

## MINUTES

**Commission Meeting****November 27, 2007**

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 )	
John R. McConaugha )	Associate Members
F. Wayne McLeskey )	
Richard B. Robins, Jr. )	
Kyle J. Schick )	
J. Edmund Tankard, III )	
Carl Josephson	Sr. Assistant Attorney General
Jack Travelstead	Chief Deputy Commissioner
John M. R. Bull	Director-Public Relations
Katherine Leonard	Recording Secretary
Jane McCroskey	Chief, Admin/Finance
Sunita Hines	Bs. Applications Specialist
Rob O'Reilly	Deputy Chief, Fisheries Mgmt.
Jim Wesson	Head, Conservation/Replenishment
Joe Grist	Head, Plans and Statistics
Sonya Davis	Fisheries Mgmt. Specialist, Sr.
Joe Cimino	Fisheries Mgmt. Specialist, Sr.
Lewis Gillingham	Fisheries Mgmt. Specialist
Mike Johnson	Fisheries Mgmt. Specialist
Alicia Middleton	Fisheries Mgmt. Specialist
Mike Meier	Head, Artificial Reef Program
Stephanie Iverson	Fisheries Mgmt. Specialist, Sr.
Warner Rhodes	Deputy Chief, Law Enforcement
Herbert Bell	Marine Police Officer
Chris Beuchelt	Marine Police Officer
Steve Head	Marine Police Officer

**Commission Meeting**

**14507  
November 27, 2007**

Bob Grabb  
Tony Watkinson  
Chip Neikirk  
Jeff Madden  
Hank Badger  
Ben Stagg  
Jay Woodward  
Benjamin McGinnis  
Justin Worrell  
Elizabeth Gallup  
Danny Bacon  
Bradley Reams

Chief, Habitat Management Div.  
Deputy Chief, Habitat Mgt. Div.  
Environmental Engineer, Sr.  
Project Compliance Technician

Virginia Institute of Marine Science (VIMS)

Lyle Varnell  
David O'Brien  
Roger Mann

Other present included:

James E. Firman, Sr.	Alice Firman	Bill Nelli	Julie Bradshaw
Craig Seltzer	Paul Applin	Jerry Saunders	Alan Crawford
Bill Kirby	David Morris	Charlie Burgess	Natasha Hatton
Tom Meree	Cary Freeman	Tim McCulloch	Philip O. Ransone
David A. Carpenter	Mark E. Stahine	Mike Jewett	John Gayer
Hank Jones	Lyle Varnell	Chris Moore	Ellis W. James
Douglas F. Jenkins Sr.		Bob Orth	Timmy Saunders
James Fletcher	Craig Paige	Frank A. Kearney	Jim Dawson
Nelson Ortiz	Jack White	Dennis H. Gryder	Richard W. Harding
Scott Bloxom	A. J. Erskine	Doug McMinn	Irv Spurlock
S. Lake Cowart, Jr.	Mike Pierson	John R. Glenn, Jr.	Rufus Ruark
Frances W. Porter	Thomas Galumn	Mark E. Wallach	Pete Terry
Thomas Walker	Susan Gaston	Patrick Lynch	Scott Harper
Tim Hayes	Tom Powers		

and others

\* \* \* \* \*

Commissioner Bowman called the meeting to order at approximately 9:39 a.m. Associate Member Bowden was late arriving due to traffic.

\* \* \* \* \*

Associate Member Tankard gave the invocation and Carl Josephson, Senior Assistant Attorney General led the pledge of allegiance.

\* \* \* \* \*

**APPROVAL OF AGENDA:** Commissioner Bowman asked if there were any changes to the agenda. Bob Grabb, Chief, Habitat Management said that staff was requesting that Item 7, Chase Properties, Inc., #07-1622, be tabled, at the request of the applicant and Item 8. Shore Land Investments, LLC, be heard in December. A letter was received from the attorney representing the applicant for Item 8, explaining a conflict which made it so he could not be at the November hearing. Copies were provided to the Board. There were no other changes.

**Commissioner Bowman asked for a motion to approve the agenda. Associate Member Robins moved to approve the agenda, as amended. Associate Member McConaugha seconded the motion. The motion carried, 8-0. The Chair voted yes.**

\* \* \* \* \*

**MINUTES:** Commissioner Bowman asked, if there were no corrections or changes, for a motion to approve the October 23, 2007 meeting minutes. **Associate Member Fox moved to approve the minutes, as submitted. Associate Member Tankard seconded the motion. The motion carried, 7-0-1. The Chair voted yes. Associate Member Robins abstained, as he was not present at the last meeting.**

\* \* \* \* \*

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

\* \* \* \* \*

**Commission Meeting**

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

Bob Grabb, Chief, Habitat Management Division, reviewed items 2A and 2B for the Commission. He said that staff was recommending approval of these items. His comments are a part of the verbatim record.

Commissioner Bowman asked for questions of staff.

Commissioner Bowman questioned what the Federal depth limit was. Mr. Grabb referred the question to the applicant’s representative. Craig Seltzer, representing the Corps of Engineers, responded 55 feet and his comments are a part of the verbatim record.

Commissioner Bowman opened the public hearing and asked if anyone was present, pro or con to address these items. There were none, therefore, the public hearing was closed.

Commissioner Bowman asked for a motion for Items 2A and 2B. **Associate Member Robins moved to approve these items. Associate Member Schick seconded the motion. The motion carried, 8-0. The Chair voted yes.**

- 2A. **FAIRFAX COUNTY PARK AUTHORITY, #07-1185**, requests authorization to construct an 11-foot by 32-foot Bridge above Cub Run behind the Recreation Center as part of the Cub Run Pedestrian Trail in Fairfax County.

Permit Fee.....\$100.00

- 2B. **U.S. ARMY CORPS OF ENGINEERS, ET AL, #06-2751**, requests authorization to dredge a portion of the Thimble Shoals Federal Navigational Channel, located in the Chesapeake Bay just east of the Chesapeake Bay Bridge Tunnel, to a maximum depth of a -68 feet mean low water to provide beach quality sand for future beach nourishment associated with the Virginia Beach Hurricane Protection Project. Approximately one million cubic yards of sand will be removed by hopper dredge and then placed along the oceanfront between Rudee Inlet and 89<sup>th</sup> Street in Virginia Beach.

Permit Fee.....\$100.00

\* \* \* \* \*

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's board).
  
- 3A. **CENTEX HOMES, #07-1926,** requests after-the-fact authorization to retain 132 linear feet of utility lines installed approximately 4 feet below Sycolin Creek in the Rokeby Hamlets subdivision in Loudoun County. The three-inch and four-inch waterlines were installed by the open trench method utilizing a temporary diversion channel. After installation the streambed was returned to its original grade and conditions. The applicant has agreed to a civil charge in the amount of \$6,276.00, including triple permit fees.

Bob Grabb, Chief, Habitat Management, gave the presentation. His comments are a part of the verbatim record.

Mr. Grabb explained that staff had completed a full public interest review regarding the unauthorized impact, including contacting both adjoining property owners and running a newspaper advertisement. Neither adjoining property owner voiced an objection to the as-built project. The 3-inch and 4-inch waterlines were installed by the open trench method utilizing a temporary diversion channel. After installation the streambed was returned to its original grade and conditions.

Mr. Grabb said that the applicant had explained that in the original 2003 permit application for a U. S. Army Corps of Engineers Nationwide Permit #39, no stream impacts were proposed because Rokeby Hamlets consisted of two separate development areas. Both areas were intended to have separate waterline networks which did not include a crossing under Sycolin Creek. At a later date, the applicant coordinated with the Loudoun County Sanitation Authority and determined that the waterline systems of the separate development areas needed to be connected, which required a crossing of Sycolin Creek. According to the applicant, the separate development areas of Rokeby Hamlets were being developed by different business entities and a lack of communication and coordination between them, the project design engineer, and the agent (Wetland Studies and Solutions, Inc.) resulted in the unauthorized crossing of Sycolin Creek.

Mr. Grabb stated that had Centex Homes applied for the utility crossings in advance of installation, it was likely that staff would have recommended approval. As a result, staff was recommending approval with triple permit fees (\$300.00), triple royalties (\$9.00 per linear foot for 264 linear feet of encroachment), and a civil charge of \$3,600.00 (at \$1,800 per line) based on a finding of a minimal environmental impact and a major degree of non-compliance. This was a total of \$6,276.00. The applicant had agreed to the triple permit fee, royalties, and civil charge.

Commissioner Bowman asked if anyone present, pro or con wished to address this issue. There were none.

**Associate Member Schick moved to accept the staff recommendation. Associate Member Robins seconded the motion. The motion carried, 8-0. The Chair voted yes.**

Royalties Fees (Triple A-T-F) (encroachment 264 lin. ft. @\$9.00/lin. ft.).....	\$2,376.00
Permit Fee (Triple A-T-F).....	\$ 300.00
Total Fees.....	\$2,376.00
Civil Charge (\$1,800/line).....	\$3,600.00

\* \* \* \* \*

Commissioner Bowman suggested that in order to wait for Associate Member Bowden to arrive that item 5 be made item 4 and heard first. He asked for a motion to amend the agenda.

**Associate Member Robins moved to approve the amendment to the previously amended agenda, as requested. Associate Member Schick seconded the motion. The motion carried, 8-0. The Chair voted yes.**

\* \* \* \* \*

- 5. **MR. & MRS. JOEL HEFLEY, #07-1473.** Commission review on appeal by the applicants, of the October 9, 2007, decision by the Northumberland County Wetlands Board to deny their application to install and backfill 199 feet of timber bulkhead impacting 252 square feet of vegetated and non-vegetated wetlands at their property situated along Glebe Creek.

Jeff Madden, Environmental Engineer, Sr., gave the presentation. His comments are a part of the verbatim record. Mr. Madden explained that there were a couple of slides for orientation.

Mr. Madden explained that the appellant's' property was located in a residential development along Glebe Creek approximately three (3) miles northwest of Heathsville. The property was unimproved save for a private pier. While the bank along the shoreline was lowest in the vicinity of the private pier, it did reach a maximum height of 17 feet in some other areas and the intertidal area contained patches of wetland vegetation. The remainder of the lot was wooded with numerous hardwood trees along the top of the bank, and throughout the upland parcel.

Mr. Madden said that the proposed project involved the construction and backfilling of 195 feet of timber bulkheading, extending as much as three (3) feet into the wetlands area

along the shoreline, which would impact 252 square feet of vegetated and nonvegetated wetlands located at the base of the existing bank.

Mr. Madden stated that this bulkhead project was first considered by the Wetlands Board at a hearing on August 14, 2007. At that time, Ms. Weymouth, staff for the Board, read into the record the findings and recommendation of the VIMS Shoreline Permit Application Report, dated August 9, 2007. That report recommended that since there were no upland improvements on the property and no structures were at risk, that consideration should be given to leaving the bank in its natural state. If stabilization were deemed necessary the preferred option was to grade the bank back to create a wider intertidal marsh which would naturally absorb wave energy. The report went on to further recommend that if the bank was graded that a riprap sill might still be needed to sustain the wetlands.

Mr. Madden noted that following staff's comments, Board Member, Mr. Vanlandingham noted that a bulkhead should not be allowed where the project was currently staked. Mention was also made that neither the applicants nor their representative were present to discuss the project. Ms. Weymouth stated that she had spoken with the applicant prior to the hearing. She expressed her concern that the stakes marking the channelward extent of the bulkhead were too far out beyond the upland bank. She recommended that the owners consider re-staking the project such that it was no further than two (2) feet channelward of the existing bank. Board Member, Mr. J.C. Curry mentioned that the project "would take the whole beach". Board Member, Mr. Albert Fisher concurred with Mr. Vanlandingham's earlier comment and said that the applicants didn't need that much room to put in a bulkhead. The Chairman, Mr. George Rew, then suggested that the hearing be tabled until the September meeting since there was nobody present to speak on behalf of the applicant. Board Member Mr. Harry Towne then moved to table a decision on the project until the September meeting. That motion passed unanimously.

Mr. Madden said that at this regularly scheduled meeting held on September 11, 2007, the tabled project was reconsidered. Present at this hearing was the agent for the project, Mr. Charles Folk who apologized for failing to attend the previous public hearing stating that he had fallen asleep. Drawing on a flipchart, Mr. Folk proceeded to create a representation of the bank profile.

Mr. Madden explained that Mr. Folk used this diagram to support his claim that he needed to align the bulkhead and backfill at the mean low water elevation to provide enough mass at the base of the 17-foot bank to prevent it from failing. Mr. Folk also expressed his clients' desire to be allowed to retain as many of the shade trees at the top of the bank as possible. Following this demonstration, Mr. Curry stated that the Board wanted the structure aligned at the mean high water mark instead of the mean low water mark. Mr. Folk expressed his concern that, by aligning the bulkhead at mean high water, the Board would be interfering with his clients' ability to protect their property. Mr. Folk then said that he had "never built a bulkhead behind mean high water". The chairman

stated that he felt the applicant should be accorded the same privilege as everyone else, which was to align the structure 2 feet in front of the existing bank. Mr. Folk urged the Chairman to consider that his project was unique in that it involved a 17-foot high bank. To this, Mr. Rew agreed that a project like this one didn't come before the board very often. Numerous Board members then mentioned previous projects where tall banks were involved. The Chairman again stated that the owner should be given what everyone else was given. Mr. Vanlandingham asked for clarification. Did the Chairman mean a structure aligned 2-feet in front of the existing bank? The Chair responded in the affirmative. Mr. Curry reiterated that if the applicants' were allowed to construct and backfill the bulkhead as proposed, the project would eliminate all of the vegetation in the intertidal zone. Mr. Folk responded that "any bulkhead would take all the vegetation" and that if nothing were done the bank would fail.

Mr. Madden stated that Commission staff then asked Mr. Folk why the bank couldn't be pulled back, to which Mr. Folk responded that if the slope were graded to a 3:1 slope every shade tree within 40 feet of the top of the bank would be cleared off. Mr. Towne recalled a previous statement Mr. Folk made that the staked alignment under consideration might vary between 30 to 40 inches. This prompted Mr. Fisher to suggest that the Board would look favorably upon a revised alignment placing the bulkhead closer to the existing bank. Mr. Folk said that unfortunately, where the bank was the highest was where the encroachment needed to be farthest out in the wetlands and the closest to the mean low water mark. The Chairman suggested that Mr. Folk re-stake the alignment.

Mr. Madden said that Mr. Vanlandingham mentioned that since the applicant was dealing with such a high bank the Board could consider allowing them to encroach three or four feet from the bank. A lively discussion ensued over the location of mean low water and the wetland board's jurisdiction. Commission staff suggested that a mean low water survey be conducted, if there were questions. The agent agreed that a survey would remove any doubts, as to the location of mean low water. After further consideration, Mr. Fisher made a motion to table the decision for 30 days at the request of the applicant so the agent could obtain a 'tide' survey. This motion was seconded and passed unanimously.

Mr. Madden stated that when the Board took up the discussion of the project for the third time at their October 9, 2007, public hearing, the agent indicated that he was unable to obtain the agreed upon tide survey. Mr. Folk then explained how he established the mean low water elevation and that, upon further examination, the proposed alignment was not as close to the mean low water elevation as he had originally thought. Mr. Folk mentioned the sparse intertidal vegetation. The Chairman followed-up by observing that Mr. Folk had made only minor changes in the previously staked alignment and that little had changed since the September hearing. The Chairman reiterated the Board's earlier concern that the proposed structure was aligned too far from the existing bank. Mr. Vanlandingham pointed out that the Board had approved a project earlier in the October hearing with a similar bank profile. Mr. Vanlandingham indicated that the approved

project was only approximately two feet from the existing bank. Mr. Fisher mentioned that he thought the bank at the project Mr. Vanlandingham was referring to was higher than the bank at the Hefley's property. The Chairman then asked if the agent wished to withdraw the application. Mr. Folk felt that he couldn't build the bulkhead in the alignment recommended by the Board. He believed that the additional encroachment was needed to anchor the base of the structure. The Chairman countered that he felt the Board couldn't approve the project, as proposed. Mr. Towne then made a motion to deny the application as proposed. That motion carried unanimously.

Mr. Madden said that in this case the Board was well aware that VIMS, their scientific advisors, did not recommend the bulkhead. Instead they proposed a more integrated coastal management approach involving creation of wetlands, widening of the intertidal buffer, bank grading and the installation of a riprap revetment. The Board also provided the applicant with ample opportunity to propose an alternative design. Staff believed that the record of the three hearings taken as a whole, and the fact that the Board continued the hearing repeatedly to afford the applicant with an opportunity to submit additional data and justification, indicated that the Board adequately considered the public and private detriments of the proposal.

Mr. Madden explained that in light of the foregoing, and failing to find that the appellants' rights had been substantially prejudiced staff recommended that the decision of the Wetlands Board be upheld in this case.

Associate Member Bowden arrived at approximately 9:56 a.m.

Commissioner Bowman asked for questions of staff.

Associate Member Tankard asked if staff agreed with the VIMS report that the existing site was classified as a low to moderate energy area. Mr. Madden responded, yes, as he had actually been there for a site visit.

Associate Member Fox asked about the approximate fetch. Mr. Madden stated that Mr. Folk could explain that better. Associate Member Fox asked if North was at the top of the slide. Mr. Madden responded, yes, not directly, but at an angle. He said it was adjacent to and to the right of the pier.

Associate Member Fox asked if VIMS could address this issue. David O'Brien, representing VIMS, was present and his comments are a part of the verbatim record. Mr. O'Brien stated that they would prefer another option, which would be selectively grading the bank and planting back vegetation to provide an erosion buffer. Associate Member Fox asked whether the trees on the bank were in jeopardy. Mr. O'Brien explained that they were, but would be no matter what was done or not done. He further explained that selective grading of the bank would save some of those trees.

Commissioner Bowman asked if the appellant was present.

Charles L. Folk, representing the applicant and a civil engineer trained in soil management, was sworn in and his comments are a part of the verbatim record. Mr. Folk stated that in response to the VIMS report, they did not look at it in the same way he and others did. There was a layer of hard clay and the high tide reaches there especially when there is extreme weather. He stated when he first looked at the site there was no vegetation. Utilizing a staff slide he explained the shoreline and how the bulkhead stabilized the bank and would save some trees. He offered some slides he had taken 3 days prior at low tide.

**Commissioner Bowman stated that if this was not a part of the Wetlands Board record, then a motion to open the record would be necessary. He asked staff if the photos were part of the record. Mr. Madden responded, no. Commissioner Bowman asked for a motion. Associate Member McLeskey moved to open the record. Associate Member Holland seconded the motion. Associate Member Fox asked if this was just for the new slides not seen by the Wetlands Board. Commissioner Bowman responded yes. The motion failed, 0-9.**

Mr. Folk continued with his presentation. He asked to review a drawing he had prepared. Commissioner Bowman asked if this was a part of the Wetlands Board record? Mr. Madden responded yes. Mr. Folk explained that he had it at the second Wetlands Board meeting. Commissioner Bowman asked if it was to scale. Mr. Folk responded that it was an approximation. He said if they could stabilize the bank, then that would prevent the clay layer from collapsing. He said the bulkhead needed to be 4 to 5 feet from the mlw, but the Wetlands Board followed the 3-foot rule. He stated that no one on the Wetlands Board was qualified to look at the proposal. He said all banks failed if they are not stabilized. He explained that a bulkhead with a tieback would stop the erosion of the clay layer and save all the vertical trees. He said the Wetlands Board did not want to hear about the Virginia Law and the Chesapeake Bay Act. He stated he did the survey himself as he could not get anyone else to do it and he set up the tide gauge. He said in the picture the grass had fallen from the bank and if nothing is done, it will continue and become silt, which would in turn fill in the creek. He said the County did not understand any of the information that he presented to them. He said he disagreed with the VIMS report entirely.

After some further questions and discussion, Commissioner Bowman read into the record Section 28.2-1313 of the Code of Virginia.

**Associate Member Schick stated that there seemed to be some differences between the Wetlands Board and the contractor, as well as VIMS. He said it was not for VMRC to make a judgment in place of the Wetlands Board. He moved to uphold the Wetlands Board decision. Associate Member Robins seconded the motion. He stated that VMRC must look at the errors of law as read and pointed out by**

Section 28.2-1313 of the Code. He also said that the applicant can reapply to the Wetlands Board to protect his property and the habitat. He said he could not see that an error had been made or that the decision by the Wetlands Board was unsupported. The motion carried, 8-0-1. Associate Member McLeskey abstained, as he felt that he did not have a clear understanding of the situation.

No applicable fees, Wetlands Board Appeal

\* \* \* \* \*

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

Commissioner Bowman asked for a motion to convene a closed meeting.

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 items:

**Discussion on litigation and review of enforcement actions by the Wetlands Board.**

Associate Member Tankard seconded the motion. The motion carried, 9-0.

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 Holland 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.**

---

**Katherine Leonard, Recording Secretary**

Commissioner Bowman asked for comments from the board on the results of the closed meeting.

Associate Member Robins made the following comments and motion.

“Mr. Chairman, for over five years the Commission staff, based on advice of agency Counsel provided to the Commission in closed meeting and without objection by the Commission, has not accepted appeals from the enforcement decisions of local Wetlands Boards. Agency Counsel’s advice was based on pertinent statutory language contained in Chapters 13 and 14 of Title 28.2 of the Code of Virginia, applicable principles of statutory interpretation and the well recognized legal principle of prosecutorial discretion. Staff has typically advised local Wetlands Boards and appropriate persons that enforcement decisions of local Wetlands Board are directly pursuable in Court by the Boards and any defenses may be raised in connection with such enforcement action. **He moved that the Commission formally announce and approve this interpretation of its jurisdiction in connection with appeals of enforcement decisions by local Wetlands Boards. He further moved that the Commission clarify that this interpretation, precluding consideration of enforcement decisions of local Wetlands Boards based on purported appeals by applicants or other persons, does not prevent the Commission from independently exercising its own enforcement authority, as provided in Code of Virginia, Sections 28.2-1316 and 28.2-1416, based on its own initiative or upon recommendation of Commission staff.**”

**Associate Member Schick seconded the motion.**

**Roll Call Vote:**

<b>Bowden</b>	<b>Aye</b>	<b>McLeskey</b>	<b>Aye</b>	<b>Chair</b>	<b>Aye</b>
<b>Fox</b>	<b>Aye</b>	<b>Robins</b>	<b>Aye</b>		
<b>Holland</b>	<b>Aye</b>	<b>Schick</b>	<b>Aye</b>		
<b>McConaugha</b>	<b>Aye</b>	<b>Tankard</b>	<b>Aye</b>		

**The motion carried, 9-0.**

\* \* \* \* \*

- 6. **ALAN CRAWFORD, #07-1697.** Commission review of the Hampton Wetlands Board’s October 23, 2007, decision to approve the construction of 75 linear feet of replacement bulkhead, and require compensation for only 225 square feet of vegetated wetland impacts out of the 477 square feet of impacts listed in the assessment provided by the Virginia Institute of Marine Science adjacent to property situated along Newmarket Creek in Hampton.

Commissioner Bowman was not in the meeting during the presentation.

Elizabeth Gallop, Environmental Engineer, Sr., gave the presentation with slides.

Ms. Gallop explained that the project was located at 9 Raymond Drive in the Riverdale Subdivision on Newmarket Creek in Hampton. This was a residential area located south of Langley Air Force Base.

Ms. Gallop stated that on July 27, 2007, the Marine Resources Commission received a Joint Permit Application from Mr. Crawford requesting authorization to replace 75 linear feet of failing bulkhead in-place. Since the project was proposed landward of Mean Low Water and out of the Commission’s jurisdiction, no permit was required from our agency. On August 15, 2007 staff received a copy of a request for additional information which was sent to Mr. Crawford by Natasha Hatton, the staff coordinator to the Hampton Wetlands Board. On November 7, 2007, staff received by email a revised JPA, signed August 31, 2007, by the applicant.

Ms. Gallop said that the Hampton Wetlands Board considered the application at a public hearing held on October 23, 2007. The Board heard testimony from the applicant and his agent, Mr. Max Buzzard of Royer Technical Services, Inc. The Board then voted 4-1 to approve the project, as proposed, with the inclusion of several standard permit conditions, as well as the condition that impacts to 225 square feet of vegetated wetlands would be compensated for through the payment of an in-lieu fee.

Ms. Gallop explained that the VIMS Shoreline Permit Application Report, dated October 18, 2007, which was available to the Board, stated that a significant fringe marsh existed

landward of the failing bulkhead and it appeared that some of the marsh was being mowed. The report also stated that the wetland species extended another foot landward of the staked area. VIMS estimated that there was a permanent loss of approximately 477 square feet of vegetated wetlands if the bulkhead were built and backfilled, as proposed. This was an additional 252 square feet of wetlands loss over and above those identified by the Board based on information submitted by the applicant's agent.

Ms. Gallop said that the application drawings used by VIMS during their site visit with VMRC staff were received by VMRC on July 27, 2007. On November 7, 2007, staff received an email from Hampton staff with a different JPA that the Board apparently used during their consideration of the application. The JPA drawings depict the agent's determination of tidal wetland limits. This limit was different than that identified by VIMS.

Ms. Gallop stated that in the opinion of staff, the Hampton Wetlands Board, in this case, failed to fulfill their responsibilities under the Wetlands Zoning Ordinance and the Commission's Mitigation – Compensation Policy and Supplemental Guidelines by requiring compensation for only 225 square feet of vegetated wetland impacts. It seemed the Board chose to disregard the impact assessment provided in the VIMS report when calculating the in-lieu mitigation fees, instead choosing to base the assessment of those fees on the 225 square feet of wetland impacts identified by the applicant. No evidence or justification for the applicant's figures was provided. Furthermore, the Board considered a revised application that had not been provided to VIMS during their review of the project's impacts.

Ms. Gallop said that in light of the fact that the Wetlands Board and VIMS reviewed seemingly different information and the fact that the Board failed to take the VIMS report into account when calculating the in-lieu fee, and in accordance with §28.2-1313 (1) of the Code of Virginia, staff recommended that the Commission remand the decision back to the Hampton Wetlands Board for further review. Staff also recommended that VIMS staff and Hampton staff visit the site together to assess the project impacts. In future cases where differences in impact estimations arise, staff suggested that Hampton staff contact VIMS directly regarding discrepancies before bringing the project before a public hearing. Also, VIMS should be forwarded a copy of any revisions prior to the project going to a public hearing so that they can evaluate the most recent information. Also, any revisions should also be forwarded to VMRC if not already done so by the applicant.

Commissioner Bowman upon his return after a short absence from the meeting, stated for the record, that he had reviewed the information and evaluation provided by staff prior to the meeting and asked if the presentation and slides presented at the meeting were the same and he asked staff to confirm this was the case. Ms. Gallop responded yes. She also noted that the vote by the Wetlands Board on the motion was 5-0, not the 4-1 as indicated in the evaluation.

Commissioner Bowman asked if the applicant or his representative was present.

David L. Morris, Chairman for the Wetlands Board, was sworn in and his comments are a part of the verbatim record. Mr. Morris stated that the Wetlands Board members take it very seriously when protecting the wetlands in the City of Hampton. He also stated that they do rely on the VIMS report. He said he agreed with working closer with VIMS would be a great idea, as well as their attendance at the meeting and site visits. He said they were concerned the applicant would appeal because of the cost and after all, he was preserving his property, which was also considered. He said they were concerned that the rip rap suggested by VIMS would make the channel narrower.

Associate Member Robins stated that in the Wetlands Board minutes, there was a statement that they did not understand the calculation of the impacts done by VIMS.

Natasha Hatton, representing the Wetlands Board staff, was sworn in and her comments are a part of the verbatim record. Ms. Hatton explained that the VIMS report dated October 18, 2007 being received just before the Wetlands Board hearing on October 23, 2007 did not give staff time to review it with VIMS beforehand and it was reviewed by the Board at their meeting.

Alan Crawford, applicant, was sworn in and his comments are a part of the verbatim record. Mr. Crawford stated that the previous 2 speakers had stated the case well. He said that the Wetlands Board staff spent a lot of time establishing the placement of the bulkhead. He said the Corps stated that behind the bulkhead no mitigation was accessed. He stated he believed the 225 feet was a reasonable number. He said he had mowed the lawn, but because of the lack of rain had not done so since June or July. He noted that there was nothing there presently but grass.

Commissioner Bowman asked if VIMS staff wanted to respond. David O'Brien, representative for VIMS, stated that it would be better to hear from their staff that had visited the site. He suggested that Julie Bradshaw a marine scientist at VIMS for ten years be allowed to address the issue.

Julie Bradshaw, Marine Scientist at VIMS, was sworn in and her comments are a part of the verbatim record. Ms. Bradshaw stated that with the area being mowed it did make the investigation more difficult. She said there was vegetation in the area landward and the bushes that was indeed wetlands. She said there were wetlands present six or more feet landward of the bulkhead alignment.

Commissioner Bowman asked her to demonstrate on the slide where the wetlands were located. She pointed out on the slides what she said were the upper limits of wetlands, which were eight feet landward of the stake.

Associate Member Tankard asked how common or unusual was it that wetlands occurred landward of the bulkhead. Ms. Bradshaw explained that it was more common as the sea rises and would continue because of the bulkhead’s deterioration to a lower level and water was allowed behind it. She said that was why it was typical to see wetlands grow behind a bulkhead.

Associate Member Schick asked if the bulkhead had not deteriorated if this would not have happened. Ms. Bradshaw stated that she was not sure how it was, she only knew what was seen now.

Associate Member Fox stated he could not see how it could be determined and this seemed to be an honest disagreement, which they need to look at again.

Associate Member Schick stated that with the bulkhead failing and wetlands migrating it seemed there needed to be a compromise on the calculation. He said applying the same rule to all areas made it a complicated situation.

Commissioner Bowman stated that there needed to be more dialogue between all parties.

**Associate Member Holland moved to remand the matter back to the Wetlands Board. Associate Member Bowden seconded the motion. The motion carried, 9-0.**

Mr. Crawford asked for clarification on what would occur if they continue to disagree. Commissioner Bowman stated that would depend on the amount of input and then they could decide.

No applicable fees – Wetlands Review.

\* \* \* \* \*

- 7. **CHASE PROPERTIES, INC., #07-1622**, is requesting authorization to construct a ten-slip community pier to serve a new residential subdivision that will extend up to 90 feet channelward of mean low water into Dymer Creek in Lancaster County. The project is protested by several nearby property owners.

Pulled from the agenda per the applicant’s request.

\* \* \* \* \*

- 8. **SHORE LAND INVESTMENTS, LLC (Willie A. Davis III, Manager, and Newman Thomas Scott Jr.), Notice of Violation #07-25.** Hearing concerning violations of the Code of Virginia, §28.2-1203, more specifically, the unauthorized dredging and filling of two small unnamed tidal creeks tributaries of Underhill Creek adjacent to the "Port Scarborough" subdivision in Accomack County.

Pulled from the agenda per the applicant's request

\* \* \* \* \*

After consulting with staff, Commissioner Bowman suggested that the Commission proceed with item 15 and asked for a motion. **Associate Member Holland moved to approve the suggestion. Associate Member Schick seconded the motion. The motion carried, 9-0. The Chair voted yes.**

\* \* \* \* \*

- 15) **DISCUSSION:** To consider amendments to Regulation 4VAC20-320-10, et seq., "Pertaining to the Taking of Black Drum" to allow for the use of small mesh gill nets in the Special Management Area; Request for Public Hearing.

Rob O'Reilly, Deputy Chief, Fisheries Management gave the presentation. His comments are a part of the verbatim record. Mr. O'Reilly explained that this was a request for a public hearing to consider amendments to Regulation 320 to allow for the use of small mesh gill nets in the Special Management Area on the Eastern Shore.

Mr. O'Reilly explained that the FMAC started this discussion at its June meeting and 2 subsequent meetings. He said that this was a companion issue with the Hampton Roads Management Area. He explained that at their October meeting they came up with a resolution to recommend allowing bottom fishing of such species as croaker, etc. with the mesh size restricted to less than five inches. He said that historically during the 1989 and 1991 period there was user conflict for black drum between the recreational and commercial fisheries, which was reconciled in 1992. He stated that they wish to take this matter to public hearing at the December meeting.

Associate Member Bowden requested that the issue be postponed until the January meeting as he would not be at the December meeting because of a meeting he was attending with the National Marine Fisheries Service. Commissioner Bowman asked staff if this presented any problems. Mr. O'Reilly responded that it would be okay.

**Associate Member Holland moved to hold the public hearing at the January meeting. Associate Member Fox seconded the motion. The motion carried, 9-0. The Chair voted yes.**

\* \* \* \* \*

- 16) **DISCUSSION:** To consider amendments to Regulation 4VAC20-252-10, et seq., “Pertaining to the Taking of Striped Bass” to establish the 2008 harvest quotas for and to adjust requirements and penalties for the possession and tagging of commercially harvested striped bass; Request for Public Hearing.

Joe Grist, Head, Plans and Statistics, gave the presentation. His comments are a part of the verbatim record. Mr. Grist explained that the quota for 2008 had been received and it was 3,284,484 pounds. This is established in the draft regulation under Sections 55 and 150.

Mr. Grist said that Law Enforcement personnel were having issues with tag possession as fishermen were using their Potomac River tags in the James River for striped bass. Also, fish tags from 2001 – 2002 that had been reported as lost were resurfacing and being used. This change is in Section 160 of the draft regulation where it was added that the limit of tags from any other jurisdiction was restricted to the Potomac River tags and could only be used in the Potomac Tributaries.

Mr. Grist stated to clarify when a harvester should tag the fish the wording in Section 160 of the draft regulation where it said after capture and before landing was strengthened to say “before leaving area of capture”. This was changed in both subsections G and H.

Mr. Grist further said that the penalty section was strengthened to say that “tagged after trucked was not allowed”. He said this was requested by Law Enforcement.

Mr. Grist said that other changes to Section 120 (D) were the adding of wording to say, “subject to provisions in Section G, H and 230 (B). Also in Section 230 it was changed to say, “lose privileges for 1 year or the rest of the year”. In Section 160, reporting of harvest in December and January were key months which determined the allocation of quota and tags for the following year. Currently, the reporting of harvest is required by the 5<sup>th</sup> of the month and the return of all unused tags, and accounting of any lost tags is 30 days after harvesting their individual harvest quota. This causes a conflict for the reissuance of tags and allotment for the next year for those fishermen who do not return their tags and report lost tags by mid January. The staff recommended changing the date to the second Thursday in January.

Mr. Grist stated that staff was asking for a public hearing to be held in December.

**Associate Member Robins moved to accept the staff recommendation for a public hearing to be held in December. Associate Member Holland seconded the motion. The motion carried, 9-0. The Chair voted yes.**

\* \* \* \* \*

- 17) **DISCUSSION:** To consider amendments to Regulation 4VAC20-620-10, et seq., “Pertaining to Summer Flounder” to eliminate the directed offshore commercial fishery during the second quarter and add the second quarter quota to the first quarter; Request for public hearing.

Joe Grist, Head, Plans and Statistics, gave the presentation. His comments are a part of the verbatim record. Mr. Grist explained that in the Section on possession limit, it was a small amount, 5,000 pounds. He said that this small amount and the cost of fuel meant no profits for the fisherman.

Mr. Grist explained that the industry had requested that the possession limit for the 2<sup>nd</sup> quarter be moved to the 1<sup>st</sup> quarter. The industry requested a change from the fourth Monday in January to the last Monday in January, but staff had also received a comment about opening in February.

Mr. Grist stated that staff was requesting a public hearing to be held in December.

**After some further discussion, Associate Member Fox moved to accept the staff recommendation for a public hearing in December. Associate Member Holland seconded the motion. The motion carried, 9-0. The Chair voted yes.**

\* \* \* \* \*

- 18) **DISCUSSION:** To consider amendments to Regulation 4VAC20-150-10, et seq., “Pertaining to the Dredging of Conch (known also as Whelk)” to update the description of certain boundary lines; Request for public hearing.

Rob O’Reilly, Deputy Chief, Fisheries Management, gave the presentation. His comments are a part of the verbatim record. Mr. O’Reilly explained this was a request for a public hearing to amend Regulation 150 in order to update the legal definition of the boundaries of the area. He said that Law Enforcement had determined that certain markers within the conch dredge areas 2 and 4 had been removed or were incorrectly marked.

Mr. O’Reilly stated that staff recommended the advertisement of a public hearing in December.

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

\* \* \* \* \*

Commissioner Bowman announced the lunch break at approximately 11:51 a.m. and the meeting was reconvened at approximately 1:00 p.m.

\* \* \* \* \*

**CLOSED MEETING FOR CONSULTATION WITH OR BRIEFING BY COUNSEL**

Commissioner Bowman asked for a motion to convene a closed meeting.

**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 items:**

VMRC versus Michael Jewett

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

**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,

- (iii) only public business matters lawfully exempted from open meeting requirements under Virginia law, and
- (iv) 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 Holland 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.**

---

**Katherine Leonard, Recording Secretary**

\* \* \* \* \*

**9. PUBLIC COMMENTS:**

**Commissioner Bowman opened the public comments period.**

**VMRC versus Michael Jewett, 03-0849:**

Mr. Michael Jewett, along with two Poquoson City Councilmen (Messrs Freeman and Meree and the Poquoson City Manager (Mr. Charles Burgess), appeared and requested that the Commission find that a letter dated November 26, 2007 from Mr. Cornwell, a structural engineer, be deemed to qualify as an acceptable plan and satisfy the requirement contained in the Commission's January 25, 2005 Order which was upheld by the York County Circuit Court. The Commission found that the letter fell short of qualifying as the comprehensive plan envisioned because it failed to outline the specific steps required, time involved, or repairs necessary to render the facility structurally sound enough to provide the loading necessary to support a commercial seafood offloading operation, the traditional and customary use of the facility. The letter also fell short of the order in that it did not certify the structure to be structurally sound. The Commission was, however, gratified to learn that the City was willing to shoulder the responsibility to assist Mr. Jewett in developing such a plan, to monitor his efforts and compliance with that plan, and to enforce through its zoning and police power authorities, Mr. Jewett' compliance with the plan, even to the point of committing City resources to ensure its completion. Based on the foregoing, and the City's agreement to facilitate a resolution to this matter, the Commission agreed to work toward the retention of Watkins Dock, subject to four conditions.

1. All unauthorized structures, specifically the finger piers and walkway that were the subject of the January 2005 order, are to be removed by December 1, 2007.

2. Mr. Jewett is required to submit a complete and comprehensive plan outlining the specific piling repairs and construction activities, along with the necessary timeframe involved, which must be undertaken to make the facility structurally sound and capable of supporting a commercial seafood offloading operation. Such plan must be submitted by December 1, 2007, and all of the activities outlined therein must be accomplished within 6 months.
3. Until all necessary repairs have been made, or the facility is deemed to be structurally sound, only boats owned by Mr. and Mrs. Jewett may be moored at the facility.
4. There shall be no overnight occupancy, habitation or other non-water dependent uses made of the structure. Only those activities directly related to the structures historic use as a commercial seafood offloading facility may be undertaken, and no commercial activities may occur until the facility is deemed to be structurally sound.

If these are completed, to the satisfaction of the Commissioner, the Commission will consider its order to have been substantially complied with.

**Associate Member Robins moved to approve the request with the compliance of the above specific conditions. Associate Member Schick seconded the motion. The motion carried, 9-0.**

**Greg Garrett, Notice of Violation #07-24**

Tim McCulloch, adjoining property and protestant, was present and his comments are a part of the verbatim record. Mr. McCulloch explained that he was requesting that this matter be continued until the January Commission meeting as he would not be able to attend the December meeting because of a conflict with his family Christmas vacation plans, which start December 15th.

Bob Grabb, Chief, Habitat Management, provided copies of Mr. McCulloch's letter.

Commissioner Bowman asked why this was necessary. Mr. McCulloch explained that this violation was in conflict with what he had done at his property, with appropriate permits. Commissioner Bowman, after consulting with Counsel, stated that he had been advised that the more comments on record the better. He then asked for a motion.

**Associate Member Holland moved to approve the request. Associate Member Tankard seconded the motion. The motion carried, 9-0.**

Commissioner Bowman instructed staff to notify all parties.

**James R. Firman, Sr.**

James R. Firman, Sr., Commercially Registered Fisherman was present and his comments are a part of the verbatim record. Mr. Firman explained that he was requesting the return of his hand scrape permit to work in the James River.

Commissioner Bowman asked someone from Law Enforcement to come forward and comment on this case.

Chris Beuchelt, Marine Police Officer, was sworn in and his comments are a part of the verbatim record. Officer Beuchelt explained that the offense occurred on November 1<sup>st</sup> when Mr. Firman was found to be harvesting oysters with a hand scrape in the Wreck Shoal Sanctuary area in the James River. He said they observed him for approximately 25 minutes. He stated that at that time the location was confirmed with the Engineering and Surveying staff. He said a summons was issued to Mr. Firman and his equipment and permit were also taken. He said when this matter went to Court the judge decided on a \$300.00 suspended fine and the cost to Mr. Firman was the \$68.00 for Court cost.

Commissioner Bowman asked if there were any other problems at the time. Officer Beuchelt stated that Mr. Firman said he did not know that he was in the sanctuary and was cooperative.

Commissioner Bowman asked Mr. Firman when he had last received a summons for a violation. Mr. Firman stated he could not remember the last time. Commissioner Bowman then asked for a motion from the Board.

**Associate Member Bowden stated that Mr. Firman had already lost a month's work and he moved to allow the return of the permit on the following Monday. He asked Mr. Firman if he would in the future stay out of this area. Mr. Firman stated that he knew better now.**

Commissioner Bowman explained to Mr. Firman that he could pick up his permit and equipment from Operations on Friday of the current week, but he was not to start work until the following Monday.

**Associate Member Holland seconded the motion. The motion carried, 9-0.**

**Douglas F. Jenkins, Sr.** – Request to open public oyster grounds for harvest in the Northern Neck area.

Douglas F. Jenkins, Sr., President of the Twin Rivers Watermen's Association was present and his comments are a part of the verbatim record. Mr. Jenkins expressed his appreciation for the issuance of a permit allowing him to survey the oyster stocks. He noted that Governor Holton was invited and he did go out with them. He said they found

mostly living old, large oysters on several bars where the watermen could hand tong. He said they also found oysters that had died in some areas. He said allowing them to work during the months of December and January would help the watermen. He said it would be approximately 20 to 25 watermen who could probably catch 3 to 4 bushels per man. He said it would be a shame to allow them to die. He said they were requesting approval of an emergency regulation for the months of December and January.

Commissioner Bowman read Governor Holton's letter concurring with Mr. Jenkins' request to allow the watermen to harvest into the record. He asked for staff comments.

Dr. James Wesson, Head, Conservation and Replenishment, was present and his comments are a part of the verbatim record. Dr. Wesson explained that the results of the Oyster Panel had eliminated the need to make decisions on this matter, other than yearly. He said the Potomac River tributaries were set for rotation, which was a new management strategy. He explained that if the areas were opened now, then that would take away from the following year. He said the oysters had not died from disease, but for other reasons. He said he hoped that the Commission would stick with the Panel's plan.

Associate Member Robins asked if an area would be opened next year. Dr. Wesson explained that one will be opened next year and another one the following year.

Associate Member Bowden asked how the area was selected. Dr. Wesson stated that it was based on seed planted there and its growth.

Commissioner Bowman asked if anyone else wished to make comments. There were none.

Mr. Jenkins said that they were not asking for hand scrape but for hand tong. He said that working these ground would help the growth of the oysters and hand tonging would only help as some of these areas had been closed from 12 to 15 years. He said the watermen in the area had no where to work as there were not enough oysters in the Lower Rappahannock River and the James River was much too far to go, which made it too expensive. He said the oysters should not be left another year and allowed to die.

No action was taken.

### **Summer Flounder Bycatch Season**

Jimmy Saunders, Commercially Registered Fisherman, was present and his comments are a part of the verbatim record. Mr. Saunders explained that he was asking the season be opened so that he could continue to work to help him out.

Commissioner Bowman asked someone from staff to comment.

Joe Grist, Head, Plans and Statistics, was present and his comments are a part of the verbatim record. Mr. Grist explained that the directed fishery had been closed as the 4<sup>th</sup> quarter quota was caught; however, final totals indicated there was a range of quota still available for a bycatch fishery in December. He stated that staff recommended that the ten (10) percent rule for the bycatch fishery be continued for the remainder of the year.

Commissioner Bowman asked if this would affect the overall quota. Mr. Grist responded that based on knowledge gained from past history there was a fairly safe amount of quota left.

Commissioner Bowman asked if there was anyone pro or con present to address this matter. There were none.

Commissioner Bowman expressed concern that the next meeting being on the 18<sup>th</sup> would not allow for the 30-day emergency action and holding the public hearing. Mr. Grist said that a draft emergency regulation was already prepared and dated to go into effect the next day, November 28, 2007 and the public hearing would be December 18, 2007.

**Associate Member Robins moved to approve the staff recommendation. Associate Member Holland seconded the motion. The motion carried, 8-0. Associate Member Schick was not present in the meeting during this time. The Chair voted yes.**

\* \* \* \* \*

- 10) **PUBLIC HEARING:** Proposed amendments to Regulation 4VAC20-960-10, et seq., "Pertaining to Tautog", to reduce harvest during the 2008 fishing season by 25.6 percent.

Joe Cimino, Fisheries Management Specialist, Sr., gave the presentation and his comments are a part of the verbatim record. Mr. Cimino stated that he had two additional e-mail comments, which he handed out to the Commission.

Mr. Cimino explained that Addendum IV to the ASMFC tautog FMP, approved in February 2007, established SSB target and threshold reference points allowing the ASMFC to determine whether or not the stock is overfished. This Addendum also established a new rebuilding fishing mortality rate of  $F=0.20$ , to initiate rebuilding to the spawning stock biomass threshold and target levels. A fishing mortality rate of 0.20 translates to an annual harvest (or exploitation) rate of 0.17. That is, 17% of the stock can be removed by fishing, annually. Due to the extraordinary contribution to the fishing mortality rate by the recreational fishery (approximately 90% of the total harvest on the coastwide level; approximately 99% in Virginia; Addendum IV only considered 2005 harvest data), Addendum IV required all reductions in the fishing mortality rate apply to the recreational sector only.

Mr. Cimino said that in August 2007 Addendum V to the Tautog FMP was approved, to address this problem. Addendum V allows states the flexibility to potentially achieve the required reduction, from the recreational fishery, the commercial fishery, or both. This addendum also changed the base period from which reductions are to be made. The base period for Addendum V is 2003 through 2005 (Addendum IV was only 2005). States are required to reduce their landings, by 25.6% of the average (2003 through 2005) total tautog landings.

Mr. Cimino stated that Addenda IV and V to the Tautog FMP required States to maintain current or more restrictive fishing regulations during calendar year 2007 to achieve a reduction in harvest and implement management measures to meet a fishing mortality rate of 0.20 by January 1, 2008. The addenda IV specifically required a 25.6% reduction in the overall landings and included both the recreational and the commercial fisheries for each state. This meant reducing the coastwide exploitation rate, from 21.35% to 17%, on an annual basis.

Mr. Cimino said that on two occasions, staff had held Ad hoc committee meetings that included individuals who were active in the recreational tautog fishery. The committee and staff originally drafted seven management options that would meet the reduction requirements during the Addendum IV process. Through a series of group e-mails and a second meeting, staff and the ad hoc recreational committee adjusted the original options of Addendum V, and pared down the number of options to five. The ad hoc recreational committee unanimously favored equal reductions for both the commercial and recreational fisheries. Staff developed reduction options, for the commercial fishery, and solicited opinions on these options, from commercial fishermen who landed tautog in 2006. Only three individuals responded. One of them was a written comment, but all comments were for no action to be taken against the commercial fishery. In 1997 the commercial fishery agreed to a closure from May 1 through August 31 and this closure has been in place since then.

Mr. Cimino explained that at the September 17, 2007 FMAC meeting, the Committee voted 7 to 4, with 2 abstentions, to exclude the commercial fishery from the current ASMFC mandated reduction. A major concern FMAC expressed was in closing the commercial fishery for five or more months out of the year, that no tautog. Table 1, option 1 is the favored option endorsed by both the Ad hoc committee and FMAC. Although FMAC moved to take the reduction in the recreational fishery only, it was not specified where the additional day to option 1 should be added.

Mr. Cimino stated that for Virginia, the commercial fishery accounted for an average of 2.4% of the overall harvest, during 2003 through 2005, so an overall landings reduction of 26.1% would need to be achieved by the recreational fishery, to account for the commercial fishery landings. This number is derived by dividing the required overall reduction percentage by the recreational portion of the harvest. If the recreational fishery

were to account for the full mandated harvest reduction, only one additional day would need to be added to the three options in Table 1.

Mr. Cimino said that although Addendum V allowed “States to choose which sectors reductions should come from in a manner that best meets their individual needs”. The Commission does need to consider if taking the reduction in the recreational sector only would violate the provisions of § 28.2-203 of the Code of Virginia by abandoning the fair and equitable allocation of fishing privileges among various user groups. If a closure to the recreational fishery alone is not seen as a violation to this section of the Code, than the intent of the Addenda again needed to be considered.

Mr. Cimino explained that the process developed to account for reduction percentages, by no means guarantees an actual harvest reduction of an equal percentage. It is impossible to accurately predict future harvest based on historical landings, and several factors confound the process in this case. It is important to consider the difference an additional one day closure would have in the recreational fishery, as opposed to an additional 30 to 60 days in the commercial fishery, on the stock itself.

Mr. Cimino said that the time of year tautog spawn was considered important in the decision making process for both the Recreational Ad hoc committee and FMAC for the endorsed options. Current literature indicates that tautog spawn in late spring through early summer. In Virginia waters it was found that tautog spawn as water temperatures approach 50° F both in the Chesapeake Bay and as far off shore as 12 miles. Staff therefore acknowledged that closing the commercial season in April, either for two weeks or for the entire month, would be more beneficial to the spawning stock, than an additional one day closure in the recreational fishery.

Mr. Cimino said that the draft regulation 4 VAC 20-960-10 contains the amendments recommended by staff. On page two it shows the recreational measures and on page three it shows the commercial measures.

Mr. Cimino explained that in the comments in the Commission packet, four wanted option 3, 1 option 2 and the blue copy of the comments from the Saltwater Fishing Association, as a group, stated they wanted option 3. In the additional comments received after the mailout to the members, one wanted option 2 for the recreational fishery and one wanted option 3 for the commercial fishery.

Mr. Cimino stated that staff recommended establishing ASMFC-mandated landings reduction measures, for the commercial and recreational tautog fisheries, so that each fishery reduces landings by 25.6%. Staff further recommended that options two through four of Table 2 are given more weight than option one, since these three options included a closure in April and would benefit the spawning stock in Virginia.

Mr. Cimino reviewed a table showing the history of the regulation and also said that tables of data were included in the packet that he would discuss if requested.

Following some questions and further discussion, Commissioner Bowman opened the public hearing.

Jim Dawson was present and his comments are a part of the verbatim record. Mr. Dawson expressed his sorrow that this was all based on only one year's data. He said he had tried to encourage ASMFC to use more years of data. He said it was important to consider the impacts on the spawning beds. He said that the tables provided, lacked data because of those fishing outside the 3-mile limit were not able to report or did not report, for various reasons. He stressed that regulations be made when it is known who is affected and to protect the biomass. He said the 98 percent problem occurs during May and June. He said he suggested a May-June closing as the fish are very susceptible when spawning and it was important to protect it for the future. He said it was important to require a commercial permit to manage and protect from exploitation of the resource. When asked which option, he stated there was a need for consideration for a new option as staff suggested. He said May and June would protect the fish during the spawning season and it was necessary to do more than is required. He was asked about the commercial sector and said that they had already done a four months closure in 1997, when the commercial harvest only represented 2.8 percent of the fishery and was not given any credit for it. He finally said that of those offered, a worst case scenario, he said he would select Option 1 with a September 1 to November 12, because the bass fishermen were working at that time.

Craig Paige, Virginia Beach Charter Business, was present and his comments are a part of the verbatim record. Mr. Paige stated he preferred no closed seasons, but if he had to chose he would chose Option 3. He said the closed season was hard on the Charter Boat operators as well as the tackle shops and other fishermen. He said that there was not much else to catch in April. He said he would love to conserve the species, but he was on both sides of the fence. He said spawning occurs in May-June and to close the season in April did not do any good. He said the Commission needed to do what would have the least impact and that was Option 3 with a 4 fish limit daily limit, as four fish was plenty and should be enough to satisfy any fisherman.

Associate Member McConaugha asked if there were no closed season would it be necessary to have a bag limit of three? Mr. Cimino responded yes. Associate Member McConaugha asked about May? Mr. Paige said that is when the spawning occurs and most of the Charter Boat operators agree with a May closure.

Commissioner Bowman asked if anyone that was on the Ad hoc committee was present.

Tom Powers, Member of the Ad hoc Committee was present and his comments are a part of the verbatim record. Mr. Powers stated that the staff told them April and May, but he

would agree with pushing it forward to May. He said that he usually fishes only in March and April when the water was warmest. He said he agreed with the 4-fish and May closure instead of April or even June. He said there are other species available for fishing, such as flounder and striped bass. When asked about the time frame, he said it would be approximately 4 or 5 weeks in May and maybe a week June. An overlap with the other season would help to justify it.

Mr. Cimino explained that the wave data indicated March and April as a high percentage resulting in a high percentage reduction and May and June there would be small effort therefore low percentage reduction. He said three fish the season would close on its own, but four fish and May there would be a need to look at other options. Also he said there would be more impact in April in meeting the percentage of reduction.

Associate Member Fox asked what would be the results if the Commission went to May and June with a 4-fish limit.

After some discussion about the comments and suggestions made by the public, Mr. Travelstead suggested the Commission take a break on this and let staff make further calculations and return later to this matter. The Commission agreed.

Commissioner Bowman said that the Commission would proceed with the next item 11.

\* \* \* \* \*

- 11) **PUBLIC HEARING:** Proposed amendments to Regulation 4VAC20-1040-10, et seq. "Pertaining to Crabbing Licenses", to extend the moratorium on the sale of additional licenses.

Rob O'Reilly, Deputy Chief, Fisheries Management, gave the presentation. His comments are a part of the verbatim record. Mr. O'Reilly explained that the CBF had submitted comments in support, with an exemption for Tangier Fishermen. He provided the Board with this letter. He provided the Commission with a powerpoint presentation.

Mr. O'Reilly stated that staff was recommending an extension to the moratorium on the sales of crabbing licenses, as the moratorium currently in effect expires at the end of 2007. He said they were concerned mostly that the abundance of exploitable size crabs remained very low. He reviewed a chart that showed the density of exploitable (>60 mm, carapace width) crabs from 1989 to 2006. He explained that these data were collected as a part of the bay-wide, fishery independent winter dredge survey that began in 1989.

Mr. O'Reilly explained that staff now had 18 years of data, and initial regulations had been enacted since 1994, but it was difficult to tell what had resulted. He said the

spawning stocks have not responded. He said that without the regulations the situation would have been worse.

Mr. O'Reilly said after reviewing the data from 1995 to 2006, staff was not optimistic about removing the moratorium. He stated that staff recommended adoption of the amendments to Regulation 4 VAC 20-1040, to establish a continuation of the moratorium on the sale of additional crabbing licenses through 2010.

Associate Member Fox asked about the Tangier exemption. Mr. O'Reilly explained that the Tangier fishermen were exempt from the transfer restriction, where it was limited to family members and under a cap of 100 transfer for non-family members. He said this was discussed by CMAC, but they did not support it despite Section 28.2-201 of the Code that he read into the record.

Mr. O'Reilly stated that, overall, this was a very tough time and more press and attention will be seen. He said there are not any good indicators of improvement. He stated he was waiting for the next winter dredge survey.

Commissioner Bowman stated there was a need to determine what is happening and to do a better job, anyone can see that from the data.

The public hearing was opened, but there were no comments. The public hearing was closed. Commissioner Bowman asked for discussion or action by the Commission.

**Associate Member Robins stated that 6 of 9 years of overfishing did not look good and he moved to extend the moratorium as recommended by staff. Associate Member Holland seconded the motion. The motion carried, 9-0. The Chair voted yes.**

\* \* \* \* \*

The Commission returned to Item 10 at this point.

**10) PUBLIC HEARING:** Proposed amendments to Regulation 4VAC20-960-10, et seq., "Pertaining to Tautog", to reduce harvest during the 2008 fishing season by 25.6 percent.

Mr. Cimino stated when staff calculated they figured for a 4 fish limit, which meant that the Wave 3 closed season would have to be 55 days to achieve the 25.6% reduction that was needed. He said similar options were discussed but the Ad hoc committee did not bring those forward.

Associate Member Fox asked staff, was the bottom line that it would work. Mr. Cimino responded yes and to correct an early statement they were looking at 3 years of data.

Associate Member Fox moved to go with option C-1 and with the Commercial fishery closed May-June. Associate Member Robins said to clarify that the commercial fishery was already closed May through August and would require a separate action. Associate Member Holland said that C-2 would be the best one. Associate Member Robin clarified that still would require a separate action for the commercial fishery. There was no second made for this motion.

Associate Member Robins in a substitute motion, moved to accept the C-2 option plus the staff's recommendation for a commercial closure. He stated, as a matter of policy, that both sides needed to conserve, not just the one. Commissioner Bowman asked him to clarify what the commercial closure would be. Associate Member Robins explained that the closed commercial season would be April 16 through October 2<sup>nd</sup> and December 1 through December 15. Associate Member Schick seconded the motion. The motion carried, 9-0. The Chair voted yes.

\* \* \* \* \*

12) **PUBLIC HEARING:** Proposed amendments to Regulations 4VAC20-610-10, et seq., "Pertaining to Commercial Fishing and Mandatory Reporting" and 4VAC20-1090-10, et seq., "Pertaining to Licensing Requirements and License Fees" to establish product owner and harvester permits, require reporting aquaculture harvests, and to adjust the permit fees.

Jack Travelstead, Chief, Fisheries Management, gave the presentation. His comments are a part of the verbatim record. Mr. Travelstead explained that the industry had come to VMRC, since the Commission did not have any information about the fishery, and asked for a license to be established with mandatory reporting. He said when the new license and reporting requirements were established earlier this year, there was some confusion about who was responsible for the reporting. He stated these amendments to the regulation were strictly to gather data.

Mr. Travelstead said the changes proposed were simply requiring the purchase of a permit which other fisheries already do with multiple permits.

Mr. Travelstead stated that in the Code of Virginia required that leaseholders provided "proof of use," for their being allowed to renew the leases, which the action today would benefit.

Mr. Travelstead stated that the permits will generate funds with permit fees of \$5 and \$10. He said another benefit would be the removal of the "bad actors" which was not a primary benefit.

Mr. Travelstead explained that the clam/oyster product owners will report harvest from leases. Daily harvest will be reported monthly. He said if the harvester was not the

owner, a harvester's permit would be required, which will allow the identification of another member of the industry and provide useful information. He said the harvester permit would be usable for all areas. He said that the industry wanted a vessel permit, but that way would not give the harvest labor information.

Mr. Travelstead stated that the Oyster Blue Ribbon Panel discussed the importance of aquaculture and the impacts by development on the highlands. The way it was there was no information for determining how much impact there was on the aquaculture industry.

Associate Member Fox asked if cages on the bottom, upweller on a dock, or traditional methods required a permit. Mr. Travelstead responded yes.

Associate Member Schick asked about designating the Captain to have a permit. Mr. Travelstead explained that does not enter into the regulation, as everyone on board has a permit to allow for identification. A vessel permit would require all on board the vessel to be cited, in the case of a violation, and this was the reason for not using the captain.

Associate Member Tankard asked why staff needed the information on the number of crew. Mr. Travelstead explained that it was information about effort and gives the number in the industry. Associate Member Tankard asked about an exemption for a minor? Mr. Travelstead said that there was nothing in the regulation addressing any exemption for a minor, and if the minor was on board, they could be issued a summons.

Commissioner Bowman opened the public hearing.

Hank Jones, member of the clam aquaculture industry, was present, and his comments are a part of the verbatim record. Mr. Jones explained that he was the one who asked for a license to be established for obtaining information on the industry at the meeting held with members of industry. He said he thought the owner would be licensed and would report all of the harvest information. He said in February '07 the regulation came out and all had to get a license and report. He said at a second meeting they requested that there be monthly reporting as it was not from public bottoms and so not subject to closure. He said they want to report monthly, not daily. He expressed concern that hundreds of licenses were issued allowing anyone to work anywhere as it was not tied to a particular oyster lease. He said he was against what was proposed, as he felt that a vessel permit was necessary.

Jack White, New Point Oyster Co., was present and his comments are a part of the verbatim record. Mr. White thanked the staff for its efforts. He did express his concern that the penalty was a class 1 misdemeanor and a year in jail and \$1,000 fine. He said working in polluted water was a class 3 misdemeanor. Also he stated the reporting was confusing.

Mark Wallace was present, and his comments are a part of the verbatim record. Mr. Wallace explained that the boat license more suited the industry. He said their workers were seasonal and the number of employees changed all the time. He stated the reporting concerned him as there could be multiple owners, such as a co-op. He asked with 2 individuals, does only one report.

Commissioner Bowman stated that what is here now was still a work in progress.

Mike Pierson, Cherrystone Aquafarms, was present, and his comments are a part of the verbatim record. Mr. Pierson stated that he still supported the clam license. He asked if handling seed only, was that reported? Mr. Travelstead responded, yes. Also, Mr. Pierson explained that the MPO's say that no license can be issued to out-of-state residents, and he had out-of-state workers and from another country, such as Mexico and Asia.

Tom Walker, J. C. Walker Brothers, was present and his comments are a part of the verbatim record. Mr. Walker asked about the product owner buying additional licenses for the year. He stated that he felt that you should report all or nothing, even the seed. He said maintaining the license on the boat needed to be simplified. He said the MPO's knew all of them and with the limited space on board the boat they should be able to keep the license on the shore. He said in the past he had always cooperated.

Jerry Saunders was present and his comments are a part of the verbatim record. Mr. Saunders asked whether those using cages and trays not on private ground have to report. Mr. Travelstead responded yes. Mr. Saunders asked about if the crew was only working on the bottom, not harvesting. Commissioner Bowman stated that it was just maintenance.

Bill Kirby was present and his comments are a part of the verbatim record. Mr. Kirby asked about shellfish that were taken for personal use only. Mr. Travelstead responded that it was for commercial harvest only.

Tom Gallivan, Eastern Shore, was present and his comments are a part of the verbatim record. Mr. Gallivan stated that with the owner's license the number of crew was being reported so that data was covered. He said because of the rotating crew, a vessel permit should be considered. He said if there were enforcement problems then they could work through the owners and boat license. He said that the owner's permit fee would benefit the Virginia Marine Products Board which needed the funds. He said the \$10 fee was too light. Also, he explained, with a rotational crew, it was difficult to obtain the license as the time an agent is available was limited to when a business was opened, as well as the number of agents on Eastern Shore.

A. J. Erskine, Bevans Oyster Company and Cowart Seafood, was present and his comments are a part of the verbatim record. Mr. Erskine asked if it was possible to

establish online reporting. Mr. Travelstead said that staff was working to accept electronic reports in 2008, as it would be easier on all. Mr. Erskine asked if 3 permits would be required for 3 harvesters. Mr. Travelstead stated yes, as they were not transferable.

Mr. Travelstead, to clarify an earlier comment, explained that it was a class 3, misdemeanor for the 1<sup>st</sup> offense and a class 1, for the second. He explained also that staff, as in the past, was always willing to help whenever possible with the reporting.

Mr. Travelstead explained that Section 28.2-634 of the Code of Virginia said that a non-resident cannot lease ground, and the question was can a non-resident get a permit for harvesting. He asked counsel for his opinion. Carl Josephson, Senior Assistant Attorney General and VMRC Counsel, responded by reading the Section referenced by Mr. Travelstead. Mr. Travelstead asked what was market or profit? Mr. Josephson said the question of whether it was for profit or market. Mr. Travelstead said that this was not a part of why the hearing was being held today only what was being proposed.

After Mr. Josephson again read the section at the request of an audience member, Commission Bowman stated that market or profit is benefiting the product owner.

Ben Stagg, Chief, Engineering and Surveying, stated that the Commission also needed to look at Section 28.2-635 of the Code of Virginia. Commissioner Bowman stated that this was not intended to impact the migrant workers. Mr. Josephson explained that interpretation could be based on the non-action applying the Code by the VMRC. He further explained that by lack of enforcement it meant that this had already been adopted in regards to the wage earner or worker.

Tim Hayes was present and his comments are a part of the verbatim record. Mr. Hayes explained that when this was done it was intended to keep Maryland watermen from harvesting shellfish from Virginia waters. He said the worker was an instrument and not the product owner.

After further discussion on the issue of migrant workers being required to have a permit, Associate Member Fox suggested that this matter might need to be tabled for staff to revisit and address.

Associate Member Tankard said that there should be consideration for a minor exemption and also an increase in the fee for the product owner's permit.

Associate Member Bowden mentioned that Mr. Wallace's concern, regarding the co-op and who does the reporting when there was more than one owner?

Pete Terry, H. M. Terry, was present and his comments are a part of the verbatim record. Mr. Terry suggested the matter be tabled until staff can come up with reporting forms for the aquaculture industry to use.

Mr. Walker stated that there was one major point and two aspects to consider, whether planting and maintenance were to be reported and whether harvester permits were required. He stated that most infractions of the law occurred during the planting and maintenance.

Mr. Travelstead stated that the regulation needed to be adopted with 3 changes: 1) no harvester permit on the person, but at the product owner's location, 2) An exemption for minors, and 3) expand the definition to include when it was not the leaseholder.

**Associate Member Tankard moved to accept the staff recommendations with the changes recommended. Associate Member Robins seconded the motion. The motion carried, 8-1. Associate Member Fox voted no. The Chair voted yes.**

\* \* \* \* \*

**13) PUBLIC HEARING:** To establish Regulation 4VAC20-1130-10, et seq., "Pertaining to the General Permit for Temporary Protective Enclosures for Shellfish."

Jack Travelstead, Chief, Fisheries Management, gave the presentation. His comments are a part of the verbatim record. Mr. Travelstead explained that during the 60-day comment period some additional comments had been received and were received after the packets were mailed. He provided copies of them, as a handout.

Mr. Travelstead stated that he was for the most part just going to review the public comments. He said the regulation was in response to the General Assembly mandate, in 2006, that VMRC regulate structures, for aquaculture, on leased ground. He said there was nothing in the regulation to allow for the public to comment, as this was in the Code of Virginia, under Section 28.2-603.2, which sets forth a specific, detailed process. He read this section into the record.

He said the two comments received that were in the packets were from DEQ which said it had no concerns and a letter from CBF, in support of the regulation. He said an e-mail from Tom Powers, with the CCA, expressed two concerns: 1) inclusion of wording that insures that the Commissioner will take into account the Public Trust Doctrine, as spelled out in Section A of the State Code, in Section 20.2-1205, and 2) that the regulation include wording that insures public notice on the VMRC website similar to what was done with the pound net siting regulation.

He explained that it was decided that this would be required administratively on the website for a 15-day comment period. He said the regulation can be changed later, if necessary. He said the marking with the name of owner was not in the regulation, but there was a requirement that the lease would be marked and the permitted area be marked with signs. He said that another issue was that no more than one buoy can be used per cage and there were two groups with different sides to this, one wants it and the other does not. Another issue was that the area be limited to 10 acres, and this was not in the regulation, as this was limited by the leased area. He said it is in the regulation that this will not interfere with navigation and not intrude on the grasses. Another suggestion was to notify property owners within 1200 feet and in the regulation it was 500 feet, which was consistent with what Habitat did. He said further that there were comments that the structures should not be allowed closer than 500 feet to a pier or the shoreline and the regulation said 100 feet. He stated these are not hard and fast provisions and the Commissioner can place conditions on the permit if necessary. Another comment was to make sure the Counties are made aware of the project. He said all the counties would be notified by the public notice. Mr. Reilly of the Gloucester Board of Supervisors hopes there will be no zoning requirements for the water. Mr. Hendricks of Hayes supports a larger area for notification and 1,000 feet from shoreline or pier. He said another comment was concerned with the number of cages and the number is limited by the regulation. He explained that for the aquaculturist to be able to work and not impede the water flow for the benefit of the shellfish spacing of the cages was important. He explained that others were fearful of crowding the shoreline and allowing for the safe navigation. He said someone had suggested that a suitability study be done for more than 5 acres and guidelines be developed. He stated all proposals will be reviewed by the staff and that guidelines would be established in addition to the regulation. He explained that some suggested insurance proof be provided and the posting of a bond, for loose or damaged structures. He said the general permit would make this a lawful activity. He stated it was also that the regulation approval be delayed to allow the Middle Planning District Commission to review it. He said the Commission is mandated by the General Assembly to have a final regulation established by March 2008.

Associate Member Tankard asked if an ad would be put in the paper and Mr. Travelstead stated that was a decision to be made by the Commissioner and will be on Website for proposals for new structure permits at least 15 days for public comments.

Commissioner Bowman asked about existing operations under a Habitat Permit. Mr. Travelstead explained that if they want to convert to this permit they can, as long as there are no changes. He stated that it would not be put on the website.

Paul Applin, Gun Point Oyster Co., was present, and his comments are a part of the verbatim record. Mr. Applin asked about the Special Conditions, Item L, which he read. He said that he objected to this as he was using floats and wanted to know if he could continue to use floats. Mr. Travelstead explained the Code required a Habitat permit for this type of structure.

Mr. Travelstead stated that he had to add one more comment which was not in the packet mailed. He said this was from VIMS and their concerns were in cases where SAV was not currently present, but had been in the past. He said that Section 50 addressed the SAV issue and had been added as an amendment for this purpose. He read the VIMS comment into the record. "No temporary protective enclosure shall be placed in or upon submerged aquatic vegetation beds, and consideration, by the Commissioner, for authorizing the placement of protective enclosures in currently un-vegetated areas that are documented as historically supporting SAV beds, shall include consultation with the Virginia Institute of Marine Science, in order to determine the potential for impacts on SAV, within the term of the prospective lease. If SAV colonizes within the boundaries of the area designated for the temporary protective enclosures, the authorization for those structures under this general permit shall remain in effect only for the remainder of the term of the lease. The general permit shall be renewed only upon a finding by the Commissioner that the placement of the temporary protective enclosures, within the lease, will not significantly interfere with the continued vitality of the SAV." He said VIMS had the data to assist the Commissioner in making this determination.

Commissioner Bowman opened the public hearing.

Tom Powers, CCA, was present, and his comments are a part of the verbatim record. Mr. Powers stated that he understood that this was mandated, and aquaculture needed to be continued, but the CCA was not included in the Ad hoc committee meetings. He said this impacts other users both commercial and recreational. He said the Public Trust Doctrine needed to be considered for this reason. He said because of Section 28.2-1205 of the Code of Virginia, this process should include being placed on the Website.

A. J. Erskine, Bevans Oyster Company and Cowart Seafood, was present, and his comments are a part of the verbatim record. Mr. Erskine stated that there was a lot of historical aquaculture. He explained that when the need for protection of the shellfish arose from the cow nosed ray, they went to the General Assembly for that purpose. He said he wanted to congratulate Mr. Travelstead on his efforts. He said they were concerned with the requirement to post all the applications on the Website, except for those with legitimate concerns. He stated that aquaculture in the past was for the half shell market, but now some were looking to it for the shucking market.

Mr. Erskine said that the following would achieve what was needed:

- 1) Notification of property owners 500 feet of the site.
- 2) Limit the size of the structure.
- 3) Marking the area.
- 4) Location 100 feet from shoreline/pier.
- 5) No floating structures.
- 6) Removal of unused structures.

Mr. Erskine stated that this was not a new issue, but just a procedural change being made simple with reasonable fees. He said this would allow the leaseholder to use areas with limited suitable ground. He said both the State and Federal levels of government supported aquaculture. He said they were trying to stay out of the way, but not be too far from shore where it would interfere with navigation.

Tim Hayes, was present, and his comments are a part of the verbatim record. He said this would allow leaseholder's to use their grounds without user conflict and minimum paperwork. He said the Commissioner could sort out conflicts that occur.

Jack White was present, and his comments are a part of the verbatim record. Mr. White said there was nothing in the regulation to prohibit floats. Mr. Travelstead stated that was another regulation. Mr. White said that he liked the flexibility of empowering the Commissioner as this was a tremendous investment and needed predictability. He stated that the Chesapeake Bay 2000 Plan could be accomplished by aquaculture.

Tom Gallivan, Eastern Shore, was present, and his comments are a part of the verbatim record. He explained that he grew oysters in cages in the Nassawadox area and he utilized the 12-inch rule. He said he supported the regulation as aquaculture was the future. He said the only way to grow shellfish was with structures in Nassawadox, and ariakensis was not going to happen any time soon. He said he was concerned that the 12-inch limit would have an effect, and that was separate from this issue. He said the advertising on the internet was not going to work because in his area most people only look at the Eastern Shore News to get their information. Also, he was concerned with the impact of SAV on aquaculture.

Bill Kirby, Gloucester, was present and his comments are a part of the verbatim record. Mr. Kirby said he supported the mandatory notice in the newspaper. He asked about night markings. Mr. Travelstead explained that the signage requirements were for a 15 foot square with a reflector, facing the perimeter of the area. Mr. Kirby stated he was also concerned with impacts to navigation, even outside of the channel. He explained that moving large vessels requires a lot of area. He said only 100 feet from the pier would mean he could not fish as a line could be cast that distance and further. He said he was also concerned that structures might be removed but not the markers and buoys.

Eric Weller, Virginia Beach waterman, was present, and his comments are a part of the verbatim record. Mr. Weller explained that he had found, from advertising his applications for oyster ground, that the notices in the Virginian Pilot could be quite expensive.

Commissioner Bowman asked for discussion or motion.

Associate Member Fox said that he could not find a height for the off-bottom limit in the regulation. Mr. Travelstead explained that there was a cubic foot limit for an individual structure requirement by Habitat.

Associate Member Tankard asked if could be stacked to the water level, if permitted. Mr. Travelstead responded yes, if permitted.

Associate Member Robins stated that clearance and area sets the standards which are considered by both the staff and the Commissioner.

Commissioner Bowman stated that the location would be considered when the evaluation was done.

**Associate Member Tankard stated that it was just a matter of using common sense and the Commissioner was very capable of overlooking the process. He said he supported the staff recommendations. He moved to accept the regulation amendments. The motion carried, 8-0. Associate Member McLeskey left during the presentation for the remainder of the day.**

\* \* \* \* \*

**14) DISCUSSION:** To consider the Recommendations of the Recreational Fishing Advisory Board (RFAB).

Sonya Davis, Fisheries Management Specialist, Sr. gave the presentation. Her comments are a part of the verbatim record.

Ms. Davis explained that the estimate of funds available for projects from the Virginia Saltwater Recreational Fishing Development Fund (VSRFDF) is \$1,436,858. The Recreational Fishing Advisory Board (RFAB) had completed their review and of the 12 project proposals reviewed during this cycle, 10 were approved.

The RFAB recommendations were as follows:

**The following ten projects were recommended for approval by the RFAB:**

A. 2008 Children's Fishing Clinic (Year 11). Rob Cowling, Newport News Rotary Club and Coastal Conservation Association-Peninsula. \$6,000. **VOTE: 8-0**

B. 2008 Kiwanis Club Children's Fishing Clinic (Year 7). Wesley Brown, Capital District Kiwanis Club. \$6,000. **VOTE: 8-0**

C. 2008 Virginia Game Fish Tagging (Year 14). Jon Lucy, VIMS and Lewis Gillingham, VMRC. \$76,718. **VOTE: 8-0**

D. Federal Assistance (Wallop-Breaux) Matching Funds FY 2008. Jack Travelstead, VMRC. \$283,512. **VOTE: 8-0**

E. Sheepshead Population Dynamics in Chesapeake Bay, Virginia (Year 3). H. Liao, J. Ballenger, C. Jones, ODURF. \$67,206. **VOTE: 7-1**

G. 2008 Youth Developmental "Hooked on Fishing" Adventure (Year 1). A. Fisher, R. Lockhart, Virginia Charter Boat Association. \$6,780. **VOTE: 8-0**

H. Saxis Fishing Pier Expansion. Charles Tull, Mayor, Town of Saxis. \$173,151. **VOTE: 8-0**

COMMENT: Funding is contingent on the Town/County filing a Joint Permit Application and securing the appropriate permits for the expansion.

J. Improving stock assessment of weakfish (*Cynoscion regalis*). Dr. Yan Jiao, Dr. Don Orth, Virginia Polytechnic Institute & State University and Rob O'Reilly, VMRC. \$87,194. **VOTE: 8-0**

COMMENT: The RFAB encourages the search for other funding sources for this project, as well as Years 2 and 3.

K. Reef Monitoring Equipment Support for VMRC's Fisheries Management Division. M. Meier, J. Grist, VMRC. \$72,964. **VOTE: 8-0**

L. Adult Red Drum Population Structure Study. Joe Grist, VMRC. \$20,390. **VOTE: 8-0**

The following two projects were not recommended for approval by the RFAB:

F. Wishart's Point Landing. Stewart Hall, County of Accomack. \$275,000. **VOTE: 8-0**

COMMENT: The County of Accomack is encouraged to submit a proposal at a later date, if the Army Corps of Engineers is ever able to secure funding and dredge the channel on the west side. The current depth of the proposed east side boat ramp location is approximately 2 ½ to 3 feet at high tide and 1 foot at low tide.

I. Pilot Study: Application of pop-up satellite archival tags (PSATs) to assess postrelease survival, habitat utilization and short term movement of striped bass in Virginia's winter recreational fishery. J. Graves, R. Latour, A. Horodysky, VIMS. \$71,371. **VOTE: 8-0**

**Commission Meeting**

COMMENT: The RFAB believed this study was providing the research and development for the company manufacturing the smaller pop-up satellite tags. The Board thought the company should provide the tags for free or at a reduced price in return for the data that VIMS would provide. Also, they did not believe this project would benefit the average angler. Many anglers already know that the circle hooks were better for the fish than the "J" hooks, while live-baiting for striped bass.

Ms. Davis stated that staff concurred with the funding recommendations, as submitted by the RFAB, with the exception to not fund Project I. This pilot study received partial public support and was also supported by the Virginia Saltwater Fishing Tournament Advisory Committee. The scientific peer review of the project was also positive. The attached letter from Dr. Graves, VIMS, responded to the concerns of the RFAB. Staff recommended approval of Project I. For Project H, the Saxis Fishing Pier Expansion, staff recommended that the Commission withhold funding approval of this project, pending review and approval of the Joint Permit Application.

Commissioner Bowman asked about the Item I, which staff was recommending approval when the RFAB voted 8-0 against approving it. Ms. Davis explained that staff had received a letter from Dr. Graves which responded to the concerns that RFAB members raised. He also asked if this letter was available to the RFAB members. She responded no, that the letter was received after the RFAB meeting.

Commissioner Bowman asked for any public comments on these items. There were none.

**Associate Member Robins stated that because of Dr. Neill's letter and the potential of this study, he moved to accept the staff recommendation, including Item I. Associate Member Tankard seconded the motion. The motion carried, 7-1. The Chair voted no.**

Commissioner Bowman expressed his concerns with approving Item I when RFAB voted 8-0 against funding the project.

\*\*\*\*\*

There was no further business and the meeting was adjourned at approximately 5:55 p.m. The next meeting will be Tuesday, December 18, 2007.

---

Steven G. Bowman, Commissioner

---

Katherine Leonard, Recording Secretary