainum property based on the comments from SEAS and VIMS-CCRM. To further examine the design elements of these structures, however, and their potential to negatively impact navigation, staff sought additional input from Scott Hardaway from the VIMS Shoreline Studies Program.

Mr. Owen explained that Mr. Hardaway cautioned that reducing the offshore location of the proposed Trainum breakwater would steepen the backshore slope and potentially create an unstable design that would leave the upland susceptible to erosion. He further advised that the Trainum shoreline must be nourished artificially for the structure to work effectively. In fact, the spur portion of the project was included in the design to prevent movement of the sand along the shoreline and into the nearby channels. Mr. Hardaway believed that this structure would more evenly disperse the wave energy or reflection, generated from a southeasterly wind, along its length. The existing revetment, conversely, allowed for a more focused and closer wave strike at the canal mouth,

increasing the potential for bottom scour. A review of the available aerial photography documents ongoing shoaling of the canal entrance.

Mr. Owen further explained that based on various VIMS reports, beaches and marshes that were constructed behind breakwaters or sills function by intercepting and dissipating waves prior to reaching the shore and by placing a physical distance between the water and upland. Although breakwaters systems were designed to create stable beaches and allow for the establishment of marsh grasses, their effectiveness was diminished if they were built smaller than needed for the shoreline's wave climate. Design criteria, based on linear relationships between the breakwater lengths, gaps and the shorelines established behind these structures, had been established based on 30 years of empirical observations of similar structures constructed and functioning in the Chesapeake Bay and/or its tributaries. Although a breakwater system resulted in a loss of nearshore bottom, the protection the structure provided may ultimately create an extensive intertidal and marsh habitat that offsets those initial losses. The resulting living shoreline established behind these structures stabilized the shore and created a viable vegetated fringe that restored and/or sustained natural resources, provided essential habitat, and created a beneficial water quality buffer. In contrast to bulkheads and revetments, living shorelines appeared to offer a vegetated coastal buffer zone that was equally effective in controlling shore erosion where the wind, wave and offshore contours supported them.

Mr. Owens explained that the VMRC Subaqueous Guidelines, it was recommended that breakwaters be designed by professionals, in such a manner that they did not create adverse sediment transport patterns and were not breached by tides and/or subjected to failure under normal wind, tide and current conditions. Given the support of both CCRM and the Shoreline Studies Programs at VIMS, it appeared that these conditions had been met.

Mr. Owens said that staff would point out, however, that a sill alternative, similar to that presented to the Wetlands Board at their February 11, 2010, hearing, would reduce the project footprint on subaqueous lands. Based on the dimensions included in the agent's conceptual drawing, the sill would extend approximately 87 feet from the existing bank while the most channelward encroachment of the breakwater would be 140 feet. Although it was anticipated that a sill at this location could effectively address the existing erosion problems, other than a reduction in the amount of sand fill nourishment, there was no specific evidence that a sill's potential to adversely impact existing navigable channels was any less than that of the proposed breakwater.

Mr. Owen stated that in light of the acknowledged public and private benefits, the lack of any quantifiable public and private detriments, the comments of SEAS and VIMS, and after evaluating the merits of the project against the concerns expressed by those in opposition to the project, and after considering all of the factors contained in §28.2-1205(A) of the Code of Virginia, staff recommended approval of the project as proposed.

Commissioner Bowman asked for questions of staff.

Associate Member Tankard asked about the review and documentation of the shoaling impact. Mr. Owen explained that the agent in the project met with VIMS to review the application and to discuss shoaling. He added that the Board needed to hear from the agent and Mr. Hardaway. Associate Member Schick asked if they had met since the last meeting to which Mr. Owen responded yes.

Commissioner Bowman asked for comments from the applicant or his representative.

John Daniel, Attorney for the applicant, was present and his comments are a part of the verbatim record. Mr. Daniel stated that they supported the issuance of the permit to construct the project as it was advertised and noticed. He noted that Mr. Trainum was out of the country and his son, Brent, was present on his behalf. He said that there had been discussion with Scott Hardaway of VIMS since the last meeting and this project would provide the best shoreline protection. He said that there are agencies proactive in assisting those on the waterfront to establish this type of protection and these advancements have shown improvements. He said that this transition would look more like mother nature. He said the entire area had been filled, which were flatlands and wetlands. He stated that the protestants themselves had taken steps to protect their property and now were protesting Mr. Trainum's project and he was using the best methods. He said they concur with the designer, VIMS, Corps of Engineers, and concur with VMRC staff. He stated that there had been a long and thorough review and they recommended approval, as presented.

Mr. Daniel stated that professionals were consulted all along the way through the entire process and it was determined that it was the right project and right place. He stated that the criteria for Section 28.2-1205 of the Code of Virginia had been met, as well as the Public Trust Doctrine and the Constitution. He said that it had not been demonstrated to cause adverse impact, as the record shows no impacts. He said there was no scientific proof that it would have negative impact to the environment. He said that this was the preferred technique that supported a living shoreline. He said every Federal, State, Local governmental body, except the Wetlands Board had granted approval. He said the staff recommended approval and they requested approval.

Commissioner Bowman asked for questions. There were none.

Neville Reynolds, project designer, was sworn in and his comments are a part of the verbatim record. Mr. Reynolds provided slides of other sites with similar structures which he reviewed.

Commissioner Bowman asked about Mr. Reynolds background. Mr. Reynolds explained that he was a Coastal Geologist with a Masters Degree from Old Dominion University.

Mr. Reynolds said that he had been involved in a number of projects, including the one proposed by the Virginia Institute of Marine Science, of which a little over half have been approved by the Commission. He explained that the 2 mile fetch going SW in the Poquoson River is what is of most concern because of the potential hurricane events in the area. He provided slides of the area of historical importance in showing how the area had changed over the years. He explained that there was subtle shoaling in the area. He referred to a technical report on Shoreline Management which involved 20 years of research and monitoring of the shorelines in Virginia and Maryland which provided the parameters by which he developed his design. He said this was closed system proposed where the breakwaters are closer together at a ratio of 1.65:1 with a gradual slope of 10:1. He said this will stabilize the beach, which is found in the written source. He said that the scale of the project was developed from the information provided in the technical source which recommended the parameters for a living shoreline.

Mr. Reynolds explained that the regulatory agencies were contacted, three public hearings were held in the county and with the Chesapeake Bay Board. He said the living shoreline was recommended by all in the pre-meetings. He said these systems are utilized in Virginia, Maryland, Delaware, and North Carolina and this is the appropriate site. He said it will protect the shoreline and be sustainable in weather events. He said this type of proposal is well documented and they request approval.

Associate Member Robins asked what he thought about the alternative solution mentioned in the staff presentation.

Mr. Reynolds said he would be concerned with the stability of the sill system when the elevations rises from 3 feet to 6 feet and also the ability of the sill to protect against major storm events. He said it could be effective, but it would be better with this system.

Commissioner Bowman asked for anyone in support present who wished to comment.

Brent Trainum, son of the applicant, was sworn in and his comments are a part of the record. Mr. Trainum said that he was present in support of the project.

Commissioner Bowman asked for those in opposition who wished to comment.

Scott Reichle, attorney for the protestant, was present and his comments are a part of the verbatim record. Mr. Reichle said he wanted it noted for the record that they objected to proceeding with the hearing. He said Section 28.2-1205 established what was to be determined for approving this project. He said the public and private benefits, the Public Trust Doctrine were to be considered when deciding on how the subaqueous bottoms were to be used by the people as well as other reasonable uses by the adjacent, nearby property owners. He said that there was significant scientific study of which he could not dispute. He said his clients use this area everyday and should be considered. He said that Mr. Trainum did have the right to protect his property. He said it was a case of his

benefits versus the detriments to others. He said they were concerned with the impacts on navigation and their use of the waterway. He said they felt that there were less significant and intrusive ways to propose this project so that it was not so massive. He said the applicant's representative says this was done elsewhere, but it was not studied for this site to analyze what impacts there would be on the surrounding area. He said the staff report said that the sill alternate would reduce the footprint and could address the problem. He said that there was no specific evidence that the sill would have less impact than the breakwater. He said that either project could work, but the proposed one is the worst. He said it was not right that the protestant must prove that it is wrong as the applicant should have to prove that it is right and there are no negative impacts. He stated that other revetments in the area have held up well and he had visited them. He said there are less massive approaches to this that would suffice. He said Mr. Vanlandingham agrees that either with work. He said the protestants wish to voice additional concerns. He said they asked that their views and concerns also be considered as was done by the citizen's board.

Commissioner Bowman asked if there were questions. There were none.

Commissioner Bowman said that in the Code Section 28.2-1100, the Virginia Institute of Marine Science is to advise other state agencies when advice is sought. He said that for the most part the Commission follows that advice.

Commissioner Bowman asked for others who wish to comment in opposition.

Chad Green, nearby property owner and protestant, was sworn in and his comments are a part of the verbatim record. Mr. Green said he was not an adjacent property owner. He said the first time he was notified of this project was 14 days ago when another resident came to them. He said that because there were owners who had no prior knowledge the Commission should consider tabling the matter. He said he was concerned with the placement of the material and that it will migrate and silt in the cove. He said there was a need to hear more science. He urged the Commission to take their time and get it right. He said that proper notice was needed and additional science.

Eric Ancarrow, lifetime resident and protestant, was sworn in and his comments are a part of the verbatim record. Mr. Ancarrow said they do not object to him protecting his land and he liked the living shoreline approach as it worked in Cabin Creek and Chisman Creek. He stated that these were appropriate areas. He said Mr. Vanlandingham of DCR met with them and discussed the sill and in his letter he stated the revetment was appropriate. He said that 25 households will be affected and are looking at the VIMS report to see how it works.

Mr. Ancarrow said the alteration of the shoreline was not good and would impact others, there are viable alternatives, and the shoreline protection guidelines are not being followed. He said in the guidelines it said the structure was needed when a beach exists.

He said he cannot see that the breakwater system is necessary. He said that there will be minimal encroachment is not true in this case as there will be 800 to 1,100 truckloads of nourishment used. He said that he was not just concerned with the sand, but with the potential shoaling. He asked that a reasonable approach be considered here, maybe not a revetment, but just more reasonable. He said that there were other living shoreline alternatives. He said this area is used by State citizens and it was not right to turn this into personal property. He said he was requesting a more conservative approach. He said the applicant would not listen.

Frank Ancarrow, property owner and protestant, was sworn in and his comments are a part of the record. Mr. Ancarrow said he lived on the canal side. He said he assumed they would be granted a continuance and he regretted the absent of Dr. Basco's information as he was an expert. He said as far as the timeline it had been very relaxed scheduled because of the owner. He said the plan was made in 2008, submitted in 2009, the wetlands board heard it in October, November and December at which time the applicant asked for a two month delay. He said that now it was moving expediently by VMRC. He said it was not reasonable to expect to move ahead with it because they needed legal counsel or an expert after the last meeting's decision. He said some of the delays were the fault of the applicant. He said that since the last meeting he had met with the applicant to seek a compromise and now he was here to do the same without risks of exposure to the fetch. He said this was shallow water and not a high erosion area. He requested the use of a staff slide and said that there were revetments in the area which had worked for decades. He said the revetment/sill would offer the most ecological benefits. He entered into the record drawings of the sill system. He said he was concerned with some of the comments made about the improperly developed land as they were not responsible. He said it was used against the protestants. He said in the 1970's he installed a sill wall which at the time was the best practice and once it was there it would exist forever. He asked the Commission to consider allowing less than more. He said the other projects that were pointed out had long stretches of beach and it the breakwater was applicable. He said it was not applicable here at this site. He said any damages that may result will be left to them to correct. He said he thought this would be continued and the slide showed where it was not applicable. He provided a notebook for the record.

Anthony Bavuso, property owner and protestant, was sworn in and his comments are a part of the verbatim record. Mr. Bavuso said he was not just a protestant but a stakeholder as it would all affect him, not just the applicant. He said he agreed with the action taken should be on the side of caution and he asking that the risk be reduced for other properties. He said he seed the shoaling coming from the point and the large spur will trap sand and increase the shoaling. He said there will be increased wave action as now it was status quo and it would impact his property. He said it was the burden of the applicant to prove it would not damage his property. He said there will be dump truck loads of sand used to fill and there will be impacts to navigation. He said in the other projects such as Yorktown there was sand lost and it had to be replenished annually. He

said at York Point there were bad consequences which received the same approvals. He said there was a lack of scientific support to show what will happen and it was being established for a hurricane event and where was the data. He said no engineer signed off on the project and there were only the SEAS and VIMS reports. He said that staff has said that from the SEAS and VIMS report there is a need for this structure here. He said Mr. Vanlandingham's report in May 2009 recommend the rip-rap sill, but he did not recommend the breakwater system. He said in the October 2009 VIMS report it said this was a moderate to high energy area with a sandy shoreline, but that is not the case here. He said the slide show showed that it was not a sandy shoreline. He said there was a need to make a good decision as this will become permanent. He said the Commission needed to look at the data and science to make the appropriate decision. He said either table or deny this project.

Mary Loesch, property owner and protestant, was sworn in and her comments are a part of the verbatim record. Ms. Loesch said she was opposed to the project as she was not convinced the smaller project would not do the same thing. He said it was going into the waterway they all use.

Carol Collier, property owner and protestant, was sworn in and her comments are a part of the verbatim record. Ms. Collier stated that as a stakeholder she had major concerns.

Robert Beilhart, property owner and protestant, was sworn in and his comments are a part of the verbatim record. Mr. Beilhart said he supported the opposition to this project as it was massive and a simple revetment would work as it had worked for others. He said the breakwater system was unproven.

Gary Van Tassel, property owner and protestant, was sworn in and his comments are a part of the verbatim record. Mr. Van Tassel said he had a degree in engineering. He said did not agree with VIMS in regards to the type of area. He said there was one slide that showed the winds. He said he had seen three days of 25 mph winds with 30 mph gust and that 48 hours of wind had caused the wave action. He said the picture showed his house in the canal and the sand does transport into the canal. He reiterated that he hoped those that spoke to the expert are correct as the stakeholders will pay if they are not. He said the sand would transport into the canal because the structures offshore are too far off. He said the revetment there has been there for decades and has worked. He said in the Chisman the revetment on his property works.

Associate Member Fox asked about the direction of the sand flow. Mr. Van Tassel said it moved around York Point due east to west as the current is out of the Cabin Creek area. He said he did not dispute that something needed to be done.

Commissioner Bowman instructed Mr. Daniel he had five minutes to rebut.

Mr. Daniel said he had two points. He said the burden of proof was laid out in the Code Section 28.2-1205 and tells applicant and VMRC what should be done. He said that burden has been met. He said they had an expert do the design and he did the best with his expertise and understanding of the area and shoreline and experience. He said the staff came to the same conclusion that it was an appropriate project. He said that other government agencies have reviewed the proposed plan and recommended it. He said it had been said that this was massive and needed to be conservative and the experts said this was conservative. He said it was not just the applicant, but others as well and it was all in the record. He said in the Subaqueous Guidelines, it says...shall be responsible for maintenance or abandonment, etc... He said no one goes into this looking to need maintenance, but in order to be in permit compliance it says inspections are to be made by the VMRC. He said it was required to be maintained by the staff and the applicant. He asked the Board to support the staff recommendation.

Commissioner Bowman stated the matter was before the Commission for discussion or action.

Associate Member Fox stated he had questions of VIMS.

Scott Hardaway, representing VIMS, was sworn in and his comments are a part of the verbatim record. Mr. Hardaway said the proposed project is an alternative to the sill. He said the sill was used in Cabin Creek and a breakwater is proposed elsewhere because these are two different areas. He said the sill system involved marsh creation and the breakwater was used in a beach situation, which are two different capacities. He said he supported the breakwater for this location.

Associate Member Fox asked about the sand flow from the east-west and if he agreed. Mr. Hardaway said he agreed, but the winds here were mostly from the south. Associate Member Fox asked if he agreed the proposed system would keep sand from the channel. Mr. Hardaway said that it would somewhat. Associate Member Fox asked if the spur would deflect the sand. Mr. Hardaway stated he was not sure that it would impact it any more than it did now. He said the material to be used was coarse sand which will remain in place even in the case of a weather event. Associate Member Fox asked about the sand from the south. Mr. Hardaway said it would trap it. Associate Member fox if it would go into the creek. Mr. Hardaway stated that it was already doing that, but it would not be any more.

Associate Member Robins asked as a closed system would the spur anchor the sediment. Mr. Hardaway responded yes. Associate Member Robins asked about the concerns of the protestant that this area was marsh in the 1950's and if the project would maintain the current status quo. Mr. Hardaway said it would be as the sand issue would be less around the Bay. He said there was rock and sterile material being used. He said it was a trade of one habitat for another and it was an acceptable trade off.

Associate Member Tankard asked about the risks and what would happen if the channel filled. Mr. Hardaway said the filling now would continue unless it were dredged. He said the pocket beach will make it stable and hold the sand.

Commissioner Bowman asked about Mr. Bavuso’s concern that there no report on record. He asked if the spur would prevent the movement of the sand into the channels and if he would include that in his report. Mr. Hardaway responded yes.

Associate Member Tankard asked about Mr. Green’s concerns about proper notification. Mr. Owen responded that there was the normal notification of the adjacent property owners, but Mr. Green was across the creek, not adjacent to the project. He said that there was a notice placed in the newspaper.

**Associate Member Holland moved to accept the staff recommendation. Associate Member McConaugha seconded the motion.**

**Associate Member Schick said he felt the protestants’ concerns had been properly addressed and the best science was considered. He said he felt there was no doubt the benefits outweighed the detriments.**

**Associate Member Robins said he supported the motion. He said that the methods used today had evolved and today’s science was different. He said it was a trade off for the positive. He said the marsh had been there historically and was lost. He said this was a comprehensive solution and the best scientific information for a state of the art solution. He said it was not a small project but it was an appropriate solution. He said the risks and concerns were addressed and the shoaling would not be increased.**

**Associate Member Laine said he agreed with Mr. Robins that it was state of the art design, but the sill alternative would be a smaller intrusion with the same benefits to the landowner. He said for erosion control the sill was simple and less state land would be given up. He said he did not support the motion.**

**The motion carried, 8-1. The Chair voted yes. Associate Member Laine voted no.**

Royalty Fees (nourishment 33,900 sq. ft. @ \$0.05/sq. ft.).....	\$1,695.00
Permit Fee .....	\$ 100.00
Total Fees.....	\$1,795.00

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The Commission broke for lunch at approximately 12:35 p.m. and returned at approximately 1:18 p.m.

\* \* \* \* \*

6. **CITY OF NORFOLK, #06-2365**, requests a modification to their previously authorized permit to now allow the dredging of up to 2,700 cubic yards of sand from three borrow areas in the Chesapeake Bay along the Willoughby Spit shoreline for the purpose of the restoration of 6,000 linear feet of dune between 14th and 8th View Streets in the City of Norfolk. The project is protested by a public interest organization and nearby property owner.

Ben McGinnis, Environmental Engineer, Sr., gave the presentation with slides. His comments are a part of the verbatim record.

Mr. McGinnis explained that the proposed modification to the City of Norfolk's existing beach nourishment permit called for the dredging and excavation of sand from three borrow areas located on and immediately offshore of the beach along Willoughby Spit, in order to restore approximately 6,000 linear feet of dune loss resulting from the November 2009 Nor'easter. Two of the three borrow areas are located on opposite sides of an existing terminal groin located at the far end of Willoughby Spit, and a third is located at the east end of the project area in the 800 block of West Ocean View Avenue. A majority of the proposed 43,300 cubic yards of sand to be removed from the borrow areas will occur landward of mean low water, with only 2,700 cubic yards to be dredged from State-owned submerged land, channelward of mean low water.

Mr. McGinnis said that according to the City of Norfolk, sand was transported from the dune bay-ward and west towards the terminal groin at the far end of Willoughby Spit by the Nor'easter. The City's proposal calls for this lost sand to be partially recaptured and used to restore the protection previously provided by the dune. The City's existing permit allowed them to selectively nourish their entire stretch of Chesapeake Bay beach from Little Creek to Willoughby Spit. In order to accomplish a portion of this beach nourishment the permit also authorized the dredging of sand from a portion of Thimble Shoals Channel, east of the Chesapeake Bay Bridge Tunnel. The City had since utilized that sand source to nourish a small portion of their beach in the East Beach/Bay Oaks area near Little Creek.

Mr. McGinnis stated that the project was protested by a nearby property owner, Mr. David Winterford, as well as Virginia Coastal Access Now (VCAN). Mr. Winterford was a unit-owner in a residential condominium at the far west end of Willoughby Spit adjacent to two of the proposed borrow areas, which are located adjacent to the existing terminal groin. Mr. Winterford's letter of March 20, 2010, asked that the Commission amend or alter the City's request to dredge sand from Borrow Areas A and B, reducing the overall size of those borrow areas. His letter goes on to state that he is concerned

about the loss of beach width, which provided a buffer during flooding events, and suggested that other means be utilized to accomplish the needed sand relocation that would not put residences near the proposed borrow areas at risk of flooding. VCAN, in their letters dated March 18, 2010 and April 6, 2010, stated that they could only support the proposed project if greater public access was restored to the beach at Willoughby Spit. Their concerns related to a perceived lack of public access to the beach from the upland due to limited or restrictive on-street parking, claims of private beach ownership, and the placement of a gate and debris at the end of Chela Avenue. VCAN believed, that as a publicly funded project, VMRC had the jurisdiction to impose permit conditions that improve upland beach access.

Mr. McGinnis also stated that in addition to the letters staff had received in opposition to the City's proposed modification, they had also received a letter of support from a nearby property owner, Ms. Helen C. Kidwell. Ms. Kidwell stated in her March 24, 2010, letter that she was happy that the City was removing the accumulated sand away from her property. The proposed removal of sand offshore her property should help restore navigable access to Ms. Kidwell's pier, which had been shoaled in for some time.

Mr. McGinnis explained that the revised Virginia Institute of Marine Science (VIMS) Shoreline Permit Application Report, provided to staff on April 20, 2010, stated that it was their belief that the conversion of beach to dune would be a temporary conversion and that the dynamic nature of the shoreline would eventually rebuild the existing beach. VIMS believed that the ecological impacts resulting from the proposed modification should be temporary and relatively restricted to the construction period.

Mr. McGinnis said that the Virginia Department of Conservation and Recreation, in a memorandum dated April 9, 2010, stated that they did not anticipate that the proposed project would adversely impact State-listed plants or insects within their jurisdiction. They did, however, suggest an inventory of nesting birds in the project area be conducted, with a primary focus on the Lest Tern and Black skimmer, as well as a time-of-year restriction be imposed to avoid impacts to active shore bird colonies during the nesting season between May 1 and July 31. Their comments also stated that the project must comply with the Chesapeake Bay Preservation Area Designation and Management Regulations, the Virginia Stormwater Management Act, and the Virginia Stormwater Management Program (VSMP) Permit Regulations.

Mr. McGinnis noted that no other agencies had raised concerns or objections to the project.

Mr. McGinnis explained that while staff was sympathetic to the concerns expressed by Mr. Winterford, sand accumulations at the terminus of Willoughby Spit were intended to and had previously been utilized to augment beach nourishment activities along the Willoughby and Ocean View beach through the City of Norfolk's active beach management program. The presence of a wide beach near Mr. Winterford's property was

a result of the City's construction of the adjacent terminal groin, which was designed to capture sand transported down the beach by littoral drift so that it could be replaced on the updrift beach before being lost from the system. Although staff was also sympathetic to the concerns expressed by VCAN, their perceived lack of upland public access to the beach did not appear to fall under the Commission's limited scope of jurisdiction and staff felt those concerns were best addressed by the City.

Mr. McGinnis stated that after evaluating the merits of the project against the concerns expressed by those in opposition to the project, since impacts resulting from the use of State-owned submerged land should be minimal, and after considering all of the factors contained in Section 28.2-1205 (A) of the Code of Virginia, staff recommended the project be approved, as proposed.

Edwin Rosenbergh, representing the City, was sworn in and his comments are a part of the verbatim record. Mr. Rosenbergh stated that it was a good job by VMRC staff in their overview. He said they had coordinated with the citizens for the projects, however, it seemed other property owners were concerned that their property would be vulnerable. He said since they did have the funding they needed to proceed. He said the project is good for both the environment and the community.

Commissioner Bowman asked for questions.

Associate Member McConaugha asked if building up the sand was a natural process. Mr. Rosenberg responded yes. Associate Member McConaugha asked if a better means to trap the sand would be by replacing the groins. Mr. Rosenberg said they always recycled the sand that was always going that way. Associate Member McConaugha asked if the sand offshore was not lost. Mr. Rosenberg said it was lost for the protection of the City's property.

Commissioner Bowman asked if anyone opposed wished to speak.

Mark Feltner, representing VCAN, was sworn in and his comments are a part of the verbatim record. He provided the Commission with a handout. Mr. Feltner stated that they shared a common goal which was to provide access for fishermen. He thanked the Commission for the opportunity to speak. He said the proposal was dredging and providing service to just one citizen. He said it should be approved if it is providing access and improving saltwater fishing access. He said that it lacks public parking so the local access is not public. He said there was a list of improvements in the mitigation strategy.

Commissioner Bowman said that he discussed this with VMRC Counsel and the matters being discussed were not within the VMRC's jurisdiction. He asked Mr. Grandis to comment.

David Grandis, Assistant Attorney General and VMRC Counsel, explained that any comments to be received should only apply to seaward issues and the local authorities have control over the recommendations being made.

Mr. Feltner stated that there was more authority regarding the Sand Dunes Act and the Virginia Coastal Zone Management.

Commissioner Bowman stated it was not appropriate to allow a public forum on issues not within the VMRC jurisdiction. He said the courts have told us what is our authority and it does not include parking lots.

Mr. Feltner asked how the VMRC can help improve access for anglers. Commissioner Bowman explained that there was a separation of power and that he needed to address this with the local authorities in the specific area.

Commissioner Bowman asked if there were further public comments.

Helen Kidwell, adjoining property owner, was sworn in and her comments are a part of the verbatim record. Ms Kidwell explained that she supported this project and as a pier owner she was glad that they wanted to take the sand to where it was needed. She stated she hoped it would be approved.

Commissioner Bowman stated the matter was before the Commission for discussion or action.

**Associate Member Holland moved to accept the staff recommendation. Associate Member Tankard seconded the motion. The motion carried, 9-0.**

No applicable fees – Permit Modification

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Jeff Madden, Environmental Engineer, Sr., gave the presentation with slides for all of the next three projects, Ben Weaver, Betty Walker, and Arnold Farber. He said the projects were on adjacent lots, but that staff was requesting that separate actions be taken in these cases. Commissioner Bowman asked if these cases were linked to each other to which Mr. Madden responded yes. He stated he would be presenting them from north to south; Farber, Walker, and Weaver.

Mr. Madden noted unit size, should be 7 feet wide by 57 feet long.

- 7. BEN WEAVER, #09-0244**, requests authorization to install seven (7) pre-cast, concrete, units creating a 9-foot wide by 57-foot long breakwater positioned 105

feet channelward of an existing revetment adjacent to the western shore of the Chesapeake Bay in Northumberland County.

Mr. Madden explained that the project is located along the western shore of the Chesapeake Bay, approximately five miles east of the town of Reedville and south of Owens Pond. Mr. Weaver's waterfront home is in the Chesapeake Beach subdivision. Mr. Weaver is one of three adjoining property owners who have submitted permit applications for similar breakwater projects.

Mr. Madden stated that this well established subdivision had small vacation bungalow homes perched along a bank that averages approximately 10 feet in height. Mr. Weaver's property was currently protected by an undersized and poorly constructed riprap revetment. Although the revetment was damaged, it was still providing some measure of shoreline protection. The adjacent properties were also protected by similar riprap structures. Many of the nearby homeowners along the beach have constructed groins which appear to be holding sand. The beach held by the groins provided those properties with an added level of protection by moving the typical wave break further from the base of their revetments or bulkheads. Mr. Weaver did not have a groin along his shoreline. His neighbor to the south, Ms. Betty Walker, had a similar 75-foot long riprap revetment with two functioning timber groins, one located at the north end of her property and the second at the south side of her property. Ms. Walker currently had a 50-foot wide beach located within the created groin cell. Mr. Ed Rice owned the property immediately north of Mr. Weaver's property. Mr. Rice also had a 50-foot long riprap revetment and a functioning 78-foot groin. Mr. Rice had a 28-foot wide beach in the groin cell.

**Associate Member Fox moved to accept the staff recommendation (as noted below). Associate Member Tankard seconded the motion. The motion carried, 9-0. The Chair voted yes.**

No applicable fees – Permit Denied

\* \* \*

- 8. BETTY WALKER, #09-0245**, requests authorization to install seven (7) pre-cast, concrete, units creating a 9-foot wide and 57-foot long breakwater aligned 105 feet channelward of an existing bulkhead adjacent to the western shore of the Chesapeake Bay in Northumberland County.

Mr. Madden explained that project is located along the western shore of the Chesapeake Bay, approximately five miles east of the town of Reedville and south of Owens Pond. Ms. Walker's waterfront home is in the Chesapeake Beach subdivision. Ms. Walker is one of three adjoining property owners who have submitted permit applications for similar breakwater projects.

Mr. Madden stated that this well-established subdivision had small vacation bungalow homes perched along a bank that averages approximately 10 feet in height. Ms. Walker's property was currently protected by a 60-foot long riprap revetment, a 10-foot timber bulkhead, a 60-foot timber groin on the south end of her property and a damaged 57-foot groin on the north end of her property. The adjacent properties were also protected by similar riprap structures. Many of the nearby homeowners along the beach had constructed groins which appear to be holding sand. The beach held by the groins provides those properties with an added level of protection by moving the typical wave break further from the base of their revetments or bulkheads. Ms. Walker currently had a 50-foot wide beach located within the created groin cell. Mr. Arnold Farber owned the property immediately south of Ms. Walker. He had an 80-foot long riprap revetment which married up with his neighbor Danny Cridlin's portion to the south. These property owners enjoyed a 90-foot long crescent shaped beach that's 20-feet deep in the center of the arc. The sand along the beach was contained by a 74-foot long groin down drift of the beach.

**Associate Member Fox moved to accept the staff recommendation (as noted below). Associate Member Tankard seconded the motion. The motion carried, 9-0. The Chair voted yes.**

No applicable fees – Permit Denied

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9. **ARNOLD FARBER, #09-0243**, requests authorization to install seven (7) pre-cast, concrete, units creating a 9-foot wide and 57-foot long breakwater aligned 105 feet channelward of an existing revetment adjacent to the western shore of the Chesapeake Bay in Northumberland County.

Mr. Madden explained that the project is located along the western shore of the Chesapeake Bay, approximately five miles east of the town of Reedville and south of Owens Pond. Mr. Farber's waterfront home is in the Chesapeake Beach subdivision. Mr. Farber is one of three adjoining property owners who have submitted permit applications for similar breakwater projects.

Mr. Madden stated that the applicant had two parcels in this well-established subdivision. He has a bay-front parcel and an upland parcel with a 2-story vacation home at the corner of Neal Road and Beach Road. In years past Mr. Farber graded his bay-front property and installed 80 feet of riprap revetment which joins up with a similar structure installed by his neighbor to the south, Mr. Danny Cridlin. Together the two property owners enjoy an 80-foot long sandy beach. In addition, Mr. Farber constructed and armored a 50 foot timber bulkhead which connects up with a bulkhead constructed by his neighbor to the north, Ms. Betty Walker.

Mr. Madden said that the adjacent properties were also protected by similar riprap structures. Many of the nearby homeowners along the beach had constructed groins which appeared to be holding sand. The beach held by the groins provided those properties with an added level of protection by moving the typical wave break further from the base of their revetments or bulkheads. Mr. Farber had an 81-foot timber groin constructed at the north end of his property, with a 36-foot wide beach located within the created groin cell.

**Associate Member Fox moved to accept the staff recommendation (as noted below). Associate Member Tankard seconded the motion. The motion carried, 9-0. The Chair voted yes.**

No applicable fees – Permit Denied

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Mr. Madden explained that the three property owners were seeking authorization to each to install a 57-foot long, 7-foot wide, pre-cast concrete breakwater aligned approximately 105 feet channelward of the toe of the revetment. The breakwaters are comprised of seven (7), 8-foot long by 7-foot wide, 6-foot tall hexagonal pre-cast concrete structures. These structures have ports in the sides and are open at the top. The pre-cast units are designed to rest on filter cloth and are secured to the substrate with concrete pins. The individual units are interlocked by tongue and groove edges and pilings are proposed at each end of the 57-foot long breakwater structure. The individual units are referred to as a HexBox. In addition Mr. Farber and Ms. Weaver both intend to remove their groins upon the completion of the breakwater construction.

Mr. Madden said that there was no beach nourishment or beach planting proposed in conjunction with the breakwaters. The concrete devices would be floated into position and sunk by pulling removable plugs.

Mr. Madden explained that the stated purpose in the applications were to protect the shoreline and maintain the beach width while not impeding the natural flow of sand along the shoreline. The designer and agent for Mr. Farber, Mr. Weaver, and Ms. Walker, Mr. Warren Veazey of Seament Shoreline Systems, Inc., maintained that his pre-cast concrete breakwaters were more cost effective than traditional riprap breakwaters and actually covered a smaller area of State-owned submerged lands.

Mr. Madden stated that in VIMS' Shoreline Permit Application Report, dated April 14, 2009, the Center for Coastal Resource Management (CCRM) noted that the existing groin field on the adjacent shoreline appeared to be relatively successful in maintaining a beach, thereby shifting the wave break away from the base of the bank. On high energy shorelines such as this, they recommended the construction of a properly designed and constructed riprap breakwater system coupled with significant beach nourishment. In

these cases, however, since there was evidence that groin fields had been effective in maintaining a beach and shifting the erosive force of the wave action away from the existing bulkheads and revetments, VIMS-CCRM stated that appropriately designed groins would be acceptable. They stated that they had concerns with the longevity of pre-cast concrete breakwaters on this exposed and dynamic environment and that previous versions of the pre-cast concrete breakwaters had broken, shifted and or failed to catch or retain sand. These earlier units were referred to by the trademark name of Seabox. With an approximate 24-mile fetch, VIMS-CCRM noted that these sites were more exposed than the Potomac River beaches where similar products were installed by Seament Shoreline Systems, Inc.

Mr. Madden said that at staff's request, Mr. Scott Hardaway, a coastal geologist with the VIMS Shoreline Studies Program, also provided comments on this type of project. The Shoreline Studies Program was a part of the Geological Oceanography Group within the Physical Sciences Department at VIMS and conducted basic and applied research primarily within the shore zone of the Chesapeake Bay estuarine system and Virginia's ocean coast. Mr. Hardaway compiled a report entitled "'Innovative' Shoreline Erosion Control Techniques Summary Report." This report summarized past shoreline erosion protection approaches and points out some areas of concern regarding the Seament products, including the lack of a stone foundation under the units and in some cases the absence of sand nourishment behind the structures. The report stated that the pre-cast breakwater units appeared to be less successful, due in part to inappropriate siting in areas with limited sand supply, and given the unusual lack of beach nourishment. He added that since the newer design was relatively porous, they might also have trouble maintaining sand attachment or any tombolos that form. Mr. Hardaway concurred with his colleagues in the CCRM Program by noting that based on 30 years of VIMS research and observations, that a properly designed and constructed riprap breakwater had demonstrated a high level of durability and predictability in the marine environment.

Mr. Madden said that staff had identified a total of 61 groins along the 6,600 foot long reach of shoreline between the mouth of Owens Pond to the north of the Weaver property and Taskmakers Creek to the south. While each site was unique, the area taken as a whole appeared to be a location where properly designed groins may trap sand and maintain a beach to provide added shoreline protection. It did not appear to staff that the pre-cast, concrete units proposed along these shorelines conformed with the criteria necessary to ensure a reasonable degree of success in the proposed environment. Staff believed any breakwater should be consistent with the design recommendations contained in the VIMS publication "Shoreline Management in Chesapeake Bay". That publication described design criteria based on empirical evidence that suggested there should be a proportional relationship between the spacing between the breakwater structures, their size and distance from shore. Specifically, the guidelines stated that there needed to be a relationship between maximum bay indention and the gap between breakwaters. Furthermore, the minimum beach width on high energy shorelines such as the Weaver site should be between 45 to 65 feet with backshore elevations of at least 3-4

feet above mean high water. Finally, the report stated that the breakwaters should be 90-200 feet in length with a crest elevation of 3-5 feet above mean high water at sites such as these three sites. The current proposals did not meet these design criteria.

Mr. Madden stated that staff understood the applicants' desire to build up the beach in front of their property and also understood that the Seament products were less expensive than a typical riprap breakwater. Staff did share, however, the concerns expressed by both the VIMS Shoreline Studies Program and the CCRM program over the deployment of these structures in such a dynamic environment. Staff was also concerned that the structures were not designed in accordance with the recommendations contained in the VIMS publication "Shoreline Management in Chesapeake Bay. Access to these shorelines did not appear to be restricted. Staff noted that except for a stair case descending the ripraped slope to the beach there were no structures in peril and further, staff did not see detrimental erosion accruing at the properties.

Mr. Madden said that staff felt that if a properly designed riprap breakwater with appropriate nourishment was cost prohibitive, the applicants could provide adequate protection to their properties by installing additional Class III or larger riprap along their existing revetment. This technique had been successfully employed along the adjoining shoreline.

Mr. Madden stated that after evaluating the merits of these three projects and after considering all of the factors contained in §28.2-1205(A) of the Code of Virginia, staff recommended denial of the projects, as they were proposed.

Commissioner Bowman asked for questions of staff.

Associate Member Tankard asked if the fetch was 14miles. Mr. Madden answered it was 24 miles.

Commissioner Bowman asked for an applicant or their representative to comment.

Edward Veazey, representing the applicants, was sworn in and his comments are a part of the verbatim record. Mr. Veazey said he was actually representing his son who could not attend and was the applicants' representative. He said that the staff had explained the project well. He provided a powerpoint presentation where he showed examples of what was done and how it would apply to these projects. He provided pictures of various successes in which they had been involved. He explained that these were 4 ½ ton units utilizing sand and water and being connected by tongue and groove. He said these were not as massive as the breakwaters and great force was needed to make them move. He said there were five of these units in the Chesapeake and Potomac since 2006 were the fetch was 25 miles. He said the design was restrained by the width of the properties, which differ when they are closer to the shore. He said they could be made higher to adjust to the VIMS-VMRC recommendations and the applicants could do sand

nourishment as well. He said they were willing to cooperate with VIMS and the VMRC. He said these were being constructed at a third of the cost of breakwaters, they were flexible units, have less impact, and would be easier to relocate.

Commissioner Bowman asked if the applicants were present and wished to comment.

Arnold Farber, applicant, was sworn in and his comments are a part of the verbatim record. Mr. Farber provided some pictures. He said the aerial photo provided by staff were older and before the Hurricane Isabel had reduced the beaches. He said he had no sand as well as Mr. Weaver. He said that most of the beaches had lost all of their sand. He said that the pictures showed how in the front of his bulkhead he had a 7-foot drop in 2009 and in 2007 it was only 2 feet. He said the jetties damaged contributed to some of the lost. He said the jetty installed by the neighbor was lost as there was no sand only clay bottom. He said it did not work. He said the Wetlands Board did not have jurisdiction, the Corps approved it last April, and the adjoining property owners notified did not protest them. He said the Club was aware of the project and adjusted the easement. He said they were willing to experiment with this system at their own expense and if it did not work then they would go to an alternative. He said the good beaches are far and few on the Bay and he appreciated the consideration of this project.

Commissioner Bowman asked for questions. There were none. He asked if someone was present in support or opposed and there were none.

Commissioner Bowman said the matter was before the Commission for discussion or action.

Associate Member Fox asked for Mr. Hardaway to comment as to why they should use breakwater versus the groins. Mr. Hardaway comments are a part of the verbatim record. Mr. Hardaway said that the evolution of the area should be considered. He said that this was an extremely dynamic area and starved for sand. He said the hardening of the shoreline cut off the sand causing a domino effect. He said he complimented the Veazeys for their ingenuity to develop these systems. He said they are less massive, but he was not sure about the sand and some of these have not worked to provide sand. He said for the breakwaters that rock was preferable and nourishment was critical.

Associate Member Robins said that there had been a successful groin field in the past but now some were failed. He asked if it would be simpler to put in rip rap groins and nourishment. Mr. Hardaway said it was appropriate here with sand nourishment and a rock groin properly built would work.

Associate Member Tankard said the applicant noted this was an experiment. He asked what is the experiment? Mr. Hardaway said he had looked at some of the projects and some have sand and some have held up. He suggested it might serve with two rows of

rock foundation and be comparable to the breakwater. He said the sites are a little different.

Commissioner Bowman said that it had been previously introduced as an experiment.

Bob Grabb, Chief, Habitat Management, said that was correct and some were approved in the past because the shoreline was inaccessible for rock to be placed and these can be floated down. He stated VMRC had approved several. He said the VMRC preference is for traditional structure and nourishment is one component of a properly constructed breakwater. He said they are good in a less energy environment.

Commissioner Bowman said he wanted the Associate Members to know that this was considered an experiment and a report required as this is not the first experiment.

Commissioner Bowman stated the matter was before the Commission for action.

Associate Member Fox said that in Mr. Hardaway's opinion there was a need for sand. He said with the 24-mile fetch this was substantial. He said the applicants should consider the rip rap breakwater with sand.

Note: The motion has been put with each project description. All of the projects were denied.

\* \* \* \* \*

10. **BOB BOUVIER, #09-0800**, requests authorization to install three (3) 57-foot long by 9-foot wide pre-cast, concrete, breakwaters aligned approximately 100 feet channelward of the existing graded bank and to place 600 cubic yards of sandy material landward of the breakwaters as beach nourishment adjacent to his property situated along the Potomac River at 8859 Sandy Beach Lane in King George County.

Dan Bacon, Environmental Engineer, Sr., explained that there was a request by Mr. Bouvier for a 60-day continuance to allow him time to consult with Scott Hardaway regarding a breakwater system.

Commissioner Bowman suggested that instead of a continuance that the matter be tabled. If it was brought back and satisfied the parameters used by staff to evaluate a project then the matter would be heard in 60 days. He asked for a motion.

**Associate Member Holland moved to table the matter for 60 days. Associate Member Tankard seconded the motion. The motion carried, 9-0. The Chair voted yes.**

Tabled – Resubmit Modified Application for Permit

\* \* \* \* \*

11. **EASTWIND, LLC, #09-1455**, requests authorization to construct a riprap groin extending 60 feet channelward of mean high water, a 6-foot by 130-foot timber open-pile bridge across Silver Creek and to construct a 10-foot by 11-foot screened gazebo incorporated into the roof of an existing boathouse adjacent to their property situated along the North River at 9812 Eastwind Road in Gloucester County.

Chip Neikirk, Environmental Engineer, Sr., gave the presentation with slides. His comments are a part of the verbatim record.

Mr. Neikirk explained that Mr. Pickens submitted the permit application on behalf of his limited liability company, Eastwind. The Eastwind, L.L.C. property was located on the eastern side of Ware Neck, along the North River, approximately one-mile upstream of Ware Point. The exposed shoreline areas of the parcel were currently protected by a riprap revetment and there was an existing pier extending from the south side property. A mostly enclosed boathouse was located near the channelward end of the 240 foot pier. The existing boathouse totaled 800 square feet and there was approximately 400 square feet of open-pile deck area on the existing pier. The open-sided extension to the boathouse had been authorized in 2006.

Mr. Neikirk further explained that Eastwind, L.L.C. proposed to construct a 60-foot long rip-rap groin to provide scour protection for a portion of their revetment and to construct a 6-foot wide by 130-foot long open-pile bridge across a marsh and the 15-foot wide mouth of Silver Creek to provide pedestrian access to an adjoining parcel also owned by Eastwind, L.L.C. The Gloucester Wetlands Board had approved those portions of the project and staff had no significant concerns with those aspects of the application.

Mr. Neikirk said that Eastwind, L.L.C. had also requested authorization to construct a 10-foot wide by 11-foot long screened gazebo incorporated into the roof of their existing boathouse. The stated purpose for the gazebo was to provide a covered area on the dock.

Mr. Neikirk noted that the Virginia Institute of Marine Science had provided comments on the bridge and groin portions of the project but did not provide any comments specifically related to the proposed gazebo. The project will not encroach on any public oyster ground. The existing pier and boathouse was located on oyster ground leased by the applicant. No protests had been received and no other state agencies had provided comments on the application.

Mr. Neikirk explained that prior to 2006, staff generally recommended against the construction of any open-sided or enclosed roofed structures on piers unless such

structures were deemed to be water dependent. In 2006, however, the General Assembly amended §28.2-1203(A)(5) of the Virginia Code, which established statutory authorization for open-sided shelter roofs or gazebo type structures measuring no more than 400 square feet, provided such structures were allowed under local ordinance and provided further that such structures were not objected to by an adjoining property owner. Although the applicant might be able to construct an open-sided gazebo on the existing pierhead under the aforementioned exemption, staff did not believe the construction of a screened room in the roof of an existing enclosed boathouse met the statutory exemption. In fact, staff was generally reluctant to issue permits for new enclosed boathouses and when permits were issued for such boathouses staff strived to limit the size and height of the structures to what was deemed necessary and appropriate. Staff typically recommended against the construction of even uncovered decks on top of boathouse roofs, especially when the elevated deck area would be in addition to the 400 square feet of statutorily authorized deck area. In April, 2006 the Commission unanimously denied an after-the-fact request to retain an uncovered deck that had been built atop a boathouse in Urbanna Creek.

Mr. Neikirk said that when reviewing proposals to build over State-owned submerged lands the Commission's Subaqueous Guidelines directed staff to consider, among other factors, the water dependency and necessity of the proposed structure. Furthermore, when considering authorization for such structures for private use, §28.2-1205 of the Code of Virginia stipulated that: "In addition to other factors, the Commission shall also consider the public and private benefits of the proposed project and shall exercise its authority under this section consistent with the public trust doctrine as defined by the common law of the Commonwealth adopted pursuant to §1-200 in order to protect and 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 people as conferred by the public trust doctrine and the Constitution of Virginia."

Mr. Neikirk stated that although the environmental impacts associated with the structure were likely minimal, staff did not consider the gazebo to be water dependent and believed it represented an unnecessary addition to an already large, mostly enclosed structure. The addition of the gazebo also increased the visual impacts associated with the structure and increased the potential for the building materials to enter the waterway during storm events or when the structure fell into a state of disrepair.

Mr. Neikirk said that in light of all of the above, staff recommended approval of the riprap groin and open-pile pedestrian bridge but was unable to recommend approval of the screened gazebo structure.

As there were no questions of staff, Commissioner Bowman asked if the applicant or a representative was present to comment.

Bill Pickens was sworn in and his comments are a part of the verbatim record. Mr. Pickens explained that the screen enclosure was for enjoyment and protection from the bugs. He stated only 110 square feet was being requested. He said that none of the neighbors had protested the project and it was not bothering others or impacting the view. He said they were requesting approval.

Commissioner Bowman asked for questions.

Associate Member Fox asked if they owned all the upstream property above the proposed bridge. Mr. Pickens responded yes, all of the area. Associate Member Fox asked if anyone else used the area for access, to which Mr. Pickens responded no.

Commissioner Bowman asked for discussion or action.

Associate Member Robins stated that staff had done a good job and this would be precedential action if the Commission allowed the second story to the boathouse.

**Associate Member Robins moved to adopt the staff recommendation to approve the groin and bridge and deny the screened structure. Associate Member Tankard seconded the motion. The motion carried, 9-0.**

Royalty Fees (encroachment 405 sq. ft. @ \$0.50/sq. ft.).....	\$202.50
Royalty Fees (encroachment 30 sq. ft. @ \$0.30/sq. ft.).....	\$ 9.00
Permit Fee.....	\$ 25.00
Total Fees.....	\$ 236.50

\* \* \* \* \*

Commissioner Bowman suggested that Item 19, Warm Water Regulations come before the Blue Crab issue. He explained that Dr. Croonenberghs from the Division of Shellfish Sanitation had another meeting to attend at 3:00 p.m. and requested that the issue be moved forward as much as possible.

**Associate Member Robins moved to hear Item 19 after Item 14. Associate Member Tankard seconded the motion. The motion carried, 9-0.**

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**12. MARSHALL SEAFOOD, #2009-025**, requests to lease approximately 70 acres of oyster planting ground within Timberneck Creek, in Gloucester County. The application is protested by a nearby property owner and leaseholder, and by

Timberneck, LLC, also a property owner along the creek. Deferred at the February meeting until the April meeting by request of the applicant's attorney.

Ben Stagg, Environmental Engineer, Sr., gave the presentation. His comments are a part of the verbatim record.

Mr. Stagg explained that the requested oyster planting ground lease was located within Timberneck Creek, a tributary to the York River in Gloucester County.

Mr. Stagg said that the application was received on April 8, 2009. It was surveyed by the Engineering/Surveying Department on September 16, 2009. Based upon internal discussions, the survey excluded two areas. One excluded area included the footprint of a proposed community-use pier that was under Commission review related to a proposed upland development along the creek. The other one excluded a proposed oyster reef creation site, as well as, the site of breakwater/sill structures.

Mr. Stagg stated that on October 1, 2009, staff received a letter of objection from Mr. Ben A. Williams, III, President of Timberneck, LLC, the developer of a large parcel on the western shore of Timberneck Creek. The letter noted the history of coordination with Gloucester County related to numerous approvals for continued development of the upland property, along with their concessions of low-density, preservation of historical, agricultural, recreational, ecological, marine and wildlife resources on the property. The letter further noted that while they had no objections to reasonable and permissible uses of State-owned bottom, the ground, as surveyed, could conflict with proposed future uses by riparian owners. It was also noted that representatives of Timberneck, LLC planned to contact Mr. Marshall of Marshall Seafood directly in an attempt to resolve the matter.

Mr. Stagg said that On November 6, 2009, staff received a copy of a letter from Mr. Ben A. Williams, III to George H. Marshall, dated November 5, 2009, indicating proposed dates to meet to discuss the matter. Staff understood that no compromise had yet been reached between Mr. Marshall and Timberneck, LLC regarding the current application.

Mr. Stagg noted that staff had received another protest letter, dated December 8, 2009, from Mr. Gregory Klimock, expressing his objections to the application. His concerns included the close proximity of the application to his own oyster lease and potential conflicts should he seek to extend his private pier channelward of its current terminus. Mr. Klimock later requested that a buffer be maintained between his lease and the applicant's lease line; again related to any potential pier extension.

Mr. Stagg explained that staff had conducted a bottom evaluation of the entire area encompassed by the area of the application on February 12, 2010, including taking depth soundings near Mr. Klimocks existing pier on April 14, 2010. Based upon those evaluations, it appeared that the upper reaches of the application area neither had existing shellfish resources nor was the bottom suitable for such activity. Based on the bottom

study there did appear to be some areas of shellstock extending from the mouth of the creek up to the public landing at the terminus of Williams Landing Road. A review of historic lease records indicated previously leased ground up to this point that were productive in the past. This was confirmed by local watermen who use the landing. It should also be noted that the creek was currently closed to the direct harvest of shellfish. Any product would have to be relayed to other grounds in non-condemned areas for depuration. Additionally, there appeared to be ample depth within Mr. Klimock's existing riparian oyster lease to extend his pier up to an additional 93 feet. Such extension would result in water depths reasonable for navigation within the creek. Any extension beyond 93 feet would not result in any discernable increase in depth and also, might present navigational issues within the main channel of the creek.

Mr. Stagg stated that while staff was sensitive to Mr. Klimock's concerns related to a future extension of his pier, he currently had an existing riparian lease and pier adjacent to his property with considerable area to extend his pier within his existing lease without the necessity for any additional buffer. To address the concerns of Timberneck LLC, staff excluded from the survey areas, which were previously permitted for a community-use marina, breakwater structures and oyster reef structures, as well as an area approximately 100 feet offshore of the western shoreline of the main stem of the creek to allow for the potential construction of private piers. Additionally, staff did not recommend the leasing of any area north (upstream) of a line just upstream of the public landing at the end of Williams Landing Road since this area did not appear to contain any shellstock nor to be suitable for shellfish aquaculture because of the soft-bottom type. The resulting area recommended for lease was 25.27 acres.

The applicant was not present.

Commissioner Bowman asked for those in support or any protestants who wish to comment to come forward.

Ben Williams, III, representing the applicant, was sworn in and his comments are a part of the verbatim record. Mr. Williams said that they were working on the oyster reef. He said he had met with Mr. Marshall and his letters had been included in the record. He said he was concerned with the acreage because he had an agreement with the County regarding the Hall House on the upland property and he agreed to sell it to someone who would restore it as a historical site. He was currently negotiating with someone to purchase and restore the house. He said he was concerned with the use of onbottom devices on this lease versus the traditional methods and as it was shallow here he did not want them to show.

Mr. Stagg stated that he can use cages up to 12 inches with no additional permit and he could not say if they would be exposed, but over 12 inches requires additional permit. He said it might be possible to put a condition on the lease and staff could adjust the lease with Mr. Marshall's approval.

Mr. Williams explained that it goes dry at low tide as he had been there when there was not much water. He said he agreed to this in order to get the County’s approval.

Mr. Stagg noted that generally speaking it was a little bit deeper in the prong area.

Mr. Williams said he had met with Mr. Marshall and they talked about his using structures and Mr. Marshall told him he put the oysters in burlap bags, but he had considered using structures.

Mr. Stagg stated it was not typical to place a condition on a lease.

Commissioner Bowman asked if Mr. Marshall had discussed this new condition with the application. Mr. Williams responded no and suggested that maybe the matter could be tabled.

Associate Member Holland asked if this involved the whole lease. Mr. Williams stated just in the prong area.

After the discussion was concluded, Commissioner Bowman suggested that the matter be tabled. He further suggested that Mr. Williams meet with Mr. Marshall and a letter be provided to the Commission that this condition on the lease was okay. He said that action would be taken next month and if it was okay then no one would need to come back for the meeting.

**Associate Member Holland moved to table the matter for 30 days. Associate McConaugha seconded the motion. The motion carried, 9-0. The Chair voted yes.**

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**13. PUBLIC COMMENTS** – There were no public comments.

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**19. CONTINUED DISCUSSION:** Final decision pertaining to public health and warm water shellfish harvest restrictions, rescinding portions of 4 VAC 20-720-10, et seq. and adoption of Regulation 4 VAC 20-1230, et seq., “Pertaining to Restrictions on Shellfish Harvest.”

Jim Wesson, Head, Conservation and Replenishment, gave the presentation. His comments are a part of the verbatim record. Dr. Wesson provided the Commission with a handout which was an e-mail from Mike Oesterling representing the Shellfish Grower’s Association, dated April 27, 2010. He explained the information in the letter explained what the State of Florida was doing as far as regulating and shows them in the same

situation. He said that Florida was requiring refrigeration and other states were coming up with complicated solutions.

Dr. Wesson explained that the James River watermen were responding positively about continuing with the use of ice and that contacts were made with some of the Eastern Shore watermen to them aware of the new regulations.

Commissioner Bowman asked where he had spoken with the watermen on the Eastern Shore. Dr. Wesson stated that from Oyster up to the Wachapreague area watermen were contacted and that those contacted know about the time period, but say they will likely not get a GPS because the harvesting definition was not strict enough and they plan to leave the oysters out in the harvest area and will pick them up prior to the time of day curfew.

Dr. Wesson stated that the VDH-Division of Shellfish Sanitation were most comfortable with the 3-hour limit and willing to compromise for a 4-hour limit instead of 5. He said the Assistant Attorney General had responded that the GPS tracker was admissible in court. He said there was a letter from the Health Commissioner in support of the 5 hours for harvest and the regulation.

Dr. Wesson explained that the Fishery Newsletter had made even more watermen aware. He said in the James River the use of ice was okay and would suggest that it be allowed in the entire Bay, too, as a trial and after one year change Section 30(L) to allow the use of ice.

Commissioner Bowman asked if this included the Seaside of Eastern Shore. Dr. Wesson explained that the VDH-Division of Shellfish Sanitation was not comfortable with allowing it on Seaside.

Commissioner Bowman asked why not include the Seaside. Robert Croonenberghs, Director, VDH-Division of Shellfish Sanitation, stated that there are problems there. Commissioner Bowman stated that he believed in fairness and that the problems needed correcting. Dr. Croonenberghs stated they would be willing but with strong reservations. He said the regulation did treat all equally as it would protect the public hearing as well as the industry.

Commissioner Bowman said when a vessel is certified the safeguards were in place, but the incident happen in another area. Dr. Croonenberghs responded that that was correct, but there were fewer oysters coming off of the Seaside.

Associate Member Bowden said that there was a smaller harvest and the water temperatures were different. He said what was suggested now was not legal. He stated a certified vessel on Seaside has ice the same as those on the James River. He stated he

was disappointed with staff. He said if the process is allowed in certain locations, it only allows certain people to meet certification.

Associate Member Robins said there was concern with allowing use of ice in areas other than the James River with the monitoring and law enforcement situation. He said in the James River the fleet is concentrated in a certain area of landing and this is not so in other areas and this was driving the monitoring concerns.

Dr. Croonenberghs stated that landings sites be designated from up North down to the James River and we will use this procedure as there is more ice available. He said on Seaside it was more difficult to get ice and there were more places to come ashore. He said he understood the fairness concept, but it would not work. He stated they are talking about leaving the oysters out overnight and picking them up the next day and no GPS would be used. He said at all the meetings it was discussed about the problems with ice on Seaside, monitoring, and enforcement problems because they cannot check the ice. He said where the law enforcement can see most areas they can enforce and keep control. He said if they were to allow the use of ice everywhere there would be the same concern. On Seaside without peer pressure and industry pressure, he said he did not know how to make it work. He said there was no simple answer. He said he understood that being fair was a prerequisite, but the ability to monitor comes into play and the reality if that enforcement is required.

David Grandis, Assistant Attorney General, stated that you're not required to treat all equal if there is a rationale basis for the different treatment.

Associate Member Fox stated that there was concern that one more incident of health impact occurs there would be no summer harvest.

Associate Member Bowden said he had problems with the broad statement about Seaside of the Eastern Shore. He said he did not know of anybody who abuses it, but he did know where it was occurring. He stated there cannot be difference regulations, one for Eastern Shore and one for the Bayside. He said that there were only a handful of scoundrels and no one was contacted in that area. He said the majority of the population was in Accomack County.

Dr. Croonenberghs stated he apologized, but he was not trying to paint the entire Eastern Shore as a problem.

Commissioner Bowman opened the public hearing.

Alice Firman, James River waterman, was present and her comments are a part of the verbatim record. Ms. Firman explained that they need to continue with the icing method as they come out of Rescue and cannot get to their grounds and have time to work and return within 3 or 5 hours.

Richard Green, waterman, was present and his comments are a part of the verbatim record. Mr. Green suggested that VIMS come out and take samples to see what occurs with the vibrio. He stated that the ice has been good.

Hank Jones, Seaside Eastern Shore waterman, was present and his comments are a part of the verbatim record. Mr. Jones stressed that there was a need to keep oysters and clams separate as he was afraid that someone is going to put these same regulations on the clambers. He said there is no problem with the clams from Seaside. He said that over there they have to work with the tides and there were extreme changes in the tide. He thanked the Commission for the opportunity to speak.

Dr. Croonenberghs explained that there had been an occurrence for vibrio tied to clams. He said this was not on seaside but in another area.

Associate Member Tankard asked if vibrio had been associated with the level of nitrogen. Dr. Croonenberghs said it had been associated by a study by a well respected researcher. Associate Member Tankard asked if the level of nitrogen was less on Seaside than on the Bayside. Dr. Croonenberghs responded yes.

Commissioner Bowman asked for further questions.

Associate Member Robins asked about the modification of the usage of ice. Dr. Wesson explained that with the James River staff had added the Chesapeake Bay and its tributaries with a landing site and certification of ice and box issued by the Health Department. Associate Member Robins asked about the designated landing site. Dr. Wesson explained that it would be on the Health Department certification.

Associate Member Bowden said he understood what a bad position it was now. He said with the problems with the farmers, special allowances had been made. He said he knew about the water temperature, but did not know about the nitrogen on Seaside. He said in order for the GPS to convict people, it must be certified. He suggested this could be avoided by putting the GPS on a pole and coming back to pick it up. He said there was a need to specify the landing site on the permit and any changes must require a 24-hour notice. He said the Commission should go ahead with a motion for this year and start on something for next year. He said there should be a meeting with the Accomack people who had not been included. He said there is not a problem with getting ice in Accomack. He stated that there should be a meeting like he suggested before as there is a need to work together. He said the worry was not if, but when will there be another occurrence of vibrio. He reiterated that there was a need to be more equitable and either extend the area where ice can be used or do away with it for all. He said if the permits are taken then the rest will fall in line. He said the GPS he did not like because it made someone feel like a criminal.

Commissioner Bowman stated that he agreed that all should be treated the same, if certified. He said the Seaside of Eastern Shore topography was not talked about and it was different from the James River. He said that enforcement was impacted by the topography.

Associate Member Robins asked staff if there was a need to require the landing site with the ice usage should it be made the same for the GPS. Dr. Wesson explained that it could be done in Subdivision of the regulation and require it for the entire state.

Associate Member Bowden asked if the amount of ice could be certified. Dr. Wesson stated that it can not be done.

Associate Member Robins stated this was a difficult situation and we must manage the risk, but with consequences. He said staff has worked with industry to make changes to the regulation. He explained that the GPS was cost effective as it gave the harvesters flexibility.

**Associate Member Robins moved to accept the staff recommendation. Associate Member Fox seconded the motion.**

**Associate Member Bowden said he was concerned that it was more extreme on Seaside Eastern Shore to require the GPS and a landing site. He said the regulations were loosened up on the Bay, but not on Seaside Eastern Shore. He said he could not support the motion unless Seaside Eastern Shore is included in the ice requirement. Associate Member Robins suggested limiting it to the James River to which Associate Member Bowden said he could live with that, but he was disappointed that it was only the James River area and did not include the Seaside of Eastern Shore. He said that water temperatures were higher on the Seaside of Eastern Shore than it was in areas on the Bayside.**

**Associate Member Robins moved to accept staff recommendation with two modifications in Sections H & L that a landing site must be specified. Associate Member Fox seconded the modified motion.**

**The motion carried, 8-1. The Chair voted no.**

\* \* \* \* \*

14. **BLUE CRAB:** Presentation of the results of the 2009/2010 Winter Dredge Survey. Request for public hearing to establish the 2010 regulations for commercial and recreational crabbing.

Jack Travelstead, Chief, Fisheries Management, gave the presentation. His comments are a part of the verbatim record. He provided a copy of a letter from the Chesapeake Bay Foundation with their comments to be added to the record.

Mr. Travelstead stated that there was good news, as could be seen in Figure One, as this was the first time the total crabs was above the long term average, even above what it was in the early 1990's. He said staff hoped it would stay at that level or go even higher. He did caution the Board that when the high levels do occur it has been followed by large declines, such as in 1992 and 1994. He said in the early 1990's there was no regulation program in place and just two years was not an indicator of a consistent trend.

Mr. Travelstead explained that in Figure 2 information showed that for the spawning age crabs (age 1+) the 315 million crabs was the highest abundance since 1993.

Mr. Travelstead stated that staff wanted to continue with the management measures in place in order to identify what caused the improvements. He said they could only say that the sweep of measures taken caused it and no individual action.

Mr. Travelstead said that the good news was that there was an increase in adults, and we were also seeing an increase in the juvenile abundance. He said this indicated that a sufficient amount of spawning had occurred. He said the numbers in the early 1990's showed that overfishing was not occurring, as the abundance was around the target amount of 46%.

Mr. Travelstead explained that in Table 1, it showed the results of the Baywide Winter Dredge Survey and in their review of the existing regulations, staff would suggest that they remain the same for another year. He stated with the sanctuary being closed, it had provided a long term benefit in higher harvest.

Mr. Travelstead said that the Blue Crab Advisory Committee had met twice over the two months and discussed the period of time the crab sanctuary was closed and the period of time for the prohibition of the possession of the dark sponge crabs. He said there was discussion of May 1 closure of the sanctuary areas being delayed until May 16. He said the Tangier watermen suggested the May 16 date for above the horizontal line at the Rappahannock and north in to allow them to recovery from the period of March 17 to mid April when there was a lack of opportunity for them to catch crabs in the upper sanctuary area. He said another motion was to open the entire sanctuary failed and the first motion for May 16 was passed. He said that most commercial watermen did not like the dark sponge crab regulation. He said it was subjective as to color and it required a lot of culling or leaving the area entirely.

Mr. Travelstead said that VIMS has determined the warm water time as July to August, which results in mortality and it does not help to have regulation. He said there was a need to protect the sponge crabs until July 16<sup>th</sup>. He said the Crab Committee was

recommending allowing possession of the dark sponge crab until June 1<sup>st</sup>. He said the problem with June 1<sup>st</sup> is that it is not a warm water month. He said the proposed prohibition time period was Sunday, June 1 through September 15. He said one member made a motion to change from Sunday to Wednesday, but it failed because there was no second.

Mr. Travelstead said also that the BCMAC committee discussed recreational fishery changes, but did not adopt any of them.

Mr. Travelstead said that staff recommended advertising for three items for a May public hearing:

- 1) An amendment to 4VAC 20-270-10 et seq., "Pertaining to Crabbing," that would allow the possession of dark sponge crabs, starting July 1, 2010;
- 2) An amendment to Regulation 4VAC 20-1140-10 et seq., "Pertaining to Crabbing Licenses," that would extend the license sales moratorium indefinitely; and,
- 3) A continuation of the requirements of 4VAC 20-1140-10, and in accordance with the provisions of Section 28.2-707, of the Code of Virginia, the crab dredging season of December 1, 2010 through March 31, 2011, would be closed, and it shall be unlawful to use a dredge for catching crabs from the waters of the Commonwealth during that season.

Commissioner Bowman asked for questions.

Associate Member Robins asked about the second recommendation for a moratorium on license sales and to make the limited entry since 1999 permanent.

Associate Member Schick asked about the sanctuary date.

Mr. Travelstead responded that there would be no change and the BCMAC had wanted to open it for two weeks in May and even discussed less than two weeks, which would not be beneficial.

Rom Lipicius, representing VIMS, gave a presentation which is a part of the verbatim record.

Commissioner Bowman opened the public hearing.

Joe Palmer, waterman, was present and his comments are a part of the verbatim record. Mr. Palmer said they needed the May 1 to May 15 open season for the sanctuary area and noted that staff had said the catch was insignificant. He said Maryland watermen come into Virginia waters in April and caught crabs. He said that Maryland watermen claimed that Virginia watermen catch all the females. He said that 1,200 bushels were caught per day at Cape Charles and less in the Lynnhaven and 1,200 bushels was an insignificant amount.

Dan Dise, Tangier Watermen's Association, was present and his comments are a part of the verbatim record. Mr. Dise explained that the March 17 opening was no good for the Tangier watermen for the upper Bay Sanctuary, from the Ghost Hall to the Rappahannock buoys to Smith Point. He said they understood why there was a need for the conservation areas. He said March 17 was good for the Seaside of Eastern Shore, but it had ruined their fishery. He said that not all can go down the Bay and sleep in a small, damp boat. He said the people down the Bay do not come up there either. He said they were not just after the shooks and wanted a shot at the male crabs, also. He said he caught 8 bushels of jimmies the day before by himself. He said they were just asking for 15 days as it would not make much of a difference.

Ty Farrington, Commercial Fisherman, Member of the Watermen's Association, and a member of the BCMAC. He provided a handout of the dredge survey. He said they were requesting removal of the dark sponge crab regulations. He said it would help the finances of the watermen, save the male crabs, make it easier on law enforcement and stop the waste of crabs. He stated the cull rings are doing more to help the situation. He read that the release of the dark sponge crabs would have little effect on increasing the spawning stock. He said they had been allowed to keep the dark sponge crabs in 2007 for a period of time and it did not impact the stocks in 2008. He noted that Dr. McConaugha had said the first part of the season had helped to save the crabs and Mr. Robins had said that the existing regulations were wasting the sponge crabs. He said they were dying and there were no statistics to support it, as it was just a theory. He requested that they be allowed to keep what they catch.

Mark Sanford, waterman, was present and his comments are a part of the verbatim. Mr. Sanford stated he agreed with Joe Palmer that they needed to open it 15 more days. He said they need a place to work or be put out of business. He said anything would help.

Commissioner Bowman asked for a motion to advertise for a public hearing.

**Associate Member Tankard moved to advertise for a public hearing. Associate Member Holland seconded the motion.**

Commissioner Bowman said the comments are about relaxation of the regulations. He said that from staff and VIMS' comments the fishery is in trouble, but all believe this is on the right track to get the fishery back to where it should be. He stated he was concerned with relaxing the regulations and sustaining a fishery.

Associate Member Robins stated he agreed with staff that which regulation worked cannot be pinpointed. He said that looking at the history, you can see the exploitation threshold had been over and now with the reduced threshold there has been a significant increase in the stocks. He said there was still work to be done and agreed it was too early to relax the regulations. He said there was a long way to go.

Associate Member Bowden asked about the Maryland portion of the sanctuary. Mr. Travelstead stated staff had no details as this was a different management of daily output, trip limits, and catch limits.

Associate Member Bowden said that Maryland watermen come to Virginia, but Virginia watermen never go to Maryland. He said the Maryland watermen did well during Virginia's open season, and when Virginia's season closed, the Maryland watermen moved back up to Maryland, but Virginia's watermen were prohibited to go into Maryland. He said he supported March 17 and spreading the seasons until the end of March. He said he had no problem giving them something as it had been a bad winter, they were out of work, and with the global warming and cold water they had lost some of their season. He said to give them this will only retrieve what was missed out on and would help not hurt.

Associate Member Tankard said there was more harvest and it looked to be rebounding, but it could be followed by a decrease year of harvest. He said there was a need for more recovery room. He said if there are good numbers for another year the regulations could be adjusted and we would know the industry was healthy.

Associate Member McConaugha said that the regulations seemed to be working as there has been two good years. He said that one bad year would put everything back to what it was or maybe even worst. He said there was a need to build the stocks up and see consistent high numbers.

**The motion 9-0. The Chair voted yes.**

Mr. Travelstead asked what was to be advertised. Commissioner Bowman stated the staff recommendations.

\* \* \* \* \*

- 15. PUBLIC HEARING:** Concerning leader mesh requirements for pound nets. Chapter 4VAC20-20-10 et seq. "Pertaining to the Licensing of Fixed Fishing Devices."

Lewis Gillingham, Head, Saltwater Fishing Tournament, gave a powerpoint presentation. His comments are a part of the verbatim record.

Mr. Gillingham provided the Commission with a handout from the Virginia Aquarium Foundation, dated October 9, 2009, which did not get included in their packets.

Mr. Gillingham said that there is a recommendation to redefine Area 1, which he pointed out on a map. He said this area had been established as a Federal Zone in 2004 by the

National Marine Fisheries Service to protect the sea turtles. He went on to describe the pound net and how the leaders work. He further defined the modified leaders, which he said was consistent with the NMFS definition. He noted that the hard lay rope required to build stringers for leaders was very expensive and not manufactured in the United States.

Mr. Gillingham reviewed the recommendations by the Bottlenose Dolphin Take Reduction Team (BDTRT), which were as follows:

- 1) Extend the modified leader requirements, consistent with the design for federal sea turtle regulations, east of Regulated Area 1 to incorporate the portion of Regulated Area 2, out through the Chesapeake Bay mouth and along Virginia coastal waters, east of the Chesapeake Bay Bridge Tunnel. Regulated Area 1 would include all waters east of the Chesapeake Bay Bridge Tunnel and into the coastal waters of Virginia, north to the Maryland/Virginia line and south to the Virginia/North Carolina line;
- 2) The timeframe for the modified leaders should be year-round;
- 3) Change definition of inshore pound net from what is defined in sea turtle regulations to a pound net with a leader starting from 10 feet horizontally from mean low water and ending at the king post/stake at 12 feet or less at mean low water to ensure the king post/stake does not extend beyond 12 feet mean low water. ;
- 4) The definition of an offshore pound net should be the same as defined in the federal sea turtle regulations;
- 5) To help insure compliance and facilitate enforcement, these regulations should include the same pound net inspections and certifications as for the federal sea turtle regulations.
- 6) There should be consistency between the regulations for the sea turtle under the Endangered Species Act and any forthcoming dolphin regulations under the Marine Mammal Protection Act pertaining to Virginia pound nets.

Mr. Gillingham said that in their letter of November 2009, the NMFS has said it would recommend expanding Area 1 and to include all of the BDTRT recommendations.

Mr. Gillingham reviewed a chart for pound net interactions with the bottlenose dolphins during the time period 1997 through 2009. He explained the regulations established in October 2009 affected the area where 80% of the interactions occurred.

Commissioner Bowman asked for questions of staff.

Associate Member Bowden stated that the number of strandings had not changed, just the time of year. He stated also that in May last year it was very low. Mr. Gillingham stated there were fewer in 2009 than in 2008.

Commissioner Bowman opened the public hearing.

Keith Like, pound net fisherman, was present and his comments are a part of the verbatim record. Mr. Like said he would like to be able to use the net he now uses until after the season is out and then he would make the changes. He said that he has a lot of net that he has put away that cannot be used because of the turtles. He said he had been disappointed in the trout catch this year as he got only 4 to 6 weeks for a whole year's work. He said he would like to two more weeks to the net he is using now this year and start next year with the new net.

Commissioner Bowman asked for comments of staff.

Mr. Gillingham explained that NMFS was in the process of rule-making and they are a year off, but NMFS is concerned with the shift in timeframe of the turtle interactions seen in 2009 and there is a possibility NMFS might take emergency action. He impressed on the Board that any actions by NMFS trumps the VMRC actions but if the State already had something reasonable in place, then NMFS just might mirror Virginia's regulations.

Kenneth Heath, Eastern Shore pound netter, was present and his comments are a part of the verbatim record. Mr. Heath said that he was involved in the study in which used 6 traps, 4 offshore with modified leaders and 2 inshore without modified leaders. He said there had been a lot learned using this leader for a whole year. He said they do not want to be shutdown. He said he agreed with staff recommendations.

Commissioner Bowman asked for discussion or action by the Board.

**Associate Member Robins explained that because of his concerns regarding the TRT status which could change, he moved to accept the staff recommendation with the July 15 date. Associate Member Laine seconded the motion.**

**Associate Member Bowden stated that only one area was affected and the takes were so rare. He said it was thought that the nets here had not caught as well. He said he agreed with Mr. Like that it was not an easy change and not highly profitable. Associate Member Robins said this would position the fishery for future concerns. Associate Member Bowden offered a substitute motion to accept staff recommendations but changing the date from July 15 to August 1 to take care of additional entanglements. Associate Member Holland seconded the motion. The motion carried, 6-3. Associate Members Laine, Tankard, and Robins voted no. The Chair voted yes.**

\* \* \* \* \*

- 16. PUBLIC HEARING:** Consideration of allowing multiple permittees on board a vessel, under a maximum gill net length requirement. Chapter 4VAC20-1190-10 et seq., "Pertaining to Gill Net Control Date, Limited Entry and Transfers".

Joe Grist, Head, Plans and Statistics, gave the presentation. His comments are a part of the verbatim record.

Mr. Grist explained that the subcommittee recognized the need for harvesters to join together to work gear, which promoted both cost savings and efficiency. He said that they did not want to promote license stacking that would allow for greater than 12,000 feet of gill net to be worked by a vessel on any day. The subcommittee recommended a vessel limit, whereby the combination of all gill net licenses on board the vessel cannot exceed 12,000 feet, regardless of the number of Class A and Class B gill net permittees were on board the vessel.

Mr. Grist said that staff recognized that efforts to promote cost savings and efficiency are important to any fishery. He said Law Enforcement had been contacted for their comments regarding this entire regulation. Lt. Col. Rhodes responded back and said that all of the Captains had responded and said that the regulation was not enforceable. He said further that they said it would be impossible to measure that amount of gill net on a boat or in the water.

Mr. Grist said that this proposal had been advertised in accordance with the Code of Virginia for a public hearing. He said to date no public comments had been received.

Mr. Grist explained that staff was recommending denial of the amendments to Regulation 4VAC 20-1190-10, et seq.

Commissioner Bowman asked for questions.

Associate Member Bowden said that even without the multiple licenses on board a vessel that Law Enforcement could not measure the amount of net no matter what.

Commissioner Bowman said he felt he could not support this regulation because of the difficulties of enforcement.

Commissioner Bowman opened the public hearing. There were no public comments and the public hearing was closed.

Commissioner Bowman asked for a motion.

**Associate Member Tankard moved to accept the staff recommendation. Associate Member McConaugha seconded the motion. Associate Member Schick said he did not see the problem and he felt that no matter the number of permittees, it was the same maximum net. Mr. Grist stated that it was related to the class of permits. Associate Member Schick said it was 12,000 feet per person. Mr. Grist noted it was 6,000 for a Class B permittee. Captain Widgeon was asked to comment. Captain Widgeon stated it was difficult to measure the net no matter what the number of**

permittees on board. Mr. Grist stated it was difficult for Law Enforcement already, without adding this. Associate Member Bowden stated that only things that were enforceable were the number of licenses allowed and if the net did not have a tag. He suggested taking this back to FMAC to discuss this for gill netters above the bridge where the problem exists. The motion carried, 8-0. Associate Member Fox was absent during this item. The Chair voted yes.

Associate Member Bowden requested that the motion include that the matter will be taken to FMAC.

\* \* \* \* \*

17. **PUBLIC HEARING:** Consideration of prohibiting the use of agents and transfers in the limited spiny dogfish fishery. A permittee transfer exception process will also be considered. Chapter 4VAC 20-490-10 et seq., "Pertaining to Sharks".

Joe Grist, Head, Plans and Statistics, gave the presentation. His comments are a part of the verbatim record. He gave the Commission hand outs of additional comments received that had not been included in the packets mailed.

Mr. Grist said that the same subcommittee met to discuss Regulation 4VAC 20-490-10, et seq. and the upcoming 2010 spiny dogfish season. He said that the subcommittee recognized that allowing the use of agents within the limited entry fishery was not their original intent, and recommended no agents be allowed for the spiny dogfish limited entry fishery permit. He said also that the subcommittee also supported the continuation of not allowing the transfer of permits, however, they did want to provide an allowance for transfer only in cases where the harvester had died.

Mr. Grist said that the FMAC at their meeting recommended allowing transfer exceptions for significant and documented hardships. Transfer exceptions to be considered were to include problems associated with health or a call to active military duty.

Mr. Grist said that the draft regulation included the following amendments:

- 1) Definition of an agent (Section 20, Page 1);
- 2) Prohibiting the use of agents (Section 44C, Page 9); and,
- 3) Exceptions to prohibition of transfers of the Spiny Dogfish Limited Entry Fishery Permit (Section 44D, Page 9).

Commissioner Bowman opened the public hearing.

Dennis Knight, Eastern Shore waterman, was present and his comments are a part of the verbatim record. Mr. Knight said this presented a problem for his family. He said one

family member had been using another family member's permit and this will leave him out. He stated that this goes back to the 1990's and there was no desire for a transfer.

Commissioner Bowman asked staff to comment. Mr. Grist said this was discussed and the subcommittee was holding strong about the recommendation.

Associate Member Bowden said he did not realize the 100's of permits not even worked and the quota's very small and the Commission was just trying to keep it controllable. He said 150 all worked the shortened season. He said if there were to be in the future increases of this limit, then more could be allowed into the fishery. He said there was no accountability for agents because if the permittee's license is taken then the agent just goes to another permittee and use theirs. He said he sympathized for them with a history going back to the 1990's.

Commissioner Bowman closed the public hearing. He said the matter is before the Commission.

**Associate Member Schick moved to accept the staff recommendation. Associate Member Bowden seconded the motion. The motion carried, 9-0.**

\* \* \* \* \*

**18. PUBLIC HEARING:** Concerning an industry proposal to extend the clam patent tong season in the Newport News Shellfish Management Area through June 30, 2010. Chapter 4VAC20-560-10 et seq. "Pertaining to Shellfish Management Areas"

Alicia Nelson, Fisheries Management Specialist, gave the presentation. Her comments are a part of the verbatim record.

Ms. Nelson explained that the Newport News Shellfish Management Area is open for the lawful harvest of clams by patent tong from December 1 through April 30, except that if the catch of clams per tong-hour for the previous season is less than 174 clams per tong-hour, the lawful season shall be December 1 through March 31. The CPUE for May, 2009 was 310.04 clams per tong-hour, which was above the average for the entire 08-09 season of 288 clams per tong-hour.

Ms. Nelson stated that last month, staff received a public request from Mr. Vigliotta to extend the 2010 clam patent tong season in the Newport News Shellfish Management Area through June 30, 2010. Currently, the season will close on April 30, 2010.

Ms. Nelson said the draft regulation included an extension for 2010 only. Any future season extensions would have to be requested and approved by the Commission.

There were no questions.

There were no public comments.

Commissioner Bowman asked for action by the Commission.

**Associate Member Robins moved to accept the staff recommendation. Associate Member Holland seconded the motion. The motion carried, 8-0. Associate Member Bowden was not present during this presentation.**

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**20. REVOCATION HEARINGS:** Cases concerning revocation of permits and licenses, under the authority of Section 28.2-232 of the Code of Virginia and Chapter 4 VAC 20-252-10 et seq., “Pertaining to the Taking of Striped Bass.”

Joe Grist, Head, Plans and Statistics, gave the presentation. His comments are a part of the verbatim record. Mr. Grist stated that there were four cases.

**Jerry Decatur, Sr.** – sworn in and his comments are a part of the verbatim record.

Mr. Grist stated that Mr. Decatur, Sr. was issued a summons to appear before the Commission for which he signed for on March 29, 2010.

Mr. Grist read from the statement of facts.

For at least the past 25 years, Jerry Decatur, Sr., was a licensed commercial fisherman in the Commonwealth of Virginia (along with his son for 10 years). They lived and conducted their fishing business in the Widewater section of Stafford County along the banks of the Potomac River. From at least 2003 through 2007, Decatur, Sr. was permitted by Virginia to harvest striped bass in its Potomac River tributaries, and was permitted by the PRFC to harvest striped bass in the main stem of the river. The border between Virginia and Maryland lies roughly along the Potomac’s Virginia shoreline, with the main stem of the Potomac River within Maryland.

On January 6 and 9, March 30 and 31, 2004; April 10, 22, and 30 and May 2, 5, and 8, 2005, Decatur, Sr. and others harvested striped bass from a gill net in the main stem of the Potomac River. The PRFC commercial striped bass fishing season was closed at the time to protect spawning, and therefore harvesting these fish was prohibited.

On March 24, 2004 and April 22, 2005, Decatur, Sr. and others harvested striped bass in the main stem of the Potomac River using a gill net that was submerged, in violation of the applicable regulations, and that had a mesh size of eight and ten inches, when the allowed maximum size was seven inches.

On April 14, 2005 in Virginia Potomac River tributaries, Decatur, Sr. and others took striped bass using gill nets with mesh sizes of eight and ten inches, which exceeded the applicable mesh size limits. In addition, these fish were tagged with improper tags, and many exceeded the Virginia size limits.

On April 20, 2007, Decatur, Sr. took striped bass by gill net from Virginia waters that measured thirty to thirty-five inches although the maximum size limit at the time was 28 inches. The maximum size limit is designed to protect large, productive spawning fish from being harvested.

From 2003 through 2007, Decatur, Sr. (with his son) failed to affix tags to the majority of the striped bass that they harvested from Maryland and Virginia waters, thereby, exceeding the amount of striped bass they were allowed to catch by thousands of pounds. In just April and May from 2003 through 2007, the Decatur's harvested over 65,800 pounds of striped bass than they were authorized to legally harvest in that time period. The over-and illegally-harvested fish were transported by the Decatur's to Washington, DC where they were sold to Profish Seafood, Ltd. and Cannon Seafood, Inc. The fair market retail value of these striped bass was in excess of \$329,173.

In an effort to conceal their activity from Virginia Marine Police, from 2004 through 2007, Decatur Sr. solicited information concerning fisheries enforcement in their area from a Virginia law enforcement agent, who unbeknownst to Decatur, Sr. was cooperating in the investigation. Decatur, Sr. offered and paid this Virginia law enforcement officer for information he supplied concerning the timing and frequency of law enforcement patrols.

Mr. Grist stated that all other information is included in the packet.

Commissioner Bowman asked Mr. Decatur, Sr. to come forward and be sworn in. He asked him if the facts read by staff were true.

Mr. Decatur said that the investigation was still pending and he was not sure why he was here now because it still may be proven he was not guilty since it was still under investigation.

Commissioner Bowman asked him about the Statement of Facts that staff read from regarding his violations in Virginia waters, which he signed before the Assistant United States Attorney and others.

Commissioner Bowman again read a portion of the Statement of Facts where it said that there was failure to tag and approximately 1,000 pounds were caught in the Potomac River and in Virginia. He read from the Code of Virginia, Section 28.2-232, where it says that the Commission may revoke and prohibit the issuance, reissuance or renewal of any license if, ...it finds that the person has violated any provisions of this subtitle.

Commissioner Bowman confirmed this with VMRC Counsel, David Grandis. Mr. Grandis also read from this same section of the Code.

Mr. Decatur stated that it was not in Virginia but in the Potomac River.

Commissioner Bowman asked what was the pleasure of the Commission.

**Associate Member Robins said that based on staff's presentation and the documentation as well as the Statement of Facts, he moved to accept the staff recommendation to revoke all of Jerry Decatur, Sr.'s licenses for two years. Associate Member Laine seconded the motion. The motion carried, 9-0.**

**Jerry Decatur, Jr.** – was sworn in and his comments are a part of the verbatim record.

Mr. Grist stated that for Jerry Decatur, Jr. the same Statement of Facts is true, except for the fact that he did not solicit enforcement information. He said the staff made the same recommendation.

Mr. Decatur, Jr. said that he had no comments.

Commissioner Bowman asked what was the Commission's pleasure.

**Associate Member McConaugha moved to accept the staff recommendation. Associate Member Tankard seconded the motion. The motion carried, 9-0.**

Commissioner Bowman explained to Mr. Decatur that his licenses and permits were revoked for two years.

Mr. Decatur asked if he would get them back in two years and not lose them indefinitely. Commissioner Bowman stated that in the case of the striped bass it would depend on whether there is quota available or not. Mr. Decatur asked if he could not fish or crab for two years and the response was yes.

**Dennis Dent** – sworn in and his comments are a part of the verbatim record.

Mr. Joe Grist read from the Statement of Facts:

In 2005, Dent, with the help of others, unlawfully harvested 2,197 pounds of striped bass from the Potomac River and its tributaries, landed the fish in Virginia, and transported and sold the fish to Profish, Ltd., a wholesale fish buyer in Washington, DC. Dent failed to affix tags or affixed false tags to the striped bass, thereby exceeding the amount of striped bass he was permitted to catch by thousands of pounds. Also, the majority of the fish Dent caught during the closed PRFC season were over the legal size for Virginia.

In 2007, Dent entered into an agreement with another fisherman, who was not a licensed striped bass fisherman in Virginia, to sell illegally harvested striped bass to Profish, Ltd. Dent introduced the other fisherman to Profish, and received one-half of the proceeds from the illegal sales, which totaled 14,450 pounds. Dent knew that the striped bass being sold to Profish by his accomplice were either not tagged, falsely tagged, or over the legal size limit for Virginia.

The fair market retail value of this over- and illegally-harvested striped bass was approximately \$83,236.

Mr. Dent said that the only thing the federal authorities had on him was the fact that his name was on the check. He said he had never had any tickets in all his years as a waterman.

Commissioner Bowman said that the fish value was \$83,000 plus.

Mr. Dent said he disputed the 2,100 pounds. Commissioner Bowman said that the time to dispute it was before signing a Statement of Facts.

Commissioner Bowman asked for a motion by the Commission.

**Associate Member Tankard moved to accept the staff recommendation. Associate Member Fox seconded the motion. The motion carried, 9-0.**

**Scott Lee Dent** – he was not present.

Mr. Grist read from the Statement of Facts:

From at 2003 through 2007, Dent was permitted by Virginia to harvest striped bass in its Potomac River tributaries, and was permitted by the PRFC to harvest striped bass in the main stem of the river.

On multiple occasions between 2003 and 2007, Dent with the help of others, unlawfully harvested 22,757 pounds of striped bass from the Potomac River and its tributaries, landed in Virginia, and transported and sold fish to Profish, Ltd. Dent failed to affix tags or affixed false tag to the striped bass he harvest from Maryland and Virginia waters, thereby exceeding the amount of striped bass he was permitted to catch by thousands of pounds. Also, the majority of the fish Dent caught during the closed PRFC season were over the legal size limit for Virginia. The fair retail market value of this over- and illegally-harvested striped bass was approximately \$113,757.

Commissioner Bowman asked what was the Commission's pleasure.

**Associate Member Holland moved to accept the staff recommendation. Associate Member Robins seconded the motion. The motion carried, 9-0.**

Dennis Dent asked if he had time to remove his fish pots and sell the crabs. Commissioner Bowman said whatever is still out there is illegal since the revocation was effective today. He further read from the Code, Section 28.2-232. Mr. Dent said he needed time to remove what he had in the river.

Jerry Decatur, Sr. asked about finishing up with the tags he had. Commissioner Bowman stated that these tags were also revoked. They asked what to do with the fish and he told them they would have to throw them back.

Commissioner Bowman said that the Commission agrees to give Mr. Dent 72 hours, by Friday, April 30<sup>th</sup>, 6:30 p.m., to remove all illegal gear.

\* \* \* \* \*

**21. YORK RIVER SHELLFISH RESTORATION:** Consideration of changes to the NOAA funded oyster restoration program for the York River.

Jim Wesson, Head, Conservation and Replenishment, gave the presentation. His comments are a part of the verbatim record.

Dr. Wesson explained that a large part of this year's program was a NOAA granted funded project for oyster restoration in the York River. The CRD has a grant for \$1,224,000 to rehabilitate oyster bars in the lower York River. NOAA is now requiring that two-thirds of the restored acreage be placed in oyster sanctuaries and one-third be available for harvest.

Dr. Wesson said that the spat per meter and shell cultch per meter is quite low on all of the areas that have been identified as the best sites for restoration. The addition of new shell to areas like this generally result in a ten to one hundred fold increase in spat set because of the new shells.

Dr. Wesson said that staff invited the petitioners to a meeting, and met with a small group of watermen on March 29 and explained the proposed activity. Staff had proposed to clean and reshell portions of Pages Rock as the sanctuary area, and the most western area (Aberdeen Rock) as the harvest area. Once the watermen understood the procedure, they were generally okay with everything except the fact that a large area must remain as a sanctuary. Staff set up a boat trip with the watermen the following Friday, April 2<sup>nd</sup>, so that they could see the areas scheduled for restoration. Only one waterman and Tommy Leggett showed up for the boat trip. As a compromise, it was proposed to restore 15 acres at Aberdeen, 60 acres at Pages Rock and 15 acres at Timberneck.

**Commission Meeting**

**15918  
April 27, 2010**

Dr. Wesson said that the Request for Proposal for the fossil shell dredging and planting had come in at a higher price per bushel than had been estimated. As a result fewer acres will be planned for restoration in the York River and will probably be closer to 40 acres at Pages Rock and 10 acres at each of the two other sites for a total of 60 acres.

Commissioner Bowman stated that he appreciated staff meeting with the watermen and no motion was necessary as this was just a update on this matter being provided for the Commission.

No action was necessary.

\* \* \* \* \*

Commissioner Bowman said that Associate Member Fox was requesting that the Commission meeting in December be moved up from the 28<sup>th</sup> to the 14<sup>th</sup> of December. Commissioner Bowman stated that would be too short of a break between meeting to do what needed doing and suggested that it be moved to December 21<sup>st</sup>. There was general consensus that the 21<sup>st</sup> be approved.

\* \* \* \* \*

There was no further business and the meeting was adjourned at approximately 6:44 p.m. The next regular meeting will be held Tuesday, May 25, 2010.

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Steven G. Bowman, Commissioner

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Katherine Leonard, Recording Secretary