

MINUTES

Commission Meeting

November 24, 2009

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

Steven G. Bowman	Commissioner
Ernest L. Bowden, Jr.)	
J. Carter Fox)	
J. T. Holland)	
William E. Laine)	
John R. McConaugha)	Associate Members
Richard B. Robins, Jr.)	
J. Kyle Schick)	
John E. Tankard, III)	
Carl Josephson	Senior, Assistant Attorney General
Jack G. Travelstead	Chief, Fisheries Mgmt. Div.
John M. R. Bull	Director-Public Relations
Katherine Leonard	Recording Secretary
Linda Farris	Bs. System Specialist, MIS
Rob O'Reilly	Deputy Chief, Fisheries Mgmt.
Jim Wesson	Head, Conservation/Replenishment
Joe Grist	Head, Plans and Statistics
Lewis Gillingham	Head, Saltwater Fishing Tournament
Joe Cimino	Fisheries Mgmt. Specialist, Sr.
Stephanie Iverson	Fisheries Mgmt. Specialist, Sr.
Alicia Nelson	Fisheries Mgmt. Specialist
Sonya Davis	Fisheries Mgmt. Specialist, Sr.
Mike Johnson	Fisheries Mgmt. Specialist
Rick Lauderman	Chief, Law Enforcement
Warner Rhodes	Deputy Chief, Law Enforcement
Jaime Cranfill	Marine Police Officer
Bill Hall	Marine Police Officer
Bob Grabb	Chief, Habitat Mgmt. Div.
Tony Watkinson	Deputy Chief, Habitat Mgmt. Div.
Chip Neikirk	Environmental Engineer, Sr.

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Justin Worrell	Environmental Engineer, Sr.
Ben McGinnis	Environmental Engineer, Sr.
Ben Stagg	Environmental Engineer, Sr.
Hank Badger	Environmental Engineer, Sr.
Elizabeth Murphy	Environmental Engineer, Sr.
Randy Owen	Environmental Engineer, Sr.
Jeff Madden	Environmental Engineer, Sr.
Jay Woodward	Environmental Engineer, Sr.
Dan Bacon	Environmental Engineer, Sr.
Bradley Reams	Project Compliance Technician

Virginia Institute of Marine Science (VIMS):

Lyle Varnell
Carl Hershner

Other present included:

Starling Lee Bowles, III	Tom Offringa	Jeffrey M. Summers
Paul Davis	Amy Walker	Adriane Marshall
Mark Thomas Crossland	Pete Crow	Alan J. Newmann
Chuck Roadley	Ben Williams	James Howell
Chester Vaughan	Kim Zweifler	Rich Zweifler
Michael Conley	Scott Rudge	Nina Williams
Carl Eason	Bob Simon	Carla White
Craig Palubinski	Kristen Donofrio	Ellis W. James
Tom Powers	Meade Amory	Michelle Peabody
Fella Daniels	David Robberecht	Wesley Robbins
Mike Shackelford	Roger Parks	Douglas F. Jenkins, Sr.
J. P. West, Jr.	Carrie West	Mark Swingle
Pat Foster	James Fletcher	Cory Nesta
John Forrest		

and others.

Commissioner Bowman called the meeting to order at approximately 9:35 a.m. Associate Member Holland was late to arrive at the meeting.

At the request of Commissioner Bowman, Associate Member Robins gave the invocation and Carl Josephson, Senior, Assistant Attorney General, led the pledge of allegiance.

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APPROVAL OF AGENDA: Commissioner Bowman asked if there were any changes to the agenda.

Bob Grabb, Chief, Habitat Management explained that for Item 10 a request had been made for a continuance for 60 days to be granted until the January 26, 2010 Commission meeting.

Carl Eason, Attorney, explained that he had just been hired to represent the applicant (Item 10) and they needed time to amend the project in order to shorten the pier and were requesting a deferral until the January meeting.

Commissioner Bowman stated that there was a consensus by the Board to continue Item 10.

Commissioner Bowman explained that after the Habitat items were completed, he wanted staff to give a status report on the progress made with the Crab License BuyBack Program.

Commissioner Bowman asked for any other changes to be made to the agenda. There were no other changes.

Commissioner Bowman asked for a motion to approve the agenda **Associate Member Robins moved to approve the agenda. Associate Member Tankard seconded the motion. The motion carried, 8-0. The Chair voted yes. Associate Member Holland was not present.**

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MINUTES: Commissioner Bowman requested a motion for approval of the October 27, 2009 Commission meeting minutes, if there were no corrections or changes.

Associate Member Fox stated that for Item 10, Mr. Edwards at the last meeting, he said his recollection of the motion was that it allowed Mr. Edwards to come back and be heard, if he could provide justification for his absence from the hearing. Commissioner Bowman said that another party interested in this item had told him he wished it could be allowed to come back and be heard. Bob Grabb, Chief, Habitat Management, said that Mr. Edward’s attorney had informed staff that the address zip code used for notification was wrong and he never received the notice. He said that staff agreed to add this to another agenda and allow him to be heard.

Associate Member McConaugha moved to approve the minutes, as amended. Associate Member Tankard seconded the motion. The motion carried, 8-0. The Chair voted yes. Associate Member Holland was not present.

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

Associate Member Holland arrived to the meeting.

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

Bob Grabb, Chief, Habitat Management Division, summarized the nine page two items, 2A through 2I, for the Board. His comments are a part of the verbatim record.

Commissioner Bowman asked for questions of staff.

Associate Member Fox asked a question about item 2E for the Corps of Engineers as to whether the spoil site at Tangier Flats, 200 miles off of Onancock Creek had previously been used. Hank Badger, Environmental Engineer, Sr. explained that it had been used before, but not since the 1960's. Associate Member Fox asked if it was on a reef area. Mr. Badger said that it was located south of the reef area and he had checked with Fisheries and they had said that they had no problems with it.

Commissioner Bowman asked about 2C and why there was such a small number, .999 MGD. Randy Owens, Environmental Engineer, Sr. explained that was the way it was submitted.

There being no further questions, Commissioner Bowman opened the public hearing. There were no public comments and the public hearing was closed. He asked for a motion from the Board.

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

2A. UPPER OCCOQUAN SERVICE AUTHORITY, #09-1242, requests authorization to install 58 linear feet of 42-inch sanitary sewer force main beneath Bull Run and install a 73-foot by 60-foot permanent maintenance vehicle access across Cub Run as part of the UOSA Flat Branch Forcemain project in Fairfax County.

Permit Fee.....	\$100.00
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2B. LEESBURG SOUTH TRUST, #09-0824, requests authorization to construct a 160-foot long by 70-foot wide bridge above Tuscarora Creek, install riprap armoring around the pilings, and install a temporary construction crossing consisting of up to seven 54-inch culvert pipes as part of a commercial development in the Town of Leesburg in Loudoun County. Staff recommends a royalty in the amount of \$22,400 for the bridge encroachment over 11,200 square feet of State-owned submerged land.

Royalty Fees (encroachment 11,200 sq. ft. @ \$2.00/sq. ft.).....	\$22,400.00
Permit Fee.....	\$ 100.00
Total Fees.....	\$22,500.00

2C. TOWN OF ST. PAUL, #09-1245, requests authorization to install a 0.999 MGD diffuser outfall into the Clinch River to facilitate upgrades and expansion of an existing wastewater treatment plant in the Town of St. Paul. Recommend approval with our standard instream permit conditions and the agreement to conduct any necessary mussel and fish surveys/relocations and adhere to any instream work time-of year restrictions as recommended by the Department of Game and Inland Fisheries.

Permit Fee.....	\$100.00
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2D. JAMES CITY SERVICE AUTHORITY, #09-0475, requests authorization to install 315 linear feet of 12-inch diameter water line attached to a wooden utility bridge across an unnamed tributary to College Creek south of the Route 199 bridge in James City County.

Permit Fee.....	\$100.00
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2E. U. S. ARMY CORPS OF ENGINEERS, #09-1240, requests authorization to hydraulically place up to 75,000 cubic yards of sandy dredged material, per dredge cycle, from the maintenance dredging of the outer portion of the Onancock Creek Federal Navigation Channel into a 5,018-foot by 1,087-foot overboard placement site 2.5 miles west of the mouth of Onancock Creek in Accomack County. The center of the placement site is located at 37° 43'14.286" N and 75° 53'31.220"W in approximately 12 feet of water at mean low water.

Permit Fee.....	\$100.00
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2F. OCEAN MARINE, LLC, #09-1132, requests authorization to maintenance dredge on an as-needed basis, up to 5,000 cubic yards of subaqueous material, per

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dredge cycle, to provide maximum depths of -11.4 feet at mean low water within two existing marina slip basins, -26.4 feet at mean low water within an existing syncrolift basin, and -11.4 to -17.4 feet at mean low water within an existing travel lift basin, adjacent to their facility situated along the Southern Branch of the Elizabeth River in the City of Portsmouth. Staff recommends inclusion of the standard dredging conditions.

Permit Fee.....	\$100.00
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2G. CITY OF NORFOLK, #09-1253, requests authorization to dredge the natural portions of an existing unnamed creek/canal between North and South Blake Roads in the City of Norfolk. The proposed project includes the maintenance dredging of approximately 1,405 cubic yards of subaqueous material to create maximum controlling depths of -3.5 feet at mean low water from within a 24-foot wide by approximately 1,030-foot long channel. The proposed project also includes the installation of one green day beacon at 36° 53' 57.8"N, 76° 16' 10.5"W and one red day beacon at 36° 54' 0.6"N, 76° 16' 11.1"W to mark the channel's entrance from the North Branch of the Lafayette River. Staff recommends inclusion of the standard dredging conditions and compliance with U.S. Coast Guard marking requirements.

Permit Fee.....	\$100.00
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2H. NORFOLK SOUTHERN CORP., #09-1359, requests authorization to replace their existing A-3.2 timber trestles crossing over Wayne Creek in the City of Norfolk, with a 37-foot wide, steel pile-supported, concrete cap and girder, double-track trestle, crossing over approximately 156 linear feet of Wayne Creek in the same alignment as the existing timber trestles. Staff recommends the assessment of a royalty in the amount of \$11,544.00 for the encroachment over 5,772 square feet of State-owned submerged land at a rate of \$2.00 per square foot.

Royalty Fees (crossing 5,772 sq. ft. @ \$2.00/sq. ft.).....	\$11,544.00
Permit Fee.....	\$ 100.00
Total Fees.....	\$11,644.00

2I. JOSEPH KUBIAK JR., #09-1051, requests authorization to install 205 linear feet timber replacement bulkhead aligned a maximum two (2) -foot channelward of a failing bulkhead and a 30-foot low profile timber groin adjacent to his property situated along the Little Wicomico River in Northumberland County. Staff recommends the assessment of a royalty in the amount of \$440.00 for the encroachment and filling of State-owned submerged lands.

Royalty Fees (encroachment/filling 410 sq. ft. @ \$1.00/sq.....	\$410.00
Permit Fee.....	\$100.00
Total Fees.....	\$510.00

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

There were no consent items to be heard.

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

Commissioner Bowman stated that Counsel had advised him that a closed meeting was not necessary.

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- 5. **CHESTER A. VAUGHAN, #09-1116.** Commission review of the New Kent County Wetland Board's October 1, 2009, decision to approve the construction of 88 linear feet of timber bulkhead with riprap scour protection at property situated along the York River.

Randy Owen, Environmental Engineer, Sr., gave the presentation with slides. Mr. Owen explained that the slides of the maps and aerial slides were for orientation purposes only and did not require opening the record.

Mr. Owen explained that Mr. Vaughan's property is a vacant lot. It is located at 6475 Stewart Road on the York River in the Barhamsville area of New Kent County. This is a residential area located approximately 2.2 miles downstream of the Town of West Point. The applicant's shoreline is best characterized as a sparsely vegetated sandy shoreline. While tidal wetlands vegetation was observed near the upstream reach of the property, the majority of the site presently consists of a sandy beach.

Mr. Owen said that the upstream neighbor's shoreline is unhardened and contains a vegetated tidal marsh. The immediate downstream neighbor, Mr. Vaughan's brother, had a bulkheaded shoreline. Tidal marsh vegetation was well established both upstream and

downstream of the Vaughan lots. A breakwater and nourished beach shoreline existed approximately 300' downstream of the applicant's property.

Mr. Owen stated that by way of history, Mr. Vaughan initiated construction of a timber retaining wall on his property during or before June 2008 without either a County building permit or Chesapeake Bay Act approval. The County, however, subsequently granted after-the-fact Chesapeake Bay Act approval for the wall on August 29, 2008. Unfortunately, since they did not even require Mr. Vaughan to submit an after-the-fact Joint Permit Application (JPA), VMRC staff was unaware of the wall's construction at that time. As such, the wall was additionally completed without the required beaches and dunes permit.

Mr. Owen said that on May 8, 2009, VMRC received a JPA from Mr. Vaughan requesting authorization to install knee braces to support the wall which had already begun to fail. That submittal was preceded by a verbal request from the applicant for permission to install a replacement bulkhead channelward of the failing structure. Since the County had not yet adopted the beaches and dunes ordinance, VMRC was functioning as the default permitting authority. Staff advised Mr. Vaughan that a new bulkhead with backfill would require a permit and formal public hearing. In light of that, the applicant alternatively sought authorization to install the knee braces to buttress the wall. Given the emergency nature and in an effort to prevent failure of the existing wall and additional adverse impacts to the sandy shoreline, staff authorized the installation of the knee braces on May 19, 2009. That work was performed and completed in the spring of 2009.

Mr. Owen explained that Mr. Vaughan's current application was received on August 7, 2009. He was again seeking authorization to construct a new timber bulkhead 5.5' channelward of the failing timber retaining wall.

Mr. Owen stated that since New Kent County adopted the model beaches and dunes ordinance in August 2009, a public hearing was scheduled and held by them on September 3, 2009. Although the project was approved as submitted, the Board agreed to reconsider the matter on October 1, 2009, given VMRC's concerns for (1) their failure to consider alternatives which minimized impacts to the tidal wetlands vegetation and sandy beach; (2) their consideration of the project without a written VIMS report and (3) the Board's failure to provide a 20 day notice of the hearing as required by §28.2-1403.6 of the Virginia Code.

Mr. Owen noted that at its October 1, 2009, hearing, the Board considered its staff briefing, the VIMS report and the testimony provided by Mr. Vaughan, his brother and the upstream adjacent property owner. The County staff advised the Board that the tidal vegetation that existed on the site the month prior was no longer present and that it was no longer an issue before the Board. No reason or explanation for its disappearance was offered.

Mr. Owen said that Mr. Vaughan had provided a handout describing his project. He explained that his purpose was to shore up the existing failing wall and to protect several trees that were at the top of the existing bank.

Mr. Owen said further that the Chairman advised the applicant that he was in receipt of an email from Virginia's Department of Conservation and Recreation - Shoreline Erosion Advisory Service (SEAS) that described the existing 88' long timber retaining wall as being a poorly constructed structure. Mr. Vaughan acknowledged that he had met with SEAS onsite and agreed that upland rainwater runoff from the top of slope had increased the problems with the existing wall. Mr. Vaughan also confirmed that SEAS had recommended that the existing bank be graded back to provide a more stable slope.

Mr. Owen explained that at the close of the public hearing, the Board discussed the project among themselves. One member voiced his opinion that people would likely start suing the State and the County if property owners weren't allowed to protect their property. Another member acknowledged that while it was the Board's responsibility to consider the property owner's shoreline erosion, he reminded the members of the Board that their specific charge was to protect the Commonwealth's sandy beaches. He concluded that he believed that the only long-term fix for the property involved the grading of the bank as was recommended by both VIMS and SEAS.

Mr. Owen said that the project was ultimately approved, as proposed, by a vote of 4 to 1. That approval was contingent on the applicant's agreement to install additional riprap as toe scour protection and to hand-grade the bank immediately behind the failing wall.

Mr. Owen also said that pursuant to §§ 28.2-1410 and 28.2-1411(A)(2) of the Code of Virginia, and by letter dated October 13, 2009, the Chairman of the Wetlands Board was notified of the Commissioner's intent to recommend Commission review the subject project. The Chairman was also apprised that this review was based on the fact that the Board's decision did not fully consider alternatives that would minimize beach losses, achieve a no net loss of vegetated wetlands and was in disregard to the impact assessment provided by VIMS.

Mr. Owen stated that staff did concur with the dissenting Board member's statement that the appropriate long-term solution for the applicant's shoreline was to grade the bank behind the failing wall to achieve a more stable slope. This was consistent with the recommendations of both VIMS and SEAS. Although the Board reconsidered this matter on October 1, 2009, their decision to approve it still ignored the Commonwealth's no net loss policy for tidal vegetation and resulted in yet additional adverse impacts to the sandy beach habitat and tidal marsh over and above that of their original decision. VIMS had advised that the absence of tidal vegetation on site in October, after it persisted in September, does not necessarily mean that the site is non-vegetated. Virginia's tidal brackish vegetation routinely experiences senescence or die off during the fall and winter months. Herbicides and removal of the vegetation could also result in a similar loss.

Mr. Owen said that staff was concerned with the Board's decision to allow Mr. Vaughan to eliminate additional wetlands and beach habitat in favor of protecting what was clearly a poorly designed and illegally constructed wall in the first place. County staff was correct in its characterization of the project as representing a self imposed hardship. Had the applicant sought the proper authorization initially, the inadequate design and construction techniques used would not have been authorized by the County and the wall would likely not be failing today. Staff also questions why the applicant is proposing an additional wall now, when the existing emergency knee brace repairs were only authorized by staff after they were certified by a Professional Engineer.

Mr. Owen explained that the Coastal Primary Sand Dunes and Beaches Protection Act declared that it was the duty of the Commission and Boards to "preserve and protect coastal primary sand dunes and beaches and prevent their despoliation and destruction" and whenever practical to "accommodate necessary economic development in a manner consistent with the protection of these features." Furthermore §28.2-1408 of the Code of Virginia established standards for use and development of coastal primary sand dunes, which by definition includes beaches and states:

No permanent alteration or construction upon any coastal primary sand dune or beach shall take place which would:

- (i) impair the natural functions of the dune/beach as described by the Act;
- (ii) physically alter the contour of the dune/beach;
- (iii) destroy vegetation growing on the dune/beach unless a determination is made that there will be no significant adverse ecological impact, or that the granting of a permit is clearly necessary and consistent with the public interest.

Mr. Owen stated that VMRC staff was of the opinion that the submitted application was not consistent with the standards for use and development of the beach at this site inasmuch as the project would permanently alter the beach resource and natural beach processes.

Mr. Owen said that the General Assembly in adopting legislation governing dunes/beaches recognized that these features, in their natural state serve as protective barriers from the effects of coastal flooding and erosion caused by coastal storms and provide an essential source of natural sand replenishment for beaches. The Board shall only grant the permit if and only if all the criteria are met (§28.2-1408.10.B). Since the property is a vacant lot with no infrastructure at risk to coastal flooding or erosion, the installation of a second wall with additional losses of sandy beach and tidal marsh habitat is unwarranted. While sandy beaches are indicative of moderate to high energy shorelines, the more seaward a structure is located, the more that structure is at risk to increased wave energies and failure. This was clearly illustrated during last week's nor'easter.

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Mr. Owen stated that due to the project's proposed permanent impacts/loss of beach habitat and the Board's failure to consider the above-referenced guidelines and/or alternatives that would minimize such losses, staff recommended that the Commission overturn the Board's decision and deny the application as submitted, leaving Mr. Vaughan recourse to submit a new request to address his shoreline erosion in a manner that is consistent with the Act's standards and guidelines. Staff recommended that he remove the inadequately designed and poorly constructed wall and grade the bank to a stable grade. Staff would also recommend that if a shoreline hardening solution was deemed necessary, that it be limited to a riprap structure whose channel alignment not exceed the alignment of the existing wall.

Commissioner Bowman asked for questions of staff.

Associate Member Robins asked for clarification of the staff recommendation as to whether their decision should be overturned or denied and whether this would require removal or to leave an option to reapply. Mr. Owen said the latter recommendation was for the 2nd wall and to look for a long-term solution, as he was only working to stabilize the bank. He said staff did not recommend removal.

Associate Member Tankard asked if the rip rap should be aligned channelward of the bulkhead or aligned with the existing wall. Mr. Owen stated that for the 2nd wall as there was a 2:1 ratio for the bank slope and there needed to be a long-term solution.

Commissioner Bowman asked if, before the permit was issued, anyone from the Wetlands Board looked at it or went out for a site visit. Mr. Owen stated that he believed that their staff did, but work was already being done by that time. He added that he was not absolutely sure, but the County was in attendance and could probably address that.

Commissioner Bowman asked if someone from the Wetlands Board was present who wished to comment.

Jeffrey Summers, New Kent County Attorney, was present and his comments are a part of the verbatim record. Mr. Summers stated that he was representing the Wetlands Board and VMRC did not give the Board the ten day notice as required by Code, Section 28.2-1410. He said that the VMRC staff were also at the Wetlands Board meeting and knew the results as well as being notified of the results electronically. He said also a letter was sent to VMRC. He explained that there was no method of notice or time limit spelled out in the Code.

Someone unknown spoke up and indicated that he believed it was Section 28.2-1411.

Mr. Summers said he might have given the wrong section, but whether the notice received by the Wetlands Board was timely needed to be determined by the Commission and the notice was late when you consider the electronic notification.

Bob Grabb, Chief, Habitat Management said that the Board must notify the Commission of the decision within 48 hours. He said the Commission then had ten days to respond and when it fell on a weekend or holiday, the deadline could be extended and allowable which meant it was within 10 days in this case.

Carl Josephson, Senior Assistant Attorney General and VMRC Counsel said it would have been the 13th and asked if it was received by that date. Mr. Summers said it was sent by VMRC on the 13th and received by the Wetlands Board later. Mr. Grabb stated it was the letter of notice sent within 10 days, not the receipt date of the letter. Mr. Josephson stated it was a long standing procedure to interpret the 10 days is the date of the letter. Mr. Summers stated he objected to which Commissioner Bowman that he was overruled.

Mr. Summers explained that the County Ordinance was verbatim of the Code. Commissioner Bowman asked him to reference the Code Section 28.2-1403. Mr. Summers agreed that it was parallel and verbatim and then referenced Section 28.2-1408, which he read into the record. He said that no one knows about the history of submerged aquatic vegetation in this area and staff had said they were not sure it had even been there. He said that the Wetlands Board considered it as well as the public benefits and detriments. He said they determined that what was put there was better than what was there otherwise and it was holding up the dune and preserving the trees. He said the Wetlands Board issued the permit as it was reasonable considering the circumstances and with the information they had been provided. He said they were requesting that their decision be ratified and realized that some re-engineering might be required.

Mr. Josephson asked if the dune was considered the hard cliff area or the shore area. Mr. Grabb read Section 28.2-1400, and explained that the words dune and beach were interchangeable in the Code. Mr. Summers said the beach was behind the wall. Mr. Grabb said that the limit of the dune ended at the structure, not behind the wall.

Commissioner Bowman asked if others wished to speak.

Chester Vaughan, applicant was sworn in and his comments are a part of the verbatim record. Mr. Vaughan said that he was a resident of Houston Texas. He utilized the staff slides to depict the history of the bank. He said that when Hurricane Isabel came the water was over the top of the bank and damaged his brother's property and with the last storm the water did go over the 1st wall, but not the second. He said before there was a wall the water would undercut the bank and that the beach was not always present as the erosion made the beach. He said he did not realize he needed a permit since he was not on the beach. He said at extreme tides and storms the water does come up. He said there were two design errors and described what was done. He said that more dirt was used in an attempt to preserve the walnut trees and the bank had been overfilled. He said the wall did yield, but it did not fail from an engineering standard. He explained that he was an Engineer but not a civil engineer. He said he did understand loads, and that the toe erosion for the 1st year was 1 to 1 1/2 feet. He said from October until the spring there

had been a lot of rain with a large number of northeasters and there was more erosion because of this weather. He said once he found out his error he had worked with the Wetlands Board and County to make the best of the situation. He said the wall had stood up to the last storm and erosion still had occurred. He said he felt the knee braces helped. He requested staff show a slide of the downstream property. He explained that downstream at Shores of York, the property had eroded. He said he needed to protect his property against further erosion. He said he was trying not to lose his beach to further erosion and the Wetlands Board agreed. He said they did discuss options and considered this the best solution. He said that the staff comments had been factual and the errors were not significant. He said he was here for 10 days when the hearing he thought would be in September. He wanted to do the work then. At the October hearing there was some minor procedural errors such as not considering the VIMS report.

There were no questions.

James Howell, upriver property owner, was sworn in and his comments are a part of the verbatim record. Mr. Howell explained that he had lived there for two years and there was never any vegetated wetlands on the Vaughan property. He said he did have some on his property.

Commissioner Bowman asked if this testimony was heard at the Wetlands Board hearing. Mr. Howell stated that this was discussed at that hearing. He said the SAV was described. He said staff recommendation was that if there was no bulkhead there would not be erosion. He stated that it did protect the bank and if it were to be removed there would be major erosion.

As there were no other public comments, Commissioner Bowman asked for discussion from the Board.

Associate Member Robins asked about the SAV presence and the record. Mr. Owen stated that Carl Hershner with VIMS was present. According to VIMS, they had found some vegetation on the site just recently.

Commissioner Bowman asked if Dr. Hershner wished to speak. Dr. Hershner said that they had confirmed the presence of wetlands. Associate Member Fox asked about the VIMS report and about the bulkhead. Dr. Hershner stated that a bulkhead in this setting was not appropriate and that the area being graded and installation of a breakwater were. Associate Member Fox asked if the neighbor's property had been considered. Dr. Hershner responded yes.

Commissioner Bowman said the Wetlands Board do good work even though it was difficult at times. He said it helped VMRC when they reviewed actions by the Code. He said they do not perceive anything, but just a necessary review. He read about Section 28.2-1408 which explained that the impacts of project on the dune must be considered

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and the impacts on the vegetation. He further read from Section 28.2-1413 as to the Commission was authorized to modify or remand if the Wetlands Board failed in its responsibilities and in this case that was here.

Associate Member Robins stated that he concurred with the staff recommendation as the decision made by the Wetlands Board did not comply with Sections 28.2-1403 (10B) or 28.2-1408, which he read a portion into the record. He said this was not the preferred solution nor did it follow the Wetlands Guidelines. He noted that VIMS had stated in their report that the bulkhead would alter the shoreline and there was a need for an alternate solution. He said the Commission should overturn the Wetlands Board decision to give them an opportunity to find an alternate solution. He moved to accept the staff recommendation to overturn the Wetlands Board decision. Associate Member Tankard seconded the motion. The motion carried, 9-0. The Chair voted yes.

Commissioner Bowman reminded those involved that this matter could be appealed to the Circuit Court.

No applicable fees - Wetlands Review – Wetlands Board decision was overturned; therefore, the project was denied.

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- 6. **TIMBERNECK, LLC, #09-1282**, requests authorization to construct a 10-foot wide by 273-foot long floating community-use pier with 20 wetslips, three (3) riprap breakwaters totaling 470 linear feet with 543 cubic yards of sandy material placed landward of the breakwaters, as beach nourishment and to place 2000 cubic yards of oyster shells on approximately 62,300 square feet of State-owned submerged land to create an oyster reef channelward of one of the breakwaters adjacent to their subdivision situated along Timberneck and Cedarbush Creeks in Gloucester County. The project is protested by a nearby property owner.

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

Mr. Neikirk explained that the approximate 1000-acre Timberneck Farms property was located in Gloucester County and was bordered by Cedarbush Creek on the west, Timberneck Creek on the east and Poplar Creek on the south. All three creeks were tributaries of the York River. Approximately one-half of the property was currently in agricultural use or was forested. The remainder of the property was comprised of the Catlett Island complex. The Catlett Islands were a series of low forested ridges and marshes bordering the York River on the south side of the property. The Catlett Islands were proposed for transfer to VIMS for incorporation into the Chesapeake Bay National Estuarine Research Reserve System (CBNERR). The “upland” portion of the property

was being developed as a residential subdivision with a maximum of 49 lots. All of the lots would be either waterfront or water view and the interior of the property would remain in forest and agriculture.

Mr. Neikirk said that the shoreline stabilization portion of the project called for the construction of three riprap breakwater/sill structures with associated grading and the placement of approximately 550 cubic yards of sand material landward of the breakwaters as beach nourishment and to support the planting of wetland vegetation. Two of the breakwaters were proposed on the southern end of the property near the mouth of Timberneck Creek. The third breakwater was proposed along an eroding bluff further up Timberneck Creek. Approximately 2000 cubic yards (43,000 bu.) of oyster shells were proposed to be placed on 63,200 square feet of submerged land to create two oyster reefs channelward of the southernmost breakwaters.

Mr. Neikirk explained that a community pier with 20 wetslips was proposed to extend from a common parcel located along Timberneck Creek. A 5-foot wide open-pile pier would lead from the upland to a 4-foot wide gangway that provides access to the concrete floating pier. The floating pier varied in width between 8 and 10 feet and was 273 feet long with 4-foot wide finger piers and the slips were designed to accommodate boats up to 25 feet in length. The pier extended approximately 75 feet channelward of mean high water and the creek was between 250 and over 400 feet wide at the pier site. Bathroom facilities were proposed on the adjacent upland.

Mr. Neikirk stated that the project was protested by Mr. Gregory Klimock, a property owner along Timberneck Creek across from the proposed pier. Mr. Klimock believed that the pier would encroach too far into Timberneck Creek and could interfere with the extension of his own pier. He also questioned why the pier could not be constructed along the York River frontage.

Mr. Neikirk said that in their report, dated October 9, 2009, VIMS questioned whether the erosion protection was warranted at this site and they recommended minimizing the filling of existing wetlands landward of the breakwaters where the beach nourishment and wetland plantings were proposed. With regard to the community pier, VIMS noted that wetslips and concentrated boat handling would introduce petroleum products and other pollutants into the waterway. They recommended the use of adequate garbage receptacles and appropriate signage which would encourage proper handling of garbage and the use of nearby pump-out facilities.

Mr. Neikirk noted that the Health Department, Division of Shellfish Sanitation stated in a memorandum dated November 3, 2009, that the project was located in an area presently condemned for the direct marketing of shellfish and the pier would not require an increase in the closure area. They noted that if the water quality improved to the point that the present condemnation could be removed, that a seasonal condemnation would still be required in the vicinity of the proposed pier. The Health Department had not yet

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approved the plan for sanitary facilities but they had discussed the plan with the applicant and they anticipated it would be approved soon. In accordance with §28.2-1205 (C) of the Virginia Code, any VMRC permit could not be issued until the Health Department had approved the plan for sanitary facilities.

Mr. Neikirk said that the Department of Game and Inland Fisheries noted that Bald Eagles and Mabee's salamanders were documented in the project vicinity and that the Catlett Islands supported a great egret and blue heron population but they did not anticipate any adverse impacts on these species. They recommended a time-of-year restriction between April 15 and June 15 to minimize impacts on anadromous fish species and they recommended the use turbidity curtains and appropriate erosion control measures during construction.

Mr. Neikirk said that the Department of Conservation and Recreation's Division of Chesapeake Bay Local Assistance noted the applicability of the Chesapeake Bay Act requirements and that these were regulated by the local government. They also noted that the project must comply with the Virginia Erosion and Sediment Control Handbook and Virginia Stormwater Management Regulations.

Mr. Neikirk stated that the project would not encroach on any existing oyster planting ground but there was a pending lease application in Timberneck Creek in the project area. As surveyed, the pier would not encroach on the pending lease; however, it was possible that the breakwaters and/or the proposed oyster reef would encroach on a portion of the area being applied for by Mr. George Marshall.

Mr. Neikirk said that Timberneck Creek was relatively deep with a controlling depth of approximately minus five (-5) feet at mean low water upstream to at least Fields Landing. Staff did not believe the project would adversely affect navigation within the creek. Erosion was clearly evident during staff's site visit at the two locations where the breakwaters were proposed. The breakwaters coupled with grading, beach nourishment and wetland planting appeared to be an environmentally acceptable method to control erosion at these sites.

Mr. Neikirk explained that the oyster reef portion of the project had been coordinated with VMRC's Conservation and Replenishment Department, VIMS, CBNERR, and the Chesapeake Bay Foundation. It appeared that portions of the oyster reef might be within the oyster planting ground being applied for by Mr. Marshall. Should the Commission decide to lease the ground to Mr. Marshall, the area occupied by the oyster reef could be excluded from any lease.

Mr. Neikirk said that several of the slips at the community pier would likely be used by property owners that were not actually riparian owners. Approximately 15 lots adjacent to the Catlett Islands terminate in the marsh, short of mean low water, and the Catlett Islands property was being transferred to the CBNERR. There were approximately 20

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lots along Cedarbush and Timberneck Creeks that were riparian lots and these lots would have a statutory right to construct private, noncommercial piers. Although staff typically recommended against providing slips at community piers for non-waterfront parcels, in this case staff recognized the fact that the shoreline could have been developed much denser under current local zoning and the property along the Catlett Islands could have been developed as waterfront if the island property were not being transferred to the CBNERR for conservation and research purposes.

Mr. Neikirk stated that after evaluating the merits of the project against the concerns expressed by those in opposition to the project, and after considering all of the factors contained in §28.2-1205(A) of the Code of Virginia, staff recommended approval of the project conditioned upon the applicant receiving prior approval from the Health Department for the sanitary facilities required for the community pier and with a condition that a sediment curtain be deployed during the construction of the breakwaters and associated beach nourishment and grading activities. Staff also recommended a royalty of \$122.30 for the encroachment of the beach nourishment on 2,446 square feet of State-owned submerged land at a rate of \$0.05 per square foot and a royalty of \$13,581.00 for the encroachment of the pier and slips on 9,054 square feet of State-owned submerged land at a rate of \$1.50 per square foot.

The applicant was present and Commissioner Bowman asked if anyone in support of the project wished to speak

Chuck Roadley with the Williamsburg Environmental Group and representing the applicant was sworn in and his comments are a part of the verbatim record. Mr. Roadley explained that they concurred with the staff’s recommendation and he would answer any questions from the Board.

There being no one present in opposition of the project, Commissioner Bowman asked for discussion or action by the Board.

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

Royalty Fees (encroachment 9,054 sq. ft. @ \$1.50/sq. ft.).....	\$13,581.00
Royalty Fees (beach nourishment 2,446 sq. ft. @ %0.05/sq. ft.).....	\$ 122.30
Permit Fee.....	\$ 100.00
Total Fees.....	\$13,803.30

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7. **RICHARD ZWEIFLER, #08-2241**, requests authorization to construct a 14-foot by 24-foot open-sided boathouse over the boatlift at the existing private, non-commercial pier serving 976 Hurds Road in the Quail Run subdivision, situated along a cove tributary to the Eastern Branch of the Lynnhaven River in Virginia Beach. The project is protested by an adjoining property owner and another neighbor.

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

Mr. Worrell explained that although the applicant's house was recently constructed, the Quail Run subdivision was an older residential subdivision with several private piers extending from the existing riparian properties. There was an existing boathouse serving a riparian property just up the cove within sight of this project in the northwest direction. Furthermore, there were several existing roof structures on private piers upon leaving this cove tributary and heading north along the Eastern Branch of the Lynnhaven River.

Mr. Worrell stated that in December of 2008, Mr. Zweifler submitted an application requesting authorization to construct a private pier with an open-sided boathouse. The boathouse roof structure was later deleted from the proposal after protests were lodged by an adjoining property owner and another neighbor. Once revised plans excluding the roof structure were submitted, staff determined that the pier proposal met the statutory authorization contained in §28.2-1203(A)(5) of the Code of Virginia, and a No Permit Necessary (NPN) letter was issued to the applicant. Staff then notified the protestants of the pier's exempt status.

Mr. Worrell said that the pier was recently built in accordance with the revised plans, including a single boatlift. Now the applicant had requested to cover that boatlift with a 14-foot by 24-foot (336 total square feet) open-sided boathouse. Staff again notified the adjoining property owners and neighbor of the new proposal.

Mr. Worrell explained that the protests received from the adjoining property owner and a nearby neighbor included detrimental view impacts, adverse wildlife impacts, a complaint that the pier and boathouse would serve as a navigational impediment, and a concern that this project could encourage others to construct similar roof structures.

Mr. Worrell noted that the City of Virginia Beach – Waterfront Operations Division had approved the pier and boathouse proposal, as had the U.S. Army Corps of Engineers, who issued an RP-18.

Mr. Worrell said the total square footage of the proposed open-sided boathouse was well below the 700 square-foot exemption criteria contained in §28.2-1203(A)(5) of the Code. Had the boathouse proposal not been protested by the adjoining property owners, staff would have considered it statutorily authorized along with the private pier. In this case,

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staff believed the open-sided design only minimally added to the visual obstruction already presented by the pier and boatlift. While staff was sensitive to the protests of the neighbors, private piers with open-sided boathouses were very common along the waterways in Virginia Beach. Therefore, staff recommended approval of the 14-foot by 24-foot open-sided boathouse, as proposed.

After some discussion about the structure and the boat, Commissioner Bowman asked if the applicant wished to speak.

Robert Simon, agent for the applicant, was sworn in and his comments are a part of the verbatim record. Mr. Simon stated that he did not have anything to add and that VMRC's staff had done a good job. He also stated that this was the only place they could put this structure.

No one was present in opposition. Commissioner Bowman asked for discussion or action.

Associate Member Robins stated that he appreciated the concerns expressed regarding this project, but this structure was low profile and would not add to the impact. He moved to approve the project. Associate Member Laine seconded the motion. The motion carried, 9-0. The Chair voted yes.

Permit Fee.....	\$100.00
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- 8. **COLES POINT TAVERN LLC, #09-0116**, seeks after-the-fact authorization to retain a 110-foot long by 10.5-foot wide deck with a 30-foot long by 10.75-foot wide roof attached to existing building, and a 115-foot long by 6-foot wide pier constructed below the 110-foot deck adjacent to property at Coles Point Tavern situated on the Potomac River appurtenant to the shore of Westmoreland County. Project is protested by several nearby property owners.

Dan Bacon, Environmental Engineer, Sr. gave the presentation with slides. His comments are a part of the verbatim record. He provided a letter of protest from Mark Drewey and Mary Wethers, as a handout.

Mr. Bacon explained that Coles Point Tavern was located in the Potomac River in the Coles Point section of Westmoreland County. The nearest town to the tavern was Kinsale. Since the tavern was located in the Potomac River the structure was actually located in Saint Mary's County, Maryland. The tavern had been in place at this location since 1953. The tavern served meals and sold alcoholic beverages and patrons visited by both car and boat. The area around the tavern was residential in nature.

Mr. Bacon said that in June of 2007, Mr. Rudge, the owner of Coles Point Tavern, applied through Saint Mary's County to expand the tavern by extending the upper deck and adding a lower deck to the facility. The expansion provided outdoor seating for up to 100 patrons, as well as access for boats that moor along the lower deck. There was indoor seating for 100 and standing room for an additional 99. Mr. Rudge did not apply for a permit from VMRC. Although lying in Maryland, permits were required pursuant to Chapter 191 Acts of Assembly 2005. That Act amended §28.2-101 of the Code of Virginia which served to expand the jurisdiction of the Marine Resources Commission. This amendment to the Code followed a U.S. Supreme Court decision that confirmed Virginia's authority to manage or regulate activities by riparian owners along the Virginia shoreline even though those activities occur over Maryland's submerged land.

Mr. Bacon stated that in June 2007, Mr. Rudge applied for and received building and health department permits from Saint Mary's County in Maryland to expand the deck. Shortly after that Mr. Rudge constructed both the upper and lower decks. In early September 2008 staff received a recorded phone message informing the Commission that the expansion at Coles Point Tavern had not received the proper permits from the Commonwealth of Virginia. On September 15, 2008, Commission staff, along with Westmoreland County Wetlands Board staff, performed a site visit at the tavern at which time it was confirmed that Mr. Rudge had not received the proper VMRC permits to expand the tavern.

Mr. Bacon explained that a Notice to Comply was issued on February 9, 2009. That notice directed removal of the unauthorized structures within 30 days of receipt of the Notice, or submittal of an after-the-fact application by Mr. Rudge to retain all or portion of the unauthorized structures within 30 days. On February 2, 2009, staff received his after-the-fact application. The applicant has maintained that since the tavern was in Maryland waters that he did not realize that a permit was required from the Commonwealth of Virginia. The applicant had applied for and thought that he had received all the proper permits that he needed for the expansion of the Tavern from the State of Maryland.

Mr. Bacon said that in response to VMRC's public interest review, five protests were received on the after-the-fact application. The Protestants complained that the expansion of the tavern had caused greater noise and unnecessary disturbances throughout the evening and early morning hours.

Mr. Bacon stated that the Virginia Department of Conservation and Recreation had stated that they were not opposed to the after-the-fact project. Should the Commission decide to approve the after-the-fact application, however, the Virginia Department of Health had recommended the following conditions be included in the permit:

1. Vessels shall only be permitted to moor during operating hours;
2. No overnight mooring or occupancy of vessels is permitted;

3. Only patrons of Coles Point Tavern shall have use of the moorings.

Mr. Bacon said that VIMS had commented that adding additional decking and a portion of roofing over the new deck may slightly increase the shading provided by the structure. However, compared to the impacts associated with the original structure, the additional shading impacts from the new pier sections should be relatively minor. Submerged Aquatic Vegetation (SAV) surveys from 2000 through 2008 indicated that there were no documented SAV resources in the vicinity of the project. In addition, since increased boat traffic can create additional wake activity and introduce additional petroleum products, toxicants, bacteria and garbage into the Potomac River, signs encouraging the proper handling of garbage and waterway stewardship should be posted.

Mr. Bacon stated that no other State agencies had commented on the project.

Mr. Bacon explained that it should be noted that Westmoreland County considered the tavern to be located in Maryland so they exerted no zoning authority over the construction or activity at the tavern. St Mary's County staff had indicated that the operation of the tavern was under the jurisdiction of the Maryland State Liquor Board. Specifically, it was St Mary's County and the Liquor Board that regulated the hours of operation, the issuance of liquor and pool table licenses, building permits, and addressed any nuisance complaints associated with the operation of a liquor establishment. Staff also understood that there was a reciprocity agreement between the St Mary's County Sheriff Department and the Westmoreland County Sheriffs Dept. As such, this situation was somewhat different from the Commission's Harrison Fishing Pier decision that was upheld by the Court of Appeals. In that case the local use and zoning issues were handled by the City of Norfolk, not the Commission. The Court of Appeals recognized the City as being the proper authority for such issues.

Mr. Bacon said that the unauthorized expansion of the Coles Point Tavern appeared to have resulted from an unintentional oversight on the part of Mr. Rudge. Although the expansion occurred in 2007, prior to 2005 permits were not required from the Marine Resources Commission for work that was accomplished in the Potomac River. Mr. Rudge did receive the necessary building permits and authorizations from Saint Mary's County, Maryland.

Mr. Bacon explained that while staff was sympathetic to the landowners whose upland properties may be impacted by the project, it appeared these were upland issues. Since the operation of the establishment was under the jurisdiction of the Maryland Liquor Board, the protestants concerns were largely outside the Commission's jurisdiction. In light of the foregoing, and after evaluating the merits of the entire project against the concerns expressed by those in opposition to the project, and after considering all of the factors contained Section 28.3-1205(A) of the Code of Virginia, staff recommended approval of the project. Given the situation and circumstances, staff was not recommending that triple fees and a civil charge be assessed.

Associate Member Robins asked if this has been an ongoing problem. Mr. Bacon explained that this had been the first case the Commission had dealt with where Maryland had issued a permit. Commissioner Bowman also said that this was the first time this had come up and explained that it was a result of a decision by the Supreme Court who gave Virginia some jurisdiction in these type of developmental projects. He said he could see and understand how this could occur, as told in the staff recommendation, where the individual would think they had all their permits. He said that he saw this as an opportunity for State and other jurisdictions in and outside of the State to work together on how this would be handled in the future.

Associate Member Fox stated that he felt that it was the responsibility of St. Mary's to inform the individuals of the need for contact with VMRC regarding any permits, as well as the reverse with VMRC informing them of possible permit requirements for the State of Maryland.

Commissioner Bowman asked if the applicant wished to speak.

Scott Rudge, applicant was sworn in and his comments are a part of the verbatim record. Mr. Rudge provided a photo for the Board to show them that the project did not exceed the original footprint and that actually there had been a bigger pier there historically. He said that the pier had been condemned for not having an emergency exist. He said this pier was in existence pre-1960 as a fuel dock. He said he thought it was in compliance when he bought it.

Commissioner Bowman asked if anyone else in support wished to comment. There were none. He asked if anyone in opposition wished to comment.

Tom Offringa, protestant and nearby property owner, was sworn in and his comments are a part of the verbatim record. Mr. Offringa stated that he lived two doors down from the tavern. He said his complaint was for the all night parties every weekend and having the deck added to the noise. He said they had called the police, but no one would do anything. He stated that Westmoreland County did not want to take any action and they did respond to calls, but not timely. He said the prior owners of his property did not have a problem with it, as they were patrons of the tavern. He said this was not a nice, quiet peaceful pub. He said that a triple shooting had occurred, fights, yelling, and shouting until closure at 2 a.m.

Commissioner Bowman asked if they had complained to the Maryland Liquor Board. Mr. Offringa responded, yes. Commissioner Bowman stated that it was not within the VMRC jurisdiction and he did sympathize with them.

Mr. Offringa said that the structure led to the noise, as the tavern is there. He said it impacts the environment with the boat and rafting activity as well as the big boats that

tie up to it. He said there needed to be a limit for overnight dockage and some control over the operation time. He stated also that this impacted his property value.

Michael Conley, protestant, was sworn in and his comments are a part of the verbatim record. Mr. Conley said that VMRC should determine whether building here was in the public interest and necessary. He said that Maryland had said they needed the deck as an emergency exit. He said the fire escape was adversely affecting the environment which outweighed the benefits, as it was a marina like polluter and noise polluter. He said in the ten years he had been there, water fowl was less in the area. He said a mini marina had not been approved by Maryland. He said that Maryland did have concerns with alcohol being served and not having a permit to sell it. He said that Maryland's law enforcement had been there for that purpose. He said that the owners did not listen to them or wish to compromise. He said they seemed to be rewarded for not following the process and when he went through all the permitting processes. He said if their after-the-fact approval was granted, why worry about following the rules? He said those who try to do right pay taxes in Westmoreland County. He said this fell between the gaps and asked that the Commission do what they could to control it. He said the real question was if it was applied for before the fact, would the Commission have allowed it.

Commissioner Bowman asked if there was anyone else in opposition who wished to speak. There were no more. He offered the applicant two minutes to provide rebuttal comments.

Mr. Rudge in his rebuttal provided the Board with a petition of those who support it. He stated the music was inside not out on the deck, it was in a preexisting location, non-smoking inside, smoking outside and they closed at 1 a.m. He stated that the nearby house had just recently been sold and they paid property taxes in Virginia.

Commissioner Bowman asked for discussion or action from the Board.

Associate Member Schick stated that he lived in Westmoreland County and he had been at the tavern himself. He explained that the Coles Point Tavern did have a colorful past with gambling, pool hall and live bands. He said that VMRC could not address the use as before when similar projects had been approved. He said the noise situation should be addressed by St. Mary's County and efforts made to come up with a compromise. He moved to accept the staff recommendation. Associate Member Holland seconded the motion.

Associate Member Fox stated that the applicant was obligated to get a permit and triple fees should be assessed. Associate Member Schick stated that a case before was not allowed to be built as the system was broken and it was not the applicant's fault. Associate Member Robins stated he had some concerns with the Protestants' concerns. He said he was concerned with the use and how it related to water dependency in this case. He stated the fire exit was necessary. He noted that the public needed some

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consideration here and he could not support the motion. Associate Member Tankard stated that he wished to echo Associate Member Robins comments. He said there were public concerns and he would not have supported allowing the deck with a restaurant. He said there would be trash, which was a problem for the environment. He stated he would vote against the motion. Associate Member McConaugha stated he was not sure of the use, but ten feet of deck was reasonable for a fire exit. He stated that three feet would not have been enough. He noted that the Maryland Liquor Board would be hearing this matter and should be in control of the situation not VMRC. Commissioner Bowman explained that he had dealt with these types of situations during his many years in Law Enforcement, but there were also two sides to a situation. He said if it were run in an orderly manner and effort was made to get along with the neighbors, those differences could be worked out.

The motion carried, 5-4. The Chair voted yes. Associate Members Bowden, Laine, Robins and Tankard all voted no.

Permit Fee.....	\$100.00
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- 9. **MARK CROSSLAND, #09-0548**, requests after-the-fact authorization to retain a 448 square foot, flat-roofed boathouse, an 18-foot by 26-foot L-head and a 41-foot by 15-foot deck (1,085 square feet of deck) adjacent to his property at 18336 Possum Point Road, situated along Quantico Creek in Prince William County. Continued from the September 22, 2009, Commission meeting.

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

Mr. Bacon explained that Mr. Crossland’s property is located along Potomac Creek in a residential neighborhood approximately 2 miles from Potomac Creek’s confluence with the Potomac River. The pier and boathouse extended approximately 81-feet channelward of an existing timber bulkhead. The creek was approximately 2300 feet wide at the project site. There were several other private piers and boathouses in the vicinity.

Mr. Bacon stated that on September 2, 2008, Mr. Crossland submitted a Joint Permit Application (JPA) to replace an existing deteriorated floating dock system and boathouse. The drawings that were submitted with the JPA depicted an A-frame type roof on top of a 30-foot by 15-foot open-sided boathouse. On September 8, 2008, a No Permit Necessary letter (NPN) was sent to Mr. Crossland authorizing the construction of an 80-foot long by 6-foot wide open-pile, non-commercial pier, a 30-foot by 15-foot open-sided boathouse, including a 26-foot by 20-foot L-head, and a 5-foot wide by 50-foot long L-shaped catwalk along with five (5) additional mooring piles. This NPN was based on the fact that

the pier and open-sided boathouse were not protested and met the criteria for exemption, and because the combined deck area applied for totaled less than 400 square feet.

Mr. Bacon said that in early January 2009, staff was advised that a flat roofed structure had been built at Mr. Crossland's property instead of the A-roof applied for. On January 28, 2009, staff conducted an on-site inspection to confirm this. During that visit, staff determined that the boathouse and the pier were not constructed as applied for and therefore constituted a violation of Chapter 12 of Title 28.2 of the Code of Virginia.

Mr. Bacon explained that it was not a question of the Commission designing the boathouse, or even approving the pitch and construction of the boathouse roof. The roof in this instance had railings and access stairs and was clearly designed to serve as additional pier deck space. As a practicing attorney, Mr. Crossland should have known the precise requirements to qualify for the codified exemption. The pertinent Code section was even specifically referenced in the NPN letter (VMRC #08-1661) staff sent to Mr. Crossland on September 8, 2008.

Mr. Bacon stated that as a result, a notice to Comply was sent to Mr. Crossland on February 9, 2009. That Notice directed either removal of the unauthorized flat roofed structure and unauthorized additional deck area by March 11, 2009, or the submittal of an after-the-fact application and request to retain all or a portion of the structure by February 24, 2009. The Notice also specified that any request for after-the-fact consideration must be accompanied with a written statement explaining why the work was not constructed as depicted in the drawings that were submitted in September 2008.

Mr. Bacon said that on April 23, 2009, two months after the deadline, staff finally received Mr. Crossland's request for after-the-fact approval of the flat roofed boathouse and the larger pier platform. Mr. Crossland did not, however, include with his after-the-fact request a letter explaining why the boathouse and pier were constructed differently than that originally proposed in his application. Mr. Crossland has also thus far refused to identify the contractor that constructed his flat-roofed boathouse.

Mr. Bacon explained that several attempts had been made by staff to get the after-the-fact ad placed in the local newspaper. Mr. Crossland had also refused to contact the newspaper to ensure proper payment for the required placement of the advertisement. As a result, the actual public interest review had not been completed although the adjacent property owners had been notified and did not object.

Mr. Bacon said that the project would not encroach on any public or private leased oyster ground. No protests had been received from other State agencies.

Mr. Bacon said that when reviewing proposals to build over State-owned submerged lands, the Commission's Subaqueous Guidelines directed staff to consider, among other factors, the water dependency and necessity of the proposed structure. Staff does not

consider the flat roofed deck and larger than authorized pier platform to be either water dependent or necessary. In addition, the sum total of all of the combined deck areas was now in excess of the 400 square feet authorized by Code. The pier platform area alone was approximately 501 square feet, and the flat roofed deck added an additional 448 square feet resulting in a total deck area of 949 square feet.

Mr. Bacon stated that as such, staff recommended the Commission direct the removal of the flat roofed structure and staircase. At a minimum, in lieu of complete removal and reconstruction of the roof, staff believed the stairs and railings should be removed. Staff would not object to the Commission's approval of the additional 101 square feet of pier platform since that represented only a minor increase in the pier deck area over that which was authorized by Code, and the neighbors had not objected. As mentioned previously, however, no newspaper ad had yet run.

Mr. Bacon said that should the Commission elect to grant approval for all or any portion of the unauthorized structures, staff believed an appropriate civil charge should be assessed to Mr. Crossland. In this case, while staff believed the environmental impact was minor, staff considered the degree of deviation major considering the fact that Mr. Crossland was a practicing attorney and should have been aware of the legal requirements for permits as well as the fact that he had been unwilling to divulge the contractor information. In the event that staff was apprised of the contractor's name, additional action against him may also be warranted.

There were no questions of staff.

Commissioner Bowman asked if the applicant or his representative was present and wished to comment.

Craig Palubinski, agent, was sworn in and his comments are a part of the verbatim record. Mr. Palubinski explained that he had been contracted to help with the after-the-fact permit. He said that it had been established that this was an existing structure and in 1998 there was a covered boat slip. He provided a photograph for the record.

Mark Crossland, applicant, was sworn in and his comments are a part of the verbatim record. Mr. Crossland said he had bought this property because of the location on the creek. He said Bill Conner was his agent and he was told he had done this work for 50-60 years.

Commissioner Bowman stated an address for Mr. Conner was needed. Mr. Crossland said the application was sent to his address. He said he was told by Mr. Conner that the VMRC had approved a flat roof in the past. Commissioner Bowman asked why as an attorney had he taken the word of a contractor. Mr. Crossland said he was told that yes the project could be done as it had been approved by Stafford County.

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Commissioner Bowman asked if Mr. Conner was still living? Mr. Crossland stated that he had cancer. Commissioner Bowman asked him why he did not bring him to the hearing. Mr. Crossland stated he could not find him. He stated he took his word as a matter of fact that this was done in the past. He said he hoped with his new agent he could get out of this problem and what he had done could be approved because it added to the aesthetics of the area and was built correctly.

Commissioner Bowman said it was two months before staff had gotten the after-the-fact application and he had still not approved the ad. Mr. Crossland stated he had done so the previous week.

Mr. Palubinski stated that payment for the ad was required up front and there had been some confusion between him and the staff and the newspaper.

Associate Member Schick asked about the pitch of the roof. Mr. Crossland said it was there when he bought it and had been there for 15 years. He said the floating dock tubes got water in them and sunk originally. Associate Member Schick asked why did he replace it. Mr. Crossland said he was told to. Associate Member Schick asked if the drawing was done by him. Mr. Crossland said that was correct and said it was done with Mr. Bacon after he was shown what was going on.

Bob Grabb, Chief, Habitat Management, stated that Mr. Conner did receive the VMRC hearing notice and called to say he did not build the boat house and that he just referred Mr. Crossland to Robert Delaney who might do it. Mr. Grabb said that Mr. Conner had cancer, but would come next month, if necessary, to testify to that fact.

Commissioner Bowman asked if Mr. Delaney said he would build it. Mr. Crossland responded no. Commissioner Bowman stated he was under oath and asked who did build it. Mr. Crossland stated that Mr. Conner had hired others to build it.

Commissioner Bowman stated that this matter would be deferred until next month and the Commission would require both the applicant and contractor(s) to be present.

Continued until the December 2009 meeting.

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10. **ENFORCEMENT: CLANCY HERR, #04-0992.** Show Cause hearing to discuss why Mr. Herr should not be found in violation of §§ 28.2-1203 and 28.2-1212 of the Code of Virginia for the construction of a 298-foot long pier without a permit from the Commission and in excess of that authorized by staff, at his property situated along Pungoteague Creek in Accomack County.

Continuance request granted until the January Commission meeting.

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The Commission broke for lunch at approximately 12:04 p. m. The meeting was reconvened by Associate Member Holland at approximately 12:50 p.m.

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SPECIAL RETIREMENT PRESENTATION

Commissioner Bowman announced that this would be Carl Josephson’s last meeting with the Commission, who had served as Counsel for the Marine Resources Commission for approximately 10 years and made what he referred to as a bittersweet presentation. He read from the Certificate and congratulated him on his retirement and wished him good luck.

Carl Josephson, Senior Assistant Attorney General and VMRC Counsel stated that it had been an honor and privilege to work with the Commission. He said he was very impressed with the current Board members. He stated that staff had been professional and dedicated and he thanked them for their assistance in defending the cases that were heard by the Circuit Courts.

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CRAB LICENSE BUYBACK PROGRAM

Commissioner Bowman noted that he had requested the agenda be modified so staff could review the Crab License BuyBack Program.

Jack Travelstead, Chief, Fisheries Management, gave the presentation and his comments are a part of the verbatim record. Mr. Travelstead stated that the buy-back was almost completed, as the letters were mailed and the checks would soon be mailed. He said there had been lots of phone calls regarding why their bids had not been accepted and calls about tax information. He stated the program was successful. He said when NMFS had asked staff what they would consider a success program they had responded 150 licenses being bought back. He said the number ended up being 359 purchased with the \$6.7 million. He said 50%, or \$3.3 million, had been allotted for the full-time and 59 crab and peeler pot licenses were purchased. He said, for the part-time, 131 license bids had been accepted and for the waiting list of 450, 169 license bids were accepted. He said there were now 359 licenses no longer a part of the fishery; reducing the number of licenses by 18%.

Mr. Travelstead explained that the long-term goal was to reduce the overcapacity. He said the regulation had reduced the pots set by 15% and the buyback by 18%. With a third of the pots eliminated, it would help in the long-term.

Mr. Travelstead stated that a total of 664 bids had been received worth \$30.4 million. He explained that the average payout was \$57,000, full-time; \$18,500, part-time; and \$8,700, waiting list. He said that staff had had no prior experience in running such a program developed methods that were unbiased, and the full range of bids was from \$500 to one bid for \$175,000. He said they would not be releasing individual information, as it was protected by Code. He said a press release had been sent out and articles were in the newspaper today. He said it was very successful and he wished there was more money, but none was anticipated. He said this went a long way to making the goal.

Associate Member Fox noted that Virginia's program had been a success and that Maryland's had been a failure. Mr. Travelstead stated that he was not sure that it was a failure but they came back with a new approach.

Commissioner Bowman asked if there had been any complaints. Mr. Travelstead explained that the buyback program was never about the buying of a person and the regulation says that the license is gone. He explained that a person does have the option to buy a license and have it transferred into their name.

Mr. Travelstead explained that 75,000 pots were out of the fishery and the long term goal had been achieved. He said he was told that the Blue Crab Management Advisory Committee was interested in the short term of the buyback and concerned about stopping all transfers which would prevent re-entering the fishery. He explained the committee felt that staff had a contract with the licensee who sold the license and if there could not be a transfer, it would be a breach of that contract.

Mr. Travelstead explained that there could be a transfer as set forth in the regulation, but it was limited to 100 transfers per year, unless it was a transfer to a family member due to incapacitation or death of the licensee.

Associate Member Robins said that Jack had stated the CMAC sentiments correctly. He said as far as long term management this was a big step forward because of the buyback program's success.

Associate Member McConaugha explained that the latent effort was always a big concern and one-third had been eliminated. He said that all economists have said that the fishery was overcapitalized. He said that this had been a successful operation.

Mr. Travelstead stated that the Universities of Virginia and Maryland had both called about a buyback study.

No action was necessary.

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11. PUBLIC COMMENTS:

POTOMAC TRIBUTARIES AND RAPPAHANNOCK RIVER (WICKS) SEED PLANT PROJECT

Douglas F. Jenkins, Sr., waterman, was present and his comments are a part of the verbatim record. Mr. Jenkins said he was concerned with the opening on December 1st of the oyster season for the Yeocomico, Nomini, Coan and Rappahannock (Wickes) Rivers. He said they were required to work one area and to move from one to another. He said this was a bad plan. He said the way it had worked in the other areas of the Rappahannock had meant that the boats were on top of each other and the smaller boats had been pushed out. He said when the Shellfish Management Advisory Committee met he was sick and he had sent word to open all the areas at one time to spread out the boats to all the areas. He said that the printout (notice) stated that the Commission can change the plan at any time. He said he requested that this be discussed and that it be approved that all areas would be opened on December 1st and water would be allowed to go where they want. He said that they can report to the Marine Police each day to tally the oysters; it had been done in the past in the Potomac River and was successful. He said in that area up there (Potomac Tributaries), there was no natural spat strike. He said other areas such as the Rappahannock, York and James have spat strike all over and they need an area to work without traveling all over the State. He said the Commission every year does the same thing.

Commissioner Bowman asked for comments by staff.

Jack Travelstead, Chief Fisheries Management, explained that they would be changing slightly. He explained further that the Blue Ribbon Oyster Panel report recommendation was to study the effectiveness of seed plants to determine cost benefit and were looking to see a 1:1 ratio. He said that the Commission should not stop the seed plant project this year, as staff would be monitoring to get the statistics. He said if the 1:1 ratio goal was met then management could change. He said this was not meant to maximize the fishermen, but to maximize the science. He stated that there will be a lot of data for the meeting in the spring with BROP and to formulate a management plan.

Dr. James Wesson, Head, Conservation and Replenishment Dept., explained that because of the amount of response, staff was planning to open the Potomac tributaries and the Wickes area in the Rappahannock at the same time. He said if the Commission were to open up more than three places at same time it would be hard to keep up with it and opening the areas one at a time would help staff to obtain more accurate data.

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Commissioner Bowman stated that he empathized with the industry. Dr. Wesson said the Commission goes through this every year. He said in the meeting processors said they wanted to stagger the seasons for areas of harvest, because they want the catch to be spread over the entire season so that they would be able to provide a Virginia product over a longer period of time. He said staff was trying to balance the season openings for the benefit of both the watermen and the processors.

Associate Member Robins stated that Roger Mann would be developing a biological reference point specific for one area or all management areas. He further stated that Dr. Mann would be coming to the BROP to discuss it and possibly how to incorporate it into the goals that were set up. He said then the Panel would be able to move forward in its discussion of the management plans.

Dr. Wesson explained that Dr. Mann would be developing this data for the Great Wicomico River, as not all areas would be done before the BROP meeting. He said there would be two meetings to go over the data and they had a GIS system being developed to show the catch by area. He stated that then they would be able to develop milestones or objectives for all areas.

Associate Member Schick asked if it was being discussed to bring seed to the areas that did not have natural strike. Dr. Wesson stated this was a budget issue more than a management one. He said it was unlikely that funding would be allotted for moving seed.

Mr. Travelstead explained that the State General Funds were approaching zero. He said that the Federal dollars continued to increase for agencies, but it was clear that the federal monies were allotted for ecological restoration and sanctuaries and this limited what could be done. He said they tell the federal agencies about maintaining harvest for the industry, but they do not care to help the industry. He said that the industry support was the biggest part of the situation and if the industry was not supported, it would just go away.

Mr. Jenkins stated their concern was that the Baylor grounds were set aside for the public, but they could not use it because of the restrictions. He said that in the past that seed was moved, but now the State was only buying shells from the processors. He said if the seed were to be moved they could become marketable oysters. He said the tributaries of the Potomac were vacant except for a little area here and there. He said things were not being done the same way, as with prior Replenishment Officers. He said getting dollar for dollar was not what was done by the State in the past and they had made plans to benefit everyone. He said there was vacant bottom just sitting there and the program needed to benefit everybody. He said they were tired of having it taken away from them.

No action was taken.

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- 12. PUBLIC HEARING:** Proposal to amend 4 VAC 20-620-10 et seq. "Pertaining to Summer Flounder" to open the late season offshore flounder fishery on the last Monday in November and to reduce the directed fishery landing limit and bycatch fishery landing limit.

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

Mr. Grist said that industry had requested a reduction in the trip limit from 10,000 pounds to 7,500 pounds for both the fall and winter directed fisheries. He said there was also a change in the start date from the first Monday in December to the last Monday in November.

Mr. Grist stated that another issue was that the bycatch of summer flounder was becoming a directed fishery when other species were being harvested. He said the 10% bycatch tolerance was identified at the previous Commission meeting as an issue, and staff had originally developed recommendations on the issue. However, new information had come in that staff wanted to share with an ad-hoc committee of industry members before acting further on the issue.

Mr. Grist stated that staff recommended that there be a reduction made to the fall and winter directed fishery to 7,500 pounds/trip limit, to start the season on the last Monday in November, 11/30/09, and to form an ad hoc committee and come back to the Commission at a later date to recommend a public hearing specific to the bycatch fishery.

Associate Member Fox stated that he was concerned with the bycatch fishery catching and throwing back the fish and how much can occur before taking action. Mr. Grist stated that it not much of this occurs during this time of year. He said it could be discussed at the January meeting. Associate Member Fox asked with the poundage limit what harm would it be to act now. Mr. Grist stated that staff needed to work with the industry to find a solution, providing industry updated information and discussing this at an ad-hoc meeting, before acting.

Associate Member Bowden stated that it was not much of a problem this time of year, June, October or November. He said he had no problem with it being discussed with industry as there was time to work it out, but something would be necessary by the spring.

Commissioner Bowman opened the public hearing.

James Fletcher, fisherman, was present and his comments are a part of the verbatim record. Mr. Fletcher stated he had a problem with the reduction in the poundage and no problem with changing the date. The industry had requested the reduction in fish to 7,500 pounds for economic reasons not for the fish or fishermen. He said if the number of fish were to be reduced it would mean a reduction in the number of employees that processors

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hire. He said there were other species, such as weakfish and croaker that keep the processors' employees in a job year-round. He stated that a number of processors had gone out of business. He asked that the poundage stay at 10,000 and the date be changed as recommended. He said if there was a change in the poundage, the big boats would not survive as they work up and down the coast. He said at one time there were 1,100 trawl boats, now that was down to 250. He said there were only 7 or 8 boats that had intentionally targeted the flounder and took advantage and the other 225 boats were going to be penalized because of those few. He suggested efforts be made to penalize those few individuals who break the rules.

Mr. Fletcher explained that the NMFS statistics had shown that 50% of saleable fish were being discarded because of the regulation and it was amended to stop the discard. He said if the Commission supported this action the individuals who were employed by the processors would be gone.

L. D. Amory, Amory Seafood, was present and his comments are a part of the verbatim record. Mr. Amory stated that he supported the amendments to the regulation and had worked with staff to get something approved.

Associate Member Fox asked what his response was to Mr. Fletcher's comments. Mr. Amory explained that this would extend the catch over the season and keep individuals working longer at the processors.

Commissioner Bowman asked for discussion or action by the Board.

Associate Member Robins stated that because of his association with someone in the industry he would be excusing his involvement in any action taken.

Associate Member Bowden stated that this would stretch out the poundage over the season and keep everyone employed longer. He said that there were concerns with the bycatch and he hoped to be on the committee. He said he agreed that it was just a handful of boats and in fairness 99% obey the laws. He stated that there was not enough quota for 225 boats and if everyone did work it would get into the next year's quota.

Associate Member Bowden moved to accept the staff recommendation to lower the limit as advertised. Associate Member Holland seconded the motion. The motion carried, 8-0-1. The Chair voted yes. Associate Member Robins abstained.

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13. **PUBLIC HEARING:** Proposal to amend 4 VAC 20-252-10 et seq. "Pertaining to the Taking of Striped Bass" to reduce the 2010 striped bass quota for the Chesapeake area and change the individual transferable shares penalties to be based on overages in pounds instead of percentages.

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Mike Johnson, Fisheries Management Specialist, gave the presentation. His comments are a part of the verbatim record.

Mr. Johnson noted that the advertised notice for these proposed amendments was in the Commission packets.

Mr. Johnson explained that the Regulation 4VAC 20-252-10 et seq. establishes harvest quotas for Virginia's Chesapeake Bay area striped bass fisheries. He said that for 2009, a harvest quota of 3,284,484 pounds was established with 1,642,242 pounds allotted equally to the recreational and commercial fisheries. He explained that quota estimates are based on the Maryland Department of Natural Resources Control Model. He said that quota estimates from the Harvest Control Model area also influenced by the average weight of striped bass harvested from all jurisdictions, the natural mortality rate, the fishing mortality rate and recent bay-wide harvests.

Mr. Johnson stated that in 2007, this Commission adopted a weight based Individual Transferable Quota (ITQ) system for the commercial harvest of striped bass in Virginia. He said that to prevent the commercial overharvest of striped bass a penalty matrix was adopted as a guideline for the Commission to penalize commercial harvesters who exceeded their ITQ share for the prior fishing season. He said also that the range of these penalties, as described in Regulation 4VAC 20-252-155(A through D), includes warnings, quota deductions, permit suspensions and the revocation of an individual's striped bass permit based upon the severity of the overharvest and the number of times that individual exceeded their quota in a five year period.

Mr. Johnson explained that because of the 6.3% decrease for the 2010 Baywide Quota from the 2009 Baywide quota, it meant that the quota for both the Virginia Recreational and commercial striped bass fisheries in 2010 would be 1,538,022 pounds compared to the 1,642,242 in 2009. He said the reason for the decreased quota was that the exploitable stock biomass had been declining since 2005.

This is an example of the proposed Amendments to 4 VAC 20-252-155 (Subsection A is provided, Subsections B through D would also be similarly amended):

A. Any initial overage by any person of an individual commercial harvest quota during any calendar year shall be considered a first offense, with penalties prescribed according to the severity of the overage as described in subdivisions 1 through 5 of this subsection.

1. Any ~~overage in pounds that ranges from zero to 3.0% or less than 200 pounds, whichever is lower,~~ overages that are less than 76 pounds shall result in a warning being issued.

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2. Any ~~overage in pounds that ranges from 4.0% to 10%~~ overages that range from 76 to 250 pounds shall result in a one year deduction of that overage from that individual commercial harvest quota during the following calendar year.
3. Any ~~overage in pounds that ranges from 11% to 20%~~ overages that range from 251 to 475 pounds shall result in a one year deduction of two times that overage from that individual commercial harvest quota during the following calendar year.
4. Any ~~overage in pounds that ranges from 21% to 30%~~ overages that range from 476 to 725 pounds shall result in that overage being permanently deducted from that individual commercial harvest quota and a one year suspension of that individual from the commercial fishery for striped bass.
5. Any ~~overage in pounds that is greater than 30%~~ overages that are greater than 725 pounds shall result in the revocation of that individual striped bass permit, and that person shall not be eligible to apply for a like permit for a period of two years from the date of revocation.

Mr. Johnson stated that this proposal had been advertised in accordance with §28.2-209 of the Code of Virginia for a public hearing today. He said the notice is in the Commission packet.

Mr. Johnson noted that staff had not received any public comments, to date.

Commissioner Bowman opened the public hearing.

Douglas F. Jenkins, Sr., waterman, was present and his comments are a part of the verbatim record. Mr. Jenkins asked if the reduction of the 2010 quota was done by the ASMFC.

Rob O'Reilly, Deputy Chief, Fisheries Management said that the reduction was based on the harvest control model. He explained that each year, since 1997, Virginia, Maryland and PRFC were a part of the Baywide quota. He said there was a 6.3% reduction for both the commercial and recreational fisheries. He stated that Virginia had the best track record for being close to the quota. He said from 2003 to 2007 there had been an overage in the recreational fishery, and in 2006 there was an overage for the commercial fishery.

Mr. Jenkins asked about the Baywide 10 million quota being caught. Mr. O'Reilly explained that the harvest usually did not reach the quota because the Potomac River and Maryland watermen did not catch their part. Mr. Jenkins said that Virginia got shorted with the Baywide quota, as Maryland got more of the quota. He said the recreational and commercial got equal parts of the Virginia quota, but the recreational fishery participants are not required to report. He said Virginia had sold the fish to Maryland and DC markets. He said from 1970 to 1975 there was some Potomac and Virginia caught striped bass during those 5 years where Virginia did not get any credit for them. He said that

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Virginia had not been given a fair deal, as there were more square miles of Bay area in Virginia than in Maryland. He said if Virginia had gotten its fair share then the 6% reduction in the pounds would not be a concern. He said someone from Virginia needed to challenge this and get more equal terms. He noted that Virginia representatives needed to renegotiate when they meet yearly. He stated that each State should get its share and if they go over that then they should be penalized.

Commissioner Bowman asked staff to comment. Mr. O'Reilly explained that there was no basis that past landings were used for the quota. He said that Maryland had a harvest control model in 1990, Virginia was held to a 20% of 1972-79 landings, and Maryland's harvest control model was approved by the ASMFC and resulted in a higher quota for Maryland. The 1997 quota for Maryland, Virginia and PRFC were looked at different years from 1993 to 1996. He said it was a disadvantage that Maryland harvest was higher than Virginia harvest. He said Virginia did not have a harvest control model.

Mr. O'Reilly said that in Maryland a 36-inch striped bass was the maximum size in the commercial fishery, and most of their harvest was the smaller fish. He said in Virginia 45% of the harvest was fish that were 28 inches or larger. He said the agreement was between the three jurisdictions, not ASMFC.

Mr. Jenkins suggested that they get together and discuss Virginia getting a fair share.

Commissioner Bowman closed the public hearing. He asked for discussion or action.

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

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- 14. PUBLIC HEARING:** Proposal to amend 4 VAC 20-1190-10 et seq. "Pertaining to Gill Net Control Date, Limited Entry and Transfers" to establish a gill net vessel limit.

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

Mr. Grist reminded the Commission that at their last meeting amended Regulation 4VAC 20-1190-10, et seq. and established a limited entry for the gill net fishery. He said that there two permit classes established Class A for residents and non-residents and Class B. He said that Class A were authorized to purchase any number of gill net licenses that total up to 12,000 feet in length and Class B were authorized to purchase any number of gill net licenses that total up to 6,000 in length.

Mr. Grist said that during the October meeting the issue of license stacking was discussed in relation to the new gill net permitting requirements:

- The presence of multiple license holders working gear in combination on a vessel to gain a competitive advantage in harvest capabilities; or,
- Harvesters possessing more than the allowed number of gear licenses on a vessel, by acting as an agent for another harvester, to maximize their individual competitive advantage.

Mr. Grist reminded the Board that they had requested that staff advertise for a November 24, 2009 public hearing a proposal to establish a vessel limit, on gill nets, whereby only one Class A gill net permittee gill nets or one Class B permittee's gill nets, per vessel, may be used to harvest, to prevent license stacking.

Proposed amendments to Regulation 4 VAC 20-1190-40:

D. A legal gill net permit shall be in the possession of any gill net permittee, or his agent, who is placing, setting, or fishing that permittee's gill net.

E. It shall be unlawful for more than one gill net limited entry permittee, aboard any vessel, at any time, to set, place or fish any gill nets, except those legally licensed to only one gill net permittee.

Mr. Grist stated that staff had advertised the public hearing and had not received any public comments to date.

Mr. Grist stated that staff recommended the adoption of the amendments.

Commissioner Bowman asked for questions and there were none. He opened the public hearing.

Associate Member Bowden said that there had been concerns expressed with watermen who work in the upriver areas where they have 2 or 3 individuals on one boat and to possibly not limiting the amount of net allowed. He said this needed to be addressed as this was a legitimate concern and a problem for law enforcement. He suggested that maybe a boundary line was needed. He said that action today was not necessary as time would be needed to figure it out.

Jack Travelstead, Chief, Fisheries Management, responded that the language now did not resolve the problem. He stated that there were economic reasons for several being on board the boat. He said how to enforce is a problem and that could be considered and brought back to the Commission. Associate Member Bowden suggested discussing it with FMAC and then come back to the Board.

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Wesley Robbins, fisherman from Gloucester, Virginia, was present and his comments are a part of the verbatim record. Mr. Robbins explained that he was not aware of the regulation until he received it in the mail for getting his license. He said he had others on board the same vessel as he was and this was done in a lot of other fisheries for economic reasons. He asked why not allow 2 sets of licenses on a boat.

Commissioner Bowman asked staff to respond.

Mr. Grist explained that it was brought up for reasons, concerning competitive advantage and establishing a cap on gill netting because of the big rigs. He said because of economics and the convenience more than one licensee worked on a boat.

Associate Member Robins said that there was stacking by having a helper on board who held a Class B license and some steps were needed to be able to review it because without it the regulation would be ineffective.

Associate Member Robins moved to accept the staff recommendations and to talk to FMAC and consider exemptions because of the concerns expressed at this hearing. Associate Member Laine seconded the motion. The motion carried, 9-0.

Associate Member Bowden announced that the FMAC meetings were opened to all and their comments would be welcomed.

Associate Member Robins suggested that item 15 be heard after Item 16.

- 16. REQUEST FOR PUBLIC HEARING:** to amend 4 VAC 20-610-10 et seq. "Pertaining to Commercial Fishing and Mandatory Reporting" and 4 VAC 20-670-10 et seq. "Pertaining to Recreational Gear Licenses" to improve the harvest data collection process and implement an improved non-compliance process.

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

Mr. Grist said this was an item that was discussed back at the September meeting. He explained that the keypunch contract was lost and staff was faced with 20 to 30,000 pieces of data to be entered every month. He said with the contractor, staff had made the corrections and the contractor had entered the information double to assure correctness. He said it would be a while before a new contractor would be acquired. He said that while staff was updating the proposal contracts for the mandatory reporting program, now was the time to make improvements to the reporting system.

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Mr. Grist said the Regulation 4VAC 20-670-10, et seq., allowed for yearly reporting. He said they knew that compliance was low, but it was difficult for the staff to monitor it. He said recreational licensees for gill nets, crab pots, and trot lines, and for certain species, were required to report daily and monthly.

Mr. Grist said the commercial use of agents needed to be reported, as it was a frequent item requested. He said another issue concerned who was listed as helpers and the total number of helps that was listed. He said that currently, helpers listed were unlimited. He said that it was rarely more than 5 helpers reported and the most would be 8 helpers listed. He said it did need to be limited to no more than 5 helpers reported. He said that another was the non-compliance issue and bringing the failure to report cases to the Commission. He stated that currently there were no strong deterrents in place for mandatory reporting, and there was a need the reporting back in line. He said sections needed to be added to the regulation noting minimum penalties for non-compliance reporting regulations.

Mr. Grist explained that staff was recommending the advertisement for a public hearing at the December meeting for Regulations 4VAC 20-610-10, et seq. and 4VAC 20-670-10, et seq.

Associate Member Robins asked staff to explain the non-compliance matrix. Mr. Grist stated that there were guidelines in Regulation 4VAC 20-252-10, et seq. for a penalty matrix for striped bass. He said in that regulation for example, it included violations where staff recommended probations, suspensions and revocations, with sections for repeat offenders also.

Commissioner Bowman left the meeting. Associate Member Holland assumed the chair responsibilities.

Associate Member Bowden asked if for one month off or clerical error. Mr. Grist said it would be resolved with a notice and the process.

Associate Member Robins explained that the collection of data was in the best interest of the fishermen, resource and management control. He stated that the staff was heading in the right direction.

Associate Member Robins moved to advertise the public hearing as staff recommended. Associate Member Bowden seconded the motion. The motion carried, 7-0-1. The Chair was not in the meeting and Associate Member Holland substituted as chair so he abstained.

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- 15. REQUEST FOR PUBLIC HEARING:** to amend 4 VAC 20-900-10 et seq. "Pertaining to Horseshoe Crabs" to modify reporting requirements and reduce 2010 quota in response to 2009 overage.

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

Commissioner Bowman returned to the meeting.

Ms. Nelson explained that there were three tiers for the horseshoe crab harvesters in Virginia. She said any fisherman who landed and sold at least 500 horseshoe crabs in Virginia and in any one year from 1998 through 2000, was eligible for a Horseshoe Crab Endorsement License. She explained that any boat or vessel that landed and sold in Virginia at least 10,000 pounds of conch in any one year from 2002 through 2005 was eligible for a Restricted Horseshoe Crab Endorsement License.

Ms. Nelson stated that when it is projected that 85% of the quota has been harvested, the landing limits for the two licenses are lowered to 2,500 and 1,000 crabs.

Ms. Nelson said that this was the second year that the quota was caught and exceeded since the regulation was modified in 2006. She said that a 10 percent overage would have to be paid back in 2010. She reviewed the following table.

Table 1: Virginia horseshoe crab harvest in 2009 by harvester type (data based on buyer's reports)

<u>Harvester type:</u>	<u>Number</u>
Endorsement license holders	60,670
Endorsement licensed holders who did not call-in	60,795
Non-license holders	46,357
Total	167,822

Ms. Nelson said that staff had come up with several adjustments to the regulation to prevent future overages from happening.

Ms. Nelson said that staff recommended the advertisement for a December public hearing to consider the amendments to Regulation 4VAC 20-900-10 et seq. to payback the 10% overage in 2009 by reducing the landing limit triggers from 85% to 50%, establish a bycatch permit, and establish a daily call-in requirement for buyers.

Associate Member Robins stated that he wished to participate in the discussion, but he would not be voting, as he was a member of the fishery. He talked about the difference

between the bay fishery and the seaside eastern shore fishery. He said the crab fishery was a stable fishery, but for 15 years reporting was not good and steps were taken to require buyer reporting. He said for the last two years the reporting was more accurate.

Associate Member Robins said that another area of concern was east of the COLREGS and that the ASMFC had limited the catch in this area to 40% of the quota. He suggested that similar triggers should be proposed for this area, as there was a need to improve the management control east of the COLREGS. He said that there were a handful of people who did not call in and the quota overage had taken away from what could be caught this year and the next year. He said that these individuals should be sanctioned, if they do not call in. He also suggested that there should be bi-monthly buyers reporting.

Associate Member Holland asked for a motion to advertise for a public hearing for those recommendations discussed.

Associate Member Tankard moved to advertise for a public hearing. Associate Member Schick seconded the motion. The motion carried, 8-0-1. Associate Member Robins abstained, as he was a member of the fishery.

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17. REQUEST FOR PUBLIC HEARING: to amend 4VAC20-20-10 et seq. "Pertaining to the Licensing of Fixed Fishing Devices" concerning priority rights and fishing requirements.

Rob O'Reilly, Deputy Chief, Fisheries Management gave the presentation. His comments are a part of the verbatim record.

Mr. O'Reilly stated that this was a request for a public hearing. He explained that at the FMAC meeting Mr. Rogers had said that a minimal amount of effort was required to set and fish a pound net.

Mr. O'Reilly stated that FMAC and staff thought it was better to establish a 2-year basis, for allowing pound nets licensees to set and fish their nets, to maintain a priority, as there were others waiting to obtain stands. He said this fishery was labor intensive and expensive. There was concern about this being grandfathered when the devices are not set. He said staff was presenting a compromise proposed.

Mr. O'Reilly said that the once every two years would start in 2009. He said this was a request to advertise the issue for public hearing.

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

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

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18. DISCUSSION: Conformity issues with spiny dogfish limited entry criteria.

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

Mr. Grist reminded the Commission of their adoption of Regulation 4 VAC 20-490-10 et seq., "Pertaining to Sharks" on October 27, 2009, establishing a limited entry fishery for spiny dogfish and the effective date was November 1, 2009. He said to qualify to participate in the spiny dogfish limited entry fishery, individuals had to be current Virginia Commercial Fisherman Registration License holders, who met one of the following two criteria:

- 1) shall have averaged 60 days of harvest by gill net, from 2006 through 2008, and shall have documented harvesting a minimum of 1 pound of spiny dogfish on VMRC Mandatory Harvest Reports, at any time, from 2006 through 2008;
- 2) OR, shall have documented harvesting more than 10,000 pounds of spiny dogfish on VMRC Mandatory Harvest Reports in any one year from 2006 through 2008.

Mr. Grist stated that VMRC records indicated that 102 individuals, either as primary harvesters or as helpers, with current Commercial Fisherman Registration Licenses, regardless of residency, qualified for the proposed spiny dogfish limited entry permit.

Mr. Grist said that calls had been received regarding these issues and letters of public comment were in the Board's packets.

Mr. Grist said that calls had also been received to make changes in what had been reported, especially to change what had been reported from dogfish to spiny dogfish. He said that others called to add helpers' information who would receive equal credit. He said that still others called to update the spiny dogfish not reported. He said that some wanted to include their federal records and vessels records. He said that there was a hardship process for medical reasons. He said that staff recommended that any amendments be advertised for a December public hearing.

Commissioner Bowman asked how many calls were received. Mr. Grist said that three dozen individuals had called and some individuals called multiple times about the issue. He said the problem was subjective on the misidentification of dogfish, and helper data was on the honor system, there was no way to audit who was or was not on the boat.. He said they could only accept their word that the helper was involved.

Associate Member Robins stated it was clear there was a problem. He said that there had been a record fishery in 1996 as there were 25 boats in the directed fishery at the time spread from Virginia Beach to the Eastern Shore. He said today the quota was 9 to 12 million pounds and the biomass was rebuilding at target and the joint benchmark with the Canadians. He said the rebuilding declaration would allow at the Federal level the amending the strategy for increasing the quota. He said a decline should be expected until it was rebuilt in 2016. He said there will be a 10-15 pound range in the future years until the design has been worked out and there can be a limited entry fishery. He said there were 25 to 102 fishermen in the fishery and if there was an exclusion of the helper it would impact the fishery. He said the changes requested needed to be taken to committee. He said a one-year sunset should be established and to bring it back to the Commission or submit it to the Committee. He stated that 102 permitted fishermen would catch the quota in three days.

Associate Member Bowden said there was a need for a different system. He said there was a need to rethink the issue and to sunset it for bringing it back later. He said he had not realized that it was overcapacity. He said from Chincoteague to Virginia Beach there had never been more than 30-40 boats. He said there was a need to do it over as it was messed up and he had not realized there was a problem.

Mr. Grist said 1.3 million were landed from New York to Virginia, and the ASMFC may close the fishery.

Commissioner Bowman asked about number of transfer requests. Mr. Grist said four transfers had been processed and money had likely been exchanged. He said there were lawful transfers. Commissioner Bowman suggested that a control date be set today.

Associate Member Bowden stated that an emergency moratorium on transfers was needed. He said a review was needed and a plan developed as big changes were needed. He said a discussion on the moratorium could be done at the same time.

Associate Member Bowden moved to have an emergency moratorium on transfers and a control date to be established of November 24, 2009, starting at midnight. Associate Member Holland seconded the motion.

Associate Member Robins suggested that the matter be revisited by FMAC. Associate Member Bowden suggested a special committee be established to handle it requiring maybe 3 meetings. He said then it can be taken to FMAC to vote on a recommendation and do it in a timely manner.

Mr. Grist stated that the management plan closed it from May 1st through April 30th.

Associate Member Robins said the Commission needed to take prompt action. He said the design needed some thought and concerns needed to be made clear regarding the fact that the fishery expansion was beyond the historical fishery.

Associate Member Bowden said there was a need to attempt to limit the fishery.

The motion carried, 9-0.

Associate Member Fox moved to advertise for a public hearing on the emergency action. Associate Member Schick seconded the motion. The motion carried, 9-0.

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19. DISCUSSION: Request of NMFS to require modified leaders in pound nets year-round.

Jack Travelstead, Chief, Fisheries Management, gave the presentation. His comments are a part of the verbatim record.

Mr. Travelstead stated that the Federal government will continue to look at this issue as they are concerned as to what happens to the sea turtles and bottlenose dolphins after mid-July 2010. He said a lot of sea turtles were killed this year by pound nets. He said staff was not requesting action today as there was still time between now and July. He stated that there was already a lot for the December and January meetings. He stated that staff would come back to the Commission regarding this matter at the January or February meeting.

Commissioner Bowman stated that we should get credit if Virginia were to go out ahead of the Federal partners.

Associate Member Fox said that studies have shown that pound nets catch the same amount of fish with either leader and it would make economic sense to continue to require the modified leader.

Mr. Travelstead said that was right, and that the Eastern Shore watermen had been very vocal in support of using the modified leader and requiring them year-round.

Associate Member Robins stated that with the State's involvement early could mean the Federal rules would reflect Virginia's work. He stated also that staff should work with the northeast regional office.

No action was necessary.

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Commission Meeting

**15703
November 24, 2009**

There was no further business and the meeting was adjourned at approximately 3:09 p.m. The next meeting will be held on the third Tuesday of the month, December 15, 2009, as approved by the Commission at its meeting in September, 2009.

Steven G. Bowman, Commissioner

Katherine Leonard, Recording Secretary