

## MINUTES

## Commission Meeting

November 23, 2010

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

Steven G. Bowman	Commissioner
Ernest L. Bowden, Jr. )	
J. Carter Fox )	
J. T. Holland )	
William E. Laine, Jr. )	Associate Members
J. Bryan Plumlee )	
Richard B. Robins, Jr. )	
Kyle J. Schick )	
John E. Tankard, III )	
David Grandis	Assistant Attorney General
Jack G. Travelstead	Chief, Fisheries Management
John M. R. Bull	Director-Public Relations
Katherine V. Leonard	Recording Secretary
Linda Farris	Bs. System Specialist, MIS
Rob O'Reilly	Deputy Chief, Fisheries Mgmt.
Joe Grist	Head, Plans and Statistics
Stephanie Iverson	Fisheries Mgmt. Specialist, Sr.
Sonya Davis	Fisheries Mgmt. Specialist, Sr.
Allison Watts	Fisheries Mgmt. Specialist
Lewis Gillingham	Head, Saltwater Fishing Tournament
Laura M. Lee	Fisheries Mgmt. Specialist
Alicia Nelson	Fisheries Mgmt. Specialist
Joe Cimino	Fisheries Mgmt. Specialist, Sr.
Warner Rhodes	Deputy Chief, Law Enforcement
John Richardson	Marine Police Officer
Ron Cagle	Marine Police Officer

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

Virginia Institute of Marine Science (VIMS):

Lyle Varnell

Others present included:

Pete Conn	Daren Pait	Yon Lambert	Claudia Hamblin-Katuik
Randy Grubbs	David O'Brien	Jay Foster	Richard Green
Kenneth J. Crofton	Jon C. Harrell	Rebecca Francese	John Newcomb
Jeff Watkins	Mark Hiltke	Keith Kopsack	Stormy Pearson
Gordon Slatford	Rex Cox	Jin Clark	Mark Pierce
Frank Daniels, Jr.	Ed Gaskins	John Tomlin	Alice C. Winborough
Mark Noel	Cynthia A. Smith	Onie Lee Smith	Lloyd Doyle
Robert L. Ayotte	John D. Ludford	Harry Kiriakou	William Reynolds
Alden D. Murphy	Sandra Butler	Steven Lang	Frank Negargy
Luke Negascard	Faye Daniels	Wilson Chopp	Tim Neilsen
Brent Malone	John Barr	Jim Joseph	Vernon Ricker
Harvey Era	Greg South	Bob Mullis	John Myszka
Woody Malane	D. W. Yerkes	Rick Gaskill	Woody Gaskins
Stephen Gaskill	David Thornes	Arron Bumgarner	Ronald Garrett
Jim Dawson	Stanley Jester	Charles Hogge	Kelly Place

and others.

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Commissioner Bowman called the meeting to order at approximately 9:37 a.m. All Associate Members were present.

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At the request of Commissioner Bowman, Associate Member Robins said the prayer and Warner Rhodes, Deputy Chief, Law Enforcement Division, led the pledge of allegiance.

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**APPROVAL OF AGENDA:** Commissioner Bowman asked if there were any changes from the Board members or staff. There were none. He asked for action by the Board.

**Associate Member Tankard moved to approve the agenda. Associate Member Bowden seconded the motion. The motion carried, 9-0. The Chair voted yes.**

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**MINUTES:** Commissioner Bowman requested a motion for approval of the October 26, 2010 Commission meeting minutes, if there were no corrections or changes. There were none.

**Associate Member Laine moved to approve the minutes, as distributed. Associate Member Fox seconded the motion. The motion carried, 9-0. The Chair voted yes.**

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

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

Tony Watkinson, Chief, Habitat Management Division, summarized these items for the Board. He stated that there were nine items (A-I). His comments are a part of the verbatim record.

Associate Member Plumlee announced that he would not be participating for Items 2E and 2I, as he was these applicants' legal counsel.

Commissioner Bowman asked for questions of staff. There were none.

Commissioner Bowman opened the public hearing. Being there were no public comments, the public hearing was closed. He stated the matter was before the Commission for action on all items except 2E and 2I.

**Associate Member Robins moved to approve all of the page two items (A through D and F through H. Associate Member Laine seconded the motion. The motion carried, 9-0. The Chair voted yes.**

Commissioner Bowman asked for a motion for items 2E and 2I.

**Associate Member Robins moved to approve items 2E and 2I. Associate Member Tankard seconded the motion. The motion carried, 8-0-1. The Chair voted yes. Associate Member Plumlee abstained.**

**2A. NORTHROP GRUMMAN SHIPBUILDING, INC., #10-0518,** requests authorization to modify their existing permit to include mechanical maintenance dredging of up to 325,000 cubic yards of State-owned subaqueous material, to re-establish and maintain maximum depths ranging between -30 and -49 feet at mean low water at their facility situated along the James River in the City of Newport News, with disposal at Craney Island.

No applicable fees – maintenance dredging.

**2B. VULCAN CONSTRUCTION MATERIALS, #01-1308,** requests a modification to their existing permit to dredge an additional 6,314 cubic yards of bottom material, by mechanical method, to a maximum depth of -16 feet mean low water at their Richmond Quarry and Lower Dock Facilities situated along the James River in the City of Richmond and Henrico County, with disposal at previously approved abandoned quarry sites. Recommend approval with an additional dredging royalty of \$2,841.30 for the new dredging of 6,314 cubic yards of State-owned bottom material at a rate of \$.045 per cubic yard.

Royalty Fees (dredging 6,314 cu. yds. @ \$0.45/cu. yd.).....	\$2,841.30
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**2C. KINDER MORGAN OPERATING L.P. "C", #10-1612,** requests authorization to mechanically maintenance dredge up to 80,000 cubic yards of State-owned subaqueous bottom, on an as needed basis to re-establish and maintain maximum depths of -52 feet at mean low water at their facility situated along the James River in the City of Newport News, with disposal at Craney Island. Recommend inclusion of the standard dredge conditions.

Permit Fee.....	\$100.00
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**2D. BLUEWATER POINT HOMEOWNERS ASSOCIATION, #10-1119,** requests authorization to maintenance dredge 977 cubic yards of accumulated material and dredge an additional 1,623 cubic yards of new material to restore and deepen an existing channel and basin adjacent to Indian Creek at 472 McSwain Road in Lancaster County. The channel will have a bottom width of 26 feet and be dredged one (1) foot deeper to achieve maximum depths of five (-5) feet at mean low water. The sandy dredged material will be removed mechanically and placed on the adjacent beach area, contained within a previously authorized groin field and jetty. Recommend approval with standard dredge conditions, and the assessment of a royalty in the amount of \$730.35 for the removal of the new material at a rate of \$0.45 per cubic yard.

Royalty Fees (dredging 1,623 cu. yds. @ \$0.45/cu. yd.).....	\$730.35
Permit Fee.....	\$100.00
Total Fees.....	\$830.35

**2E. CITY OF CHESAPEAKE, #10-1572,** requests authorization to install a 36-inch raw water transmission pipeline 30 feet below the bed of the Nansemond River by directional bore method, near the intersection of Rt. 58 and Wilroy Road in Suffolk. (Local government project. No royalties required.)

Permit Fee.....	\$100.00
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**2F. COLONNA'S SHIPYARD, #09-0073,** requests a modification to their existing permit to now mechanically dredge an additional 13,200 cubic yards of State-owned subaqueous material to establish and maintain, on an as-needed basis, maximum depths of -27 feet at mean low water, adjacent to Pier 8 at their West Yard facility situated along the Eastern Branch of the Elizabeth River in the City of Norfolk. All dredged material will be transported to and disposed of at Craney Island. Recommend an additional royalty assessment in the amount of \$5,940.00 for the dredging of 13,200 cubic yards of State-owned subaqueous material at a rate of \$0.45 a cubic yard.

Royalty Fees (dredging 13,200 cu. yds. @ \$0.45/cu. yd.).....	\$5,940.00
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**2G. LYON SHIPYARD, INC., #10-1050,** requests authorization to mechanically maintenance dredge, on an as-needed basis, up to 35,000 cubic yards of State-owned subaqueous material to re-establish and maintain maximum depths ranging between -12 and -42 feet at mean low water, at their facility situated along the

Eastern Branch of the Elizabeth River in the City of Norfolk. All dredged material will be transported to and disposed of at Craney Island or an approved upland disposal site. Recommend inclusion of the standard dredging conditions.

Permit Fee.....	\$100.00
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**2H. DEPARTMENT OF THE NAVY, #10-1175,** requests authorization to install a new fender system at two locations on the south side of Pier 6 at Naval Station Norfolk, situated along Hampton Roads in the City of Norfolk. The proposed fender system will be comprised of two (2) approximately 22-foot long pre-stressed concrete fender modules extending approximately two and one-half feet beyond the south face of the existing pier at each location, and will accommodate the temporary placement of camels for the berthing of CVN class vessels.

Permit Fee.....	\$100.00
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**2I. NORFOLK SOUTHERN CORP., #10-1738,** requests authorization to install a replacement power cable within a new four-inch diameter conduit installed by directional bore method approximately six feet beneath a 150 linear foot section of the Eastern Branch of the Elizabeth River, to provide power to their existing swing span railway bridge in the City of Norfolk. Recommend the assessment of a royalty in the amount of \$450.00 for the power line’s encroachment beneath 150 linear feet of State-owned submerged land at a rate of \$3.00 per linear foot.

Royalty Fees (crossing 150 lin. ft. @ \$3.00/lin. ft.).....	\$450.00
Permit Fee.....	\$100.00
Total Fees.....	\$550.00

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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). There were none.

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**4. CLOSED MEETING FOR CONSULTATION WITH, OR BRIEFING BY, COUNSEL.** Counsel advised that no closed meeting was required.

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5. **RAYMOND BUTLER, #10-0803**, requests after-the-fact authorization to permit the Nansemond River Duck Club to use a previously constructed concrete boat ramp, extending up to seven (7) feet channelward of mean low water, and an existing 58-foot long by 4-foot wide fixed pier, and authorization for the installation of a 36-foot long by 6-foot 1-inch wide floating platform at the applicant's property situated along the Western Branch, Nansemond River, at 4029 Godwin Boulevard in the City of Suffolk. The request is protested by a number of nearby property owners.

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

Mr. Stagg explained that the project was located along the Western Branch of the Nansemond River, in the Reids Ferry area of the City of Suffolk. Staff received a complaint, through the VMRC Law Enforcement Division, in late January, 2010, that construction activity was taking place at property owned by Mr. Raymond Butler. According to the complaint, upland clearing was taking place and a boat ramp was being constructed at the property. Staff contacted the City of Suffolk and Mr. Butler, VMRC staff was informed that Mr. Butler was allowing the Nansemond River Duck Club to make improvements to his property that would include the Club's use of the existing private pier and boat ramp. Staff conducted a site visit on February 4, 2010, with Mr. Butler, representatives from the Duck Club, and the City of Suffolk staff. During the site visit staff noted that the Duck Club had installed a floating dock structure adjacent to the existing private pier and some upland clearing and grading was ongoing at the site. Staff directed Mr. Butler and/or the Duck Club to remove the floating dock section. Additionally, since Mr. Butler indicated a continued desire to lease the use of his upland, pier and boat ramp to the Duck Club, staff informed both parties that such activity would constitute a change in use of the pier and boat ramp from private to commercial use and that a permit would be required from VMRC.

Mr. Stagg further explained that staff wrote to Mr. Butler on February 5, 2010, to reiterate the information discussed during the site visit and to request the submission of a Joint Permit Application (JPA) within two weeks. Staff noted that such a submission would in no way guarantee approval of the request, but that any additional enforcement action would be withheld during the public interest review. After several conversations with Mr. Kenneth Crofton, whom Mr. Butler and the Hunt Club indicated would be their agent during the permit application review process, a Joint Permit Application was submitted on May 18, 2010. The applicant sought authorization to allow Mr. Butler's boat ramp and pier to be used by the Nansemond River Duck Club. The application also included a request to re-install the floating dock structure at the channelward end of the existing pier.

Mr. Stagg stated that a public interest review had been conducted, including a public notice in the Virginian Pilot on May 23, 2010. Staff received a letter of objection from David B. and Margaret R. P. Nelms, Robert L. and Barbara B. Nelms, and Robert W. and

Elisabeth Nelms on October 7, 2010. Their objections included concerns over the existing concrete debris along the shoreline, lack of any evidence this material was being removed, vehicular traffic and parking on the adjacent hillside, increased boat traffic and increased erosion from such traffic, navigational safety related to unmarked channel, and both a bridge and pipeline crossing near this site, upsetting of the quiet sanctuary of the area, use of an ingress and egress driveway by Duck Club members, what if any policing can be expected, previous alleged late night use of spotlight disturbing sleep of the protestants, and concerns on how the use of this private ramp by the Club was allowed to occur without a prior request for proper permits.

Mr. Stagg said that the Department of Conservation and Recreation stated in their comments dated June 15, 2010, that the project could require additional authorization under the Chesapeake Bay Preservation Act and Management Regulations administered by the City of Suffolk. The Department of Game and Inland Fisheries indicated in their comments dated June 18, 2010 that the project was within an area documented to have bald eagles, but the site was not within a management zone for any currently documented nests. They also noted that while the project was located within a potential anadromous fish use area, they did not anticipate any adverse impacts on those resources. The Virginia Department of Health Office of Environmental Health indicated the project was in compliance with their Sanitary Regulations for Marinas and Boat Moorings.

Mr. Stagg explained that in VIMS' Shoreline Application Report dated June 21, 2010, they noted that utilizing sites with existing facilities to serve multiple users was preferred from a marine environmental viewpoint. They further recommended that sufficient garbage receptacles be provided along with signage to encourage proper handling of garbage, gasoline, oils, and overall waterway stewardship. They also noted that an increase in boating traffic might result in some additional impacts to the marine resources in the vicinity of the shoreline.

Mr. Stagg said that the application was subjected to a public interest review and multiple meetings by the City of Suffolk Wetlands Board. On July 15, 2010 the project was presented to the Board for their consideration. At that hearing the Board heard testimony from the City's staff, Mr. Crofton; nearby property owners in opposition to the project; and from the operator of a nearby marina (Brady's Marina) at which the Duck Club had previously had an agreement for use of that facility. The marina operator indicated that the agreement had been terminated with the Duck Club.

Mr. Stagg stated that after considerable discussion by the Board the matter was tabled to allow the applicant, the Duck Club and the protestants a chance to see if some agreement could be reached that would address their concerns. The Board also requested the applicant provide additional information related to any lease agreement in place between Mr. Butler and the Duck Club, including a copy of any lease agreement. Also, while outside the Wetlands Board jurisdiction, the applicant's agent agreed to also provide



additional clarification related to an ingress/egress issue concerning access to the boat ramp and pier related to the protestants' concerns.

Mr. Stagg said that on September 16, 2010, the Suffolk Wetlands Board continued the public hearing. After considerable additional testimony by the applicant's agent and a number of the protestants, the Board voted 4-0 to approve the project with the following conditions:

- The existing intertidal concrete debris is to be removed.
- The width of the driveway shall be reduced and the sides planted with vegetation.
- The applicant shall provide garbage receptacles on-site.
- The ramp and pier are to be for the exclusive non-commercial use of the Duck Club members and Mr. Butler's private use only.

Mr. Stagg explained that while staff was sensitive to the concerns of those in opposition to the project, staff believed most of their objections related to the upland use of the property and ingress and egress issues, would be better addressed through local ordinances. While the use of the boat ramp and pier by the Duck Club may result in some additional impacts to the immediate area, the site appeared appropriate for the type of activities proposed by the Club. Therefore, after considering all factors contained in §28.2-1205 of the Code of Virginia, staff recommended approval of the change of use of the existing boat ramp and pier, and the addition of the requested floating platform. Staff also recommended the assessment of a royalty of \$489.00 for the encroachment of the pier over 326 square feet of State-owned subaqueous bottomlands at a rate of \$1.50 per square foot and \$42.00 for the encroachment of the boat ramp over 84 square feet of State-owned subaqueous bottomland at a rate of \$0.50 per square foot, for a total of \$531.00. Should the Commission wish to consider a civil charge in association with the previous use of the facility by the Duck Club, staff would recommend it be based on a finding of minimal environmental impact and a moderate degree of non-compliance.

Commissioner Bowman asked for questions of staff.

Associate Member Fox asked if there were only two issues, the after-the-fact change of use and the floating dock. Staff believed the ramp was already present before 1972 and the Wetlands Ordinance.

Associate Member Schick asked if the City was aware of the violation. Mr. Stagg stated only after the complaint was received.

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

Kenny Crofton, representing the club, was sworn in and his comments are a part of the verbatim record. Mr. Crofton stated that it was for the club exclusive use only. He said

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they have assured Mr. Nelms and he understands that they will maintain and keep the traffic under control.

Being there was no further public comments, Commissioner Bowman stated that the matter was before the Commission.

**Associate Member Robins moved to support the staff recommendation to approve the permit with the conditions and royalties, but no civil charge would be assessed. Associate Member Laine stated that he supported the motion and seconded it. The motion carried, 9-0. The Chair voted yes.**

Royalty Fee (pier encroachment 326 sq. ft. @ \$1.50/sq. ft.).....	\$489.00
Royalty Fee (ramp encroachment 84 sq. ft. @ \$0.50/sq. ft.).....	\$ 42.00
Permit Fee.....	\$ 25.00
Total Fees.....	\$556.00

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**6. CITY OF ALEXANDRIA, #10-0798**, requests authorization to restore approximately 600 linear feet of Holmes Run including the installation of J-hooks and rock vanes and to construct a 12-foot wide low-profile pedestrian crossing near North Chambliss Street and Holmes Run Parkway in the City of Alexandria. The project is protested by multiple adjacent property owners.

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

Mr. Bacon explained that the project was located in the vicinity of Hawthorne Avenue and Holmes Run Parkway in the City of Alexandria. The project was also known as the Holmes Run/Chambliss Crossing and stream restoration/stabilization project. The purpose of the project was to provide a pedestrian crossing and to restore and stabilize approximately 600 linear feet of eroding bank on Holmes Run, which in turn would reconnect the stream with its floodplain and improve water quality. The stabilization would be conducted on the east bank of Holmes Run while the west bank, located in Fairfax County, would be left in its current condition. In addition to the riprap revetment, the stabilization was proposed to employ natural channel design which included the use of rock vanes, J-hooks, and storm water step outlets along the bank.

Mr. Bacon further explained that the project also included a crossing of Holmes Run. The proposed low-profile, pedestrian, shared-use crossing would connect Dora Kelly Park in Alexandria to Glen Hill Park in Fairfax County. This connection was a part of the City of Alexandria’s long-term plan to extend a non-motorized pedestrian trail system in the

City. The proposed crossing would complete a critical connection of the Homes Run Trail from Columbia Pike in Fairfax County to Eisenhower Valley (beyond Telegraph Road) in Alexandria, approximately 4.5 miles. The proposed crossing would be 12 feet wide and approximately 48-feet long. It was designed to be low-profile and constructed on four (4) 12-foot by 6-foot box culverts. The culverts would be buried three (3) feet into the streambed and extended approximately 24-inches above ordinary high water. The crossing was designed to allow water to flow over the structure during high water events.

Mr. Bacon said that the City of Alexandria prioritized the need for bank stabilization on Holmes Run near Dora Kelly Park for many years, but did not have the funds to effect the improvements. When the plans for the crossing were initiated, it was hoped that some restoration could be achieved at the same time. Shortly thereafter mitigation funds became available and a more inclusive restoration was envisioned.

Mr. Bacon stated that during the development of the design the City and stakeholders developed criteria to evaluate crossing types. The criteria consisted of hydraulic impacts, environmental impacts, accessibility, aesthetics and cost. Three different types of crossings were considered. Those options were a fair weather crossing, a clear span bridge, and a low profile crossing. The fair weather crossing was not chosen because the path would have water flowing over it on a regular basis which would not be conducive to bikers, pedestrians and generally was evaluated low in terms of accessibility. It also had negative impacts on benthic organisms and created a fish blockage. The clear span bridge was considered to be cost prohibitive and the neighborhood considered it an intrusive structure. The low profile crossing design was ultimately chosen since it would be approximately 24-inches above ordinary high water and would therefore provide the greatest measure of accessibility during normal flow conditions. During flood events it would allow the stream and associated debris to flow over the top of the structure and avoid impacts to the bridge and floodplain elevation. The cost of the low profile alternative was also significantly lower than the clear span bridge.

Mr. Bacon noted that the City of Alexandria had also undertaken several public/stakeholder meetings between March of 2009 and September of 2010. This allowed the local community to review the project, have input into the design and to have their concerns addressed. During this period the City also tried to address issues of concern raised by several local residents. Since the crossing was a “no-rise” design the local floodplain manager was able to certify the construction of the crossing in the FEMA floodplain.

Mr. Bacon stated that the project was protested by several residents along Holmes Run. Their objections included a concern that the crossing would increase the flood elevation in the vicinity of the project and the adjoining neighborhood; that the design of the project was not sufficient to address the erosion along Holmes Run during storm events; that the project would adversely affect water quality; and that the construction of the path would

eliminate a large part of the green space (meadow) next to the stream. The City of Alexandria addressed these concerns in several letters and at public meetings.

Mr. Bacon said that the proposed project had been modeled with the low profile crossing (both unblocked and obstructed) and in both cases the 100-year water surface elevation decreases slightly from the existing condition. The project took into account various flows and associated forces from base/low flow conditions to the 100-year flow event with an anticipated 11+ feet of water flowing down Holmes Run. It was anticipated that the use of the chosen natural channel design would serve to work with those flows rather than against them. The rocks and boulders proposed to be used in the restoration for bank protection and associated structures are approximately three tons and are to be placed within the stream to capitalize on existing or proposed stream hydraulics.

Mr. Bacon explained that the City anticipated that the water quality would be improved by decreasing the amount of sediment and pollutants being introduced to the stream by the unstable banks and the improvement of the riparian buffer. The “meadow” or green space was an upland issue that the City had addressed with the protestants.

Mr. Bacon said that the Department of Game and Inland Fisheries supported the project with the inclusion of standard in-stream conditions to minimize impacts during the construction. The Department of Environmental Quality determined that a Virginia Water Protection permit would not be required since the work was authorized under the Corps of Engineers Nationwide Permit number 27 (Stream and Wetland Restoration Activities). In The Department of Conservation and Recreation comments dated June 22, 2010, they noted the potential presence of rare ground water amphipods including the Capital Area ground water amphipod and the Northern Virginia well amphipod at the site. They recommended an inventory for these species if seeps or springs would be impacted by the project. The City stated there had been no observable evidence of seeps or springs during their all-season investigations. No other State agencies commented on the project.

Mr. Bacon explained that while staff was sympathetic to the concerns of the protestants, staff believed the City of Alexandria had adequately addressed the concerns of the protestants through modeling and state-of-the-art design for the crossing, stabilization, and erosion control at the site.

Mr. Bacon said 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 the project be approved, as proposed.

Mr. Bacon noted that Mr. Madden, the protestant, had e-mailed him on 11/22/10 to inform him that he would not be able to attend the meeting. He provided the Commission with a hard copy of the e-mail.

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Commissioner Bowman asked for questions of staff. There were none.

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

Daren Pait, agent, was sworn in and his comments are a part of the verbatim record.

Associate Member Schick asked if he could explain the design and how the pool works. Mr. Pait explained that it was standard. He put up a slide to assist him and explained the rock crossing protected the bank from storms because the water flows over the rock and into the channel. He said it would improve habitat and stabilize the bank during storms.

Associate Member Plumlee asked how it would reduce flooding in the area of concern and had they addressed the 100 year storm event. Mr. Pait using another slide explained the cross-sectional design.

Associate Member Tankard asked if they had addressed the debris issue resulting from the storms, such as trees and shrubs that get trapped in the structure. Mr. Pait said yes, they had tested it for all conditions

Associate Member Schick asked if there was a maintenance plan for long term care.

Pete Conn, agent, was sworn in and his comments are a part of the verbatim record. Mr. Conn explained that it was required and talked about siltation removal and regular monitoring.

Commissioner Bowman asked if there was anyone present in opposition. There were none. He read the letter of protest for the record.

Commissioner Bowman asked for action by the Board.

**Associate Member Tankard moved to approve the project, as proposed. Associate Member Schick seconded the motion. The motion carried, 9-0. The Chair voted yes.**

Permit Fee.....	\$100.00
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- 7. **WHITE POINT COVE ASSOCIATION, #10-1649**, requests authorization to install 35 linear feet of quarry stone riprap a maximum of six (6) feet in front of an existing timber bulkhead which will impact 210 square feet of jurisdictional beach at property at the confluence of the Rappahannock River and Chesapeake Bay on Riverside Drive in Middlesex County. A Coastal Primary Sand Dunes and Beaches permit is required.

Jay Woodward, Environmental Engineer, Sr., gave the presentation with slides. His comments are a part of the verbatim record. Mr. Woodward stated that there was no encroachment onto state-owned subaqueous bottom since the project was modified. He said it only required a Coastal Primary Sand Dunes and Beaches permit.

Mr. Woodward explained that the project site was located along Riverside Drive, just west of Stingray Point, in Middlesex County. The property is one lot west of a similar project considered by the Commission on October 26, 2010, in the name of Zoar Baptist Church (#10-1370). The shoreline faces north with a northeast fetch of greater than 30 miles to the Eastern Shore. The property is an undeveloped parcel with a deteriorated timber bulkhead extending approximately 3 feet in height above the beach. The lot provides access to the river for residents of the association. The sand beach area is currently approximately 12 feet in width between the existing bulkhead and the mean low water line. The Association is seeking authorization to armor the failing bulkhead with class III quarry stone (500-1500 pounds per stone) which will extend a maximum of six (6) feet channelward of the bulkhead. The original request had the stone extending up to ten (10) feet channelward of the bulkhead and did not include a buried toe for the revetment. The applicants have now modified their request to reduce the base width of the revetment and bury the toe a minimum of one (1) foot below the elevation of mean low water elevation, in accordance with standard design recommendations.

Mr. Woodward said that the construction of the revetment would impact 210 square feet of jurisdictional beach. Middlesex County had not yet adopted the Coastal Primary Sand Dunes and Beaches ordinance which was made available to them by virtue of recent Code changes that was effective on July 1, 2008. As a result, the Commission was charged with acting as the local dunes and beaches board pursuant to Chapter 14, Article 3, of Title 28.2 of the Code.

Mr. Woodward stated that in VIMS' report dated November 16, 2010, they stated that the environmentally preferred approach would be to remove the bulkhead and align the revetment with the toe no further channelward than the bulkhead in order to lessen the direct beach impacts. The Department of Environmental Quality indicated that because the water quality impacts should be minimal and temporary in nature, and would not involve any discharge to surface waters or impacts to wetlands, a Virginia Water Protection Permit would not be required.

Mr. Woodward added that staff had received comments from the Department of Conservation and Recreation on 11/22/10 where they stated that they did not anticipate any impacts to the natural heritage resources. Commissioner Bowman asked for an explanation for natural heritage resources. Mr. Woodward responded that he believed there were bald eagle nests nearby. No other agencies had commented on the application.

Mr. Woodward explained that the failing state of the existing bulkhead and the fact that the adjoining parcel to the west and much of the surrounding shoreline was already

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protected by riprap revetments appeared to justify the anticipated minor impacts to the jurisdictional beach area at this location. While the alignment of the revetment was slightly channelward of the existing bulkhead, staff felt the design, as modified, was consistent with staff’s recommendations for this type of structure in such an exposed environment and would provide a better tie-in with the adjacent bulkhead to the east and revetment to the west.

Mr. Woodward said that after evaluating the merits of the project, and after considering all of the factors contained in §28.2-1403(10)(B) of the Code of Virginia, staff recommended approval of the project, as modified. Staff also recommended encouraging the applicant to nourish the beach channelward of the revetment with appropriately sized sand to provide additional protection to the property and the toe of the new revetment. The placement of beach quality nourishment material above the low water line was a statutorily authorized activity under the Coastal Primary Sand Dunes and Beaches ordinance.

Commissioner Bowman asked for questions. There were none. He asked if the applicant or their representative was present and wished to comment. There was no one present. He asked for anyone pro or con who wished to comment on this item and there were none.

Commissioner Bowman announced that the matter was before the Commission for action.

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

Permit Fee.....	\$25.00
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- 8. **JOHN AND PEGGY NEWCOMB, #10-1663**, request authorization to remove three (3) deteriorated groins and to construct three (3) new replacement low-profile groins extending up to 45 feet channelward of mean high water adjacent to their property situated along the York River at 1540 Fleming Road in Gloucester County. Both Coastal Primary Sand Dunes and Beaches and Submerged Lands permits are required.

Chip Neikirk, Deputy Chief, Habitat Management gave the presentation with slides. His comments are a part of the verbatim record.

Mr. Neikirk explained that the project site was located along the York River near Gaines Point in Gloucester County. The shoreline consisted of a sandy beach with a wide

shallow sandy sub-tidal flat with submerged aquatic vegetation (SAV) channelward of the beach. Existing deteriorated groins appeared to be assisting in maintaining the sandy beach. The adjacent upland was low in elevation and their home was located approximately 250 feet landward of mean low water. The Newcombs' lot was approximately 200 feet wide along the shoreline.

Mr. Neikirk stated that the Newcombs were seeking authorization to remove the deteriorated portions of three timber groins and to construct three (3) replacement groins extending up to 45 feet channelward of mean high water. The replacement groins would be constructed utilizing a low-profile design and one of the groins was proposed to extend further landward to help protect a portion of the beach that had migrated landward. There were existing groins upstream and downstream of the Newcombs' property.

Mr. Neikirk said that the proposed groins would impact approximately 126 square feet of jurisdictional beach and approximately 18 square feet of State-owned submerged land. Gloucester County had not yet adopted the Coastal Primary Sand Dunes and Beaches ordinance which was made available to them by virtue of Code changes that were effective on July 1, 2008. As a result, the Commission was charged with acting as the local dunes and beaches board pursuant to Chapter 14, Subtitle III, of Title 28.2 of the Code.

Mr. Neikirk said that in VIMS' report dated November 13, 2010, they stated that the predominant movement of sand along this shoreline appeared to be back and forth between the beach and the adjacent offshore area rather than along the beach. Accordingly, they stated they were uncertain whether groins were the most effective structures to assist in maintaining a beach and to address any shoreline erosion that may be occurring at the site. If erosion was occurring at the site, they stated that an offshore rock breakwater system would be more effective but they noted that the reconstruction of the groins within the established groin field was an acceptable approach that would have minimal adverse environmental impacts.

Mr. Neikirk noted that no other agencies had commented on the application and no comments were received in response to the public notice and notification of the adjoining property owners.

Mr. Neikirk stated that staff agreed that the construction of an offshore breakwater system would be preferable along this shoreline, however the groins proposed to be replaced were within an established groin field and would be significantly less expensive than breakwaters. Additionally, breakwaters were typically more effective when they were used to treat an entire reach of shoreline and the adjoining owners were not currently proposing any shoreline protection work.

Mr. Neikirk explained that although groins interrupted the sediment transport by design, that impact was reduced through the use of a low-profile design. In this case the groins



being replaced were not currently low-profile so their replacement with low-profile groins should reduce adverse impacts on sediment transport.

Mr. Neikirk said that after evaluating the merits of the project, and after considering all of the factors contained in §28.2-1403(10)(B) and §28.2-1205(A) of the Code of Virginia, staff recommended approval of the project, as proposed, with a royalty in the amount of \$9.00 for the encroachment of the groins on 18 square feet of State-owned submerged land at a rate of \$0.50 per square foot.

Commissioner Bowman asked if this was a very shallow area. Mr. Neikirk stated that yes it was and also there was submerged aquatic vegetation (SAV).

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

Mr. John Newcomb and Mr. Jeff Watkins were both present and sworn in.

Mr. Watkins, contractor for the project, said that they were requesting approval of the project, as submitted.

Commissioner Bowman asked for action by the Board.

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

Royalty Fees (encroachment 18 sq. ft. @ \$0.50/sq. ft.).....	\$ 9.00
Permit Fee.....	\$25.00
Total Fees.....	\$34.00

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- NEW TIDES, LLC, #10-1471**, requests authorization to remove and replace a fixed, 24-slip marina pier with an 8-foot wide floating pier extending approximately 237 feet channelward of a previously authorized bulkhead, including a 28-foot by 24-foot fixed platform, a 10-foot long gangway, four (4) 60-foot long and five (5) 40-foot long finger piers, and a 138-foot long by 8-foot wide T-head; construct two (2) 20-foot long finger piers extending from the bulkhead; and construct a 14-foot long pier connection to an existing floating platform along Carter Creek adjacent to the Tides Inn resort hotel in Irvington, Lancaster County. Review of royalty assessment.

Jay Woodward, Environmental Engineer, Sr., gave the presentation with slides. Mr. Woodward stated that there were no protests and this matter was before the Commission because the applicant questioned the applicability of royalties.

Mr. Woodward explained that the New Tides, LLC, operated the Tides Inn resort hotel, which included a 24-slip marina facility that was originally constructed in 1946. Since that time the marina had undergone improvements and repairs, the majority of which were done before permits for such activities over State-owned submerged land were required from VMRC. The current proposal requested authorization to replace all of the fixed piers with floating piers, construct two new finger piers for transient/small boats in a new location, and to construct a new, slightly larger, fixed platform and deck, from which the floating pier would be accessed. The new marina facility would have 24 slips with water, electrical, television, wireless internet access, and sewage pump-out facilities. Fuel would not be available at the new pier, but was available at the nearby Tides Lodge Marina facility. The existing marina office and floating dock used for kayaks and canoes would remain in the same location adjacent to a marginal wharf which runs the length of the shoreline adjacent to the marina. The Lancaster County Wetlands Board issued a permit last month (#10-1307) to replace a failing bulkhead under the wharf, which was all above mean low water.

Mr. Woodward said that this matter is before the Commission for consideration of the royalty assessment for the proposed replacement of pier facilities over State-owned bottoms for transient use by Tides Inn guest and for longer term leasing as provided for by § 28.2-1205(E) of the Code of Virginia.

Mr. Woodward stated that staff had not received any opposition to the proposal as a result of the standard public interest review. The local Wetlands Board did not require a permit for this project since all of the improvements were to be done channelward of mean low water, with no new direct or indirect impact to tidal wetlands expected.

Mr. Woodward said that in VIMS' report dated November 11, 2010, they indicated that the Tides Inn marina was a designated Virginia Clean Marina and that no adverse environmental impacts were expected, as a result of the proposed improvements. They stated that floating piers were generally acceptable when located in waters deep enough such that the structures remain floating during all normal tide conditions, and recommended that all pier demolition debris be removed and lawfully disposed at an upland location. Their recommendations included constructing the piers, as proposed; collect and properly dispose of demolition debris, and continue to operate a Clean Marina.

Mr. Woodward said that the Virginia Department of Health, Division of Waste Engineering had indicated that the project was in compliance with the Sanitary Regulations for Marinas and Boat Moorings, and had, therefore, been approved. The

VDH Division of Shellfish Sanitation indicated that the project was located in condemned shellfish growing waters and the project would not cause an increase in the size or type of the existing closure.

Mr. Woodward added that the Virginia Department of Environmental Quality did not require a Water Protection Permit because the project complied with the requirements of a U. S. Army Corps of Engineers general permit, for which they had provided Section 401 Certification. The U.S. Army Corps of Engineers had informed us that the work qualified for a non-reporting Nationwide Permit #3, which covered maintenance and repair of existing facilities with no additional environmental impacts.

Mr. Woodward said that while there was no formal opposition to the project and staff found the marina replacement project acceptable, the applicant had questioned staff's standard recommendation of an encroachment royalty for their use of state-owned bottomlands. When staff first informed the applicant of the requirement for royalties the applicants indicated they felt that the facility met the requirements for an exemption provided in Section 28.2-1206(B)(i-iii) of the Code of Virginia. It was their contention that the Tides Inn was "a commercial facility engaged in the business of selling or servicing watercraft" and therefore exempt from royalties. They had submitted information regarding the facilities at the marina, including sewage pump-out, fuel, water, and electric to support their claim. In addition, they indicated that a company called Premier Sailing, which operated at the Tides Inn, sold boats and that the recent sale of the *Miss Ann* supported their claim that the Tides Inn was in the business of selling watercraft. Furthermore, they had indicated that in-water repairs by others were allowed while boats were moored at the marina. The *Miss Ann* was used for years as a cruise boat for Tides Inn guests. In fact, the Seller's Closing Statement for the *Miss Ann*, included with the submitted additional information, indicated the sale was brokered by United Yacht Sales of Stuart, Florida, and not brokered by the Tides Inn itself. Further information submitted by the Tides Inn indicated that the marina itself was run by a subsidiary of the New Tides LLC, a company called Rappahannock Marine LLC, incorporated on April 5, 2001. Documents provided indicated that the "purpose for which the limited liability company was to be formed were to purchase, own, sell and operate marine vessels to engage in cruise and related services..." It was staff's understanding that the Tides Inn owned many vessels that were available for use by guests and it would appear the authority granted the LLC allowed for the sale and purchase of vessels for this purpose.

Mr. Woodward stated that as background information, it should be noted that during the November 22, 2005, meeting, the Commission voted to endorse a new royalty schedule and considered several recommendations of the Habitat Management Advisory Committee (HMAC). One of those recommendations was that royalties should be calculated based on the bold outline of the area encumbered, not the shadow of the permitted encroachment, as was the case previously. In cases where an existing marina

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was being upgraded or modified in the same general location, and the original marina facility had paid a royalty for the square footage of the original structures themselves, staff had supported the subtraction of the shadow of the structures from the overall bold outline. Two recent examples of royalty assessments for the reconstruction of older marina facilities considered by the Commission included the Poquoson Marina Associates LLC (VMRC #07-1569) and the Urbanna Harbour Yacht Club Association (VMRC #07-1620) projects. In these cases, the royalties were assessed based on the bold outline of the new structures. The encroachment assessment for Poquoson Marina Associates LLC was based on a rate of \$1.00 per square foot, since the facility was available of public use, for a total of \$84,595.00 based on the current plan to rebuild the marina facility. The assessment for the Urbanna Harbour Yacht Club Association was based on a rate of \$1.50 per square foot, since the facility was previously converted to a Dockominium and only those who had purchase slips could use the marina, for a total of \$150,294.00.

Mr. Woodward also said that in addition to the updated rent and royalty schedule, and the bold outline calculation method recommended by HMAC, and adopted by the Commission on November 22, 2005, HMAC further recommended that all permittees be assessed a royalty even if they were ultimately determined to satisfy the criteria for one of the exemptions provided in Section 28.2-1206(B)(i-iii) of the Code of Virginia Code. HMAC felt that the burden of proof that they in fact did meet the criteria for exemption would rest with the permittee, and in the absence of that proof, a royalty should be assessed and collected in conjunction with permit issuance.

Mr. Woodward explained that over the years the Tides Inn marina facilities had been repaired and maintained with the addition of new decking, support piles, stringers, etc., but VMRC records for the facility show only two projects that involved new improvements resulting in additional encroachment over State bottom. One permit was issued for a 30-foot long by 8-foot wide pier extension of one of the existing finger piers and five additional mooring piles to facilitate larger vessels (#93-0386), and a second authorized a floating platform for a marina office, later turned into a fixed structure (#96-1548). Both of those permits included the assessment of a royalty for the additional encroachment of the structures over State-owned bottom, although at the time such royalties were not being collected due to a Governor's moratorium.

Mr. Woodward said that while staff had no objection with the project itself, and in fact supported the upgrades proposed, staff did not believe the facility qualified for the exemption from royalty payment provided in Code. Staff was of the opinion that the New Tides, LLC was actually engaged in a resort hotel business which just happened to offer water-related recreational activities as an amenity for its guests including boat slips for transient use and longer term leasing. When guests arrived by boat and stayed at the Inn, they were afforded standard amenities like water, electric, sewage pump-out and fuel from a nearby facility. Although there was opportunity for minor repairs to be done to vessels while they were moored at the facility, there was no travel lift or service yard at

the resort property. Staff also did not believe that the sale of the *Miss Ann*, or any other boats sold by Premier Sailing or others at the Tides Inn, met the criteria for selling watercraft, as required by State Code, because the Tides Inn was not a boat sales or brokerage business, per se. For these reasons, staff did not feel that the New Tides, LLC was truly a “commercial facility engaged in the business of selling or servicing watercraft” which would exempt the company from royalties.

Mr. Woodward said that in the current economic climate, staff understood that a royalty payment was an additional expense to the cost of the project. The royalty payment was, however, for the private use of state-owned bottomlands based on the area of public trust lands encumbered by the Tides Inn and for which they would charge a fee for use by their resort guests. In this case staff does not see how New Tides, LLC, could be considered to qualify for a royalty exemption without setting a precedent for other similar mooring facilities in Virginia based on the presence of pump-out and fuel facilities or the sale and service of vessels by other entities.

Mr. Woodward stated that staff recommended approval of the project, as proposed, conditioned upon the proper and lawful demolition, removal and disposal of all existing structures with the assessment of a royalty in the amount of \$27,788.00 for the encroachment of the facilities over 27,788 square feet of State-owned submerged land at a rate of \$1.00 per square foot. This rate was in conformance with the revised rent and royalty schedule adopted by the Commission. Since staff could not find any record of a royalty ever being paid for any portion of the facilities being replaced, staff did not recommend the subtraction of the shadow of the existing structures from the bold outline of the marina that would result from the new proposal.

Mr. Woodward stated that the project was not protested and only before the Board because of the applicant’s questioning the applicability of royalties.

Commissioner Bowman asked for questions of staff.

Associate Member Tankard asked about the minor repairs that could be done when moored and why this did not meet the exemption allowed in 28.2-1206(B). Mr. Woodward explained that these activities can be done on the boat in the slips by others and the boats would not be hauled out and it did not qualify as a repair facility. Mr. Tankard asked about a permit for the office over state-owned bottom. Mr. Woodward stated there was an after-the-fact permit. He said the dockmaster operates out of the office to provide access to slips when notified. He said this was authorized at the time with royalties, but the Governor had put a moratorium on collecting any royalties so it was never collected. He said that when the extension of the pier was done, royalties were assessed and were not collected for the same reason.

Commissioner Bowman said at the time, it was suspended by a Governor's directive and later the suspension was lifted and royalty collection was allowed again.

Associate Member Plumlee asked if the assessment was done for the area controlled by the owner even when there was no structure. Mr. Woodward responded yes, it was the area encumbered not just the physical structures, since other users were not able to use or access the area. Commissioner Bowman stated that only the applicant was receiving the benefits.

Associate Member Plumlee asked if a straight pier with no finger piers would be different. Mr. Woodward responded yes, if it were a community pier with no finger piers and there would be no mooring. Associate Member Plumlee asked if it was straight and had mooring it would be, because you were only looking at the use. Mr. Woodward responded you would be looking at the use, which was the mooring of boats.

Associate Member Plumlee asked if a regulation provided guidance on how this is applied. Commissioner Bowman said the statute was clear as to the intent of the General Assembly was for shipyards; and port facilities; but the line 'in the business' means the business is not incidental. He indicated the royalty exemptions dealt with the Public Trust lands and the public benefits of shipbuilding and national defence and the economic engine of the ports. He said there were no other guidance documents and it was at the discretion of the Commission. He said he believed the statute's intent was that it be a primary focus not an incidental action. Associate Member Plumlee said that 'in the business' is an important phrase.

Associate Member Schick explained that HMAC had review this issue and decided that the business was a direct, active pursuing of the business with equipment, employees and an area to work.

David Grandis, Assistant Attorney General explained that the Code had been rewritten in 2005 and VMRC had not developed regulations, this would be a case of first impression and the interpretation was to be made by the Commission.

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

Gordon Slatford, applicant, was sworn in and his comments are a part of the verbatim record. Mr. Slatford explained that the resort and marina carry out many business functions, such as, boat sales, boat repairs, boat services, shipbuilding, transient mooring, fuel sales, sewage pump out, a port in emergencies, food and sustenance and they provide recreation and relaxation facilities. He said there is also electrical hook-up, bottom scraping, diving services, tv and wifi, telephone, and so on. He felt that because this was a unique facility which was exempt from royalties under Code Section 28.2-1206. He said that he believed that the exemption ruling was originally created as an inducement

and encouragement to businesses to invest in their infrastructure and this would be consistent with other state agencies promoting and encouraging businesses to invest and nothing he found contradicted this belief.

Mr. Slatford said in his discussions with staff they had inferred that in this case, the selling of boats and the services of boats is not the primary business. He stated that the facts were on their side, the law was on their side and quite frankly they needed the Commission's help so this worthwhile project could proceed.

Commissioner Bowman asked if there were questions. There were questions of clarification about the type of services performed by the marina from the Commission which are a part of the verbatim record.

Stormy Pearson, employee of New Tides, LLC, was sworn in and his comments are a part of the verbatim record.

Mr. Pearson Associate Member Plumlee asked if they provided servicing to boats. Mr. Pearson stated that their staff, physically, meet and greet guest, handle lines, pump-out, electrical and actively service the guest possessions. Associate Member Plumlee asked about the number of employees. Mr. Pearson replied there were five.

Associate Member Schick asked if there was repair to a water pump was a work order. Mr. Pearson said there was no paperwork or a work order. He said he had ordered parts.

Associate Member Fox asked if the repair was more of a problem than the boat owner could handle, what was done? Mr. Pearson explained contact would be made with another marina with mechanics and they would be put in touch with the boat owner. Associate Member Fox asked if they arranged for the repair. Mr. Pearson said at the site or at another site.

Associate Member Robins asked about the sale of vessels and the Premier Sailing partnership. Mr. Slatford said that the partner was provided a place for the business and ran the charge through their books, resulting in a commission from the sales.

Associate Member Tankard asked if in running the office, Mr. Pearson created invoices. Mr. Pearson said no invoices were created at the office.

Commissioner Bowman asked if the sale of the "Miss Ann" was registered with the Department of Game and Inland Fisheries by the company. Mr. Slatford said he did not know. Commissioner Bowman said it was required by Code of Virginia that it be licensed with the DGIF.

Associate Member Plumlee asked if fuel was provided at another site and if the employees fueled the boats. Mr. Pearson said the owners were directed to the other site.

Commissioner Bowman asked if anyone else was present in support or opposition. No one else was present in support or in opposition. He asked Mr. Slatford if he had rebuttal comments.

Mr. Slatford said they were leaving it up to the Commission's discretion. He said that \$36,000 was too much to allow the project to continue and they did not object to a royalty assessment, but asked that it be reasonable.

Commissioner Bowman asked for discussion or action on this matter by the Commission.

Associate Member Schick said the key word derived from Code Section 28.2-1206 was "engaged", which means to occupy attention, to secure for employment or hire, to engage workers. He said there must be an active effort; it cannot be passive for someone else to do the work. He said he would like to see marinas exempted, but the State Legislature did not exempt marinas. He said there was no brokerage license, no work orders, no employees engaged in repair or services and he just cannot see the exemption from royalties.

Associate Member Plumlee said the arguments were compelling with regards to service, but only limited services were provided. He said the details provided did not support the level of service indicated.

Commissioner Bowman noted that it was confirmed by Mr. Pearson's comments.

Associate Member Robins stated that the services provided were not at the level required for the statutory exemption. He said that the General Assembly did not exempt marinas based on what Tides Inn indicated they provided. He said that being engaged in the business of sales and services was not just to provide fuel and pump-out amenities at a marina.

Associate Member Tankard said that from the testimony the marina was not actively engaged in the business.

Associate Member Fox said he saw it differently, as the lodging of guest was the primary business of the Tides Inn. The marina attracted a port of guests related to the private business and servicing was not required physically by the applicant. He said some are done by employees, such as tying up and fueling. He said allowing an outside repair company in to do the work was providing a service.

David Grandis, Assistant Attorney General, said that the Code required the riparian owner to be actively engaged, not for a third party agent to provide.

Commissioner Bowman asked if the amount assessed was consistently applied and not deviated from.



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Tony Watkinson, Chief, Habitat Management, said yes, although the royalty schedule provides a range and the specific amount was recommended from that range.

Commissioner Bowman asked for action by the Board.

**Associate Member Schick moved to accept the staff recommendation as the Commission had looked at the situation of the riparian owner being engaged in the actual repair and sales and found that there was not evidenced to show that. Associate Member Tankard seconded the motion. He said he would like to give them a break, but it would set a precedent and they were using state waters for a commercial application. Commissioner Bowman said that because of the statute he supported the motion. The motion carried, 9-0. The Chair voted yes.**

Royalty Fees (encroachment 27,788 sq. feet @ \$1.00/sq. ft.).....	\$27,788.00
Permit Fee.....	\$ 100.00
Total Fees.....	\$27,888.00

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**10. RICHARD GREEN, OYSTER LEASE GROUND APPLICATION, 2010-044**, requests to lease approximately 60 acres of planting ground near the James River Bridge in the City of Newport News. The Commission declined to lease this area under two previous applications in 2005 and 2008.

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

Mr. Stagg explained that the requested oyster planting ground lease was immediately upstream of the James River Bridge, offshore from Huntington Park, in the City of Newport News. It was within the Thomas Rock Hand Scrape Area of the James River and was open during Commission approved dates to public harvest. The area was leased historically by the J. H. Miles Company until it reverted to the Commonwealth on November 7, 2000. The ground reverted after the J.H. Miles Company failed to provide documentation of significant production of oysters and/or clams, reasonable plantings of oysters, clams or cultch, or significant oyster or clam aquaculture operation during any portion of the ten-year period immediately prior to renewal. Portions of the Miles' ground had been leased since 1930 and were extensively worked until the diseases MSX and Dermo adversely affected the area.

Mr. Stagg said a portion of this same area was the subject of a previous application by Mrs. Sharon Carr. That application was the subject of a full Commission hearing in May of 2005. During the public hearing on the Carr application, Mr. George Marshall stated that this area should be kept open to the public and that over 1,000 bushels of oysters

were caught in this area from December 1, 2004, through March 31, 2005. Staff noted at the time that a harvest estimate of 1,000 bushels of oysters from this area seemed high, based on information provided by the Law Enforcement Division. Also, a portion of the Carr application (approximately 80 acres) was restricted because of an existing Health Department condemnation and was not open to harvest during that time period. Subsequently, the Commission voted 4-3-1 to deny the application with a proviso that Mrs. Carr could reapply for a "more reasonable" amount of acreage. No such application was ever submitted by Ms. Carr. Also, during the May 2005 hearing, Mr. Marshall requested that the Commission set the area aside as public ground; however, no specific Commission action was taken on his request.

Mr. Stagg stated that on May 5, 2008, Mr. Green applied for the same general area encompassed by the previous Carr application. The application was subjected to the VMRC normal public interest review and the area was surveyed in July of that year. As surveyed, the 215.37 acre area included 121.43 acres that were open to direct harvest of shellfish and 93.94 acres that were restricted for direct harvest, due to the Health Department condemnation. Shellfish could be relayed from this area to unrestricted ground under a VMRC relay permit. Staff received a protest from Mr. George Marshall on August 18, 2008, along with a petition signed by 41 other citizens requesting that the area be set aside as public ground.

Mr. Stagg said that Mr. Green provided testimony and a rebuttal to Mr. Marshall's protest at the October 28, 2008, Commission hearing regarding his application. Mr. Green noted that he had worked on the water for the last 50 years. He also provided a petition signed by 42 citizens in support of his lease application. Mr. Green noted in his letter that the ground had been held as a private lease for well over 50 years and that he had personally worked the ground for the J. H. Miles Company in years past. He further noted that the area was not the best strike area in the James River, but properly seeded oysters would grow to market size before they die from the effects of MSX and Dermo. He stated he planned to plant large seed oysters there and provide work for himself and other commercial watermen and their crews.

Mr. Stagg explained that on October 20, 2008, the Replenishment Department staff conducted a survey of the resources in the area of the application. That survey indicated considerable existing shellfish resources along the offshore area of the application area. Staff therefore recommended that the offshore area not be leased and that the Commission set the area aside for an indefinite period subject to any future Commission action.

Mr. Stagg said that based upon all the information provided at the October 28, 2008 hearing, the Commission approved an area of 156.55 acres to be leased to Mr. Green, leaving approximately 60 acres that were not leased. The area was not set aside from leasing.

Mr. Stagg stated that Mr. Green submitted a new application for the 60 acre area on June 1, 2010.

Mr. Stagg explained that staff conducted the VMRC normal public interest review as required by the Code of Virginia, including the surveying of the ground in the field on October 12, 2010. No protests had been received.

Mr. Stagg stated that the Engineering/Surveying Department again requested assistance from the Replenishment Department staff to determine what, if any resources might currently be located within the application area. Based upon actual bottom grabs, the Replenishment Department staff found a count of 164 spat, 54 small oysters and 34 market size oysters per bushel from each grab within the application area compared to counts of 190 spat, 26 small oysters and 26 market size oysters per bushel from each grab on the nearby Brown Shoal public ground area.

Mr. Stagg stated that while staff did not receive any objections from the public concerning the current application, staff was reluctant to administratively assign the lease without further direction from the full Commission. The staff's hesitance was based upon the Commission actions for the two previous applications and the fact that the previous applications were protested and public comment was received at both hearings concerning potential resources in the area and public use of the area of the application. It did not appear, however, that the public was currently working in the area of this application.

Mr. Stagg noted that the area encompassed within the most recent application was a part of an area historically leased by J. H. Miles Company. The area was adjacent to, but was not included in, a portion of the natural rocks that were originally set aside as public ground under the Baylor Survey. However, most likely due to years of cultivation while under lease, the area had now taken on characteristics similar to the adjoining public ground (Brown Shoal). Since it did not appear that the public was at the present time actively working this area, staff had received no objections to this most recent application, and at a minimum some portions of the ground appeared to be suitable for shellfish culture, staff recommended approval of the application as surveyed, containing 59.47 acres.

Mr. Stagg stated that should the Commission deem leasing this area was not warranted at this time, staff would recommend the area be set aside as additional public ground, subject to any future Commission review and re-evaluation of leasing of the area.

Commissioner Bowman asked for questions of staff. There were none. He asked if the applicant was present and wished to comment.

Richard L. Green, applicant, was sworn in and his comments are a part of the verbatim record. Mr. Green stated he was reapplying for the ground as he would like to be able to

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relay some oysters on the ground. He said it would be easier to work and relay there instead of upriver to another area. He said he had worked there and had not found much, but he only could use a small dredge. He said a larger dredge might have found more. He said staff had surveyed it but he had found more oysters in the condemned area than here. He said he would be able to create work for himself and other watermen.

Commissioner Bowman asked if anyone was present in support or opposition. There were none. He said the matter was before the Commission.

**Associate Member Tankard moved to approve the application. Associate Member Plumlee seconded the motion. The motion carried, 9-0. The Chair voted yes.**

Commissioner Bowman said that here was an opportunity hear protest, but none were made.

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The Commission broke for lunch at approximately 12:20 p.m. and reconvened at approximately 1:10 p.m.

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**11. PUBLIC COMMENT – No public comments.**

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**12. CYNTHIA SMITH (REEDVILLE, VIRGINIA):** Requests the return to a June 1 closure of the blue crab spawning sanctuaries and a modification of the upper western mainstream Chesapeake Bay boundary line of that blue crab spawning sanctuary. 4 VAC 20-752-10 et seq., "Pertaining to Blue Crab Sanctuaries".

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

Mr. O'Reilly explained that he would give a little background on the issue. A letter was received from Cynthia Smith requesting Commission action on two components.

Change the starting date for the Bay Sanctuary Crabbing restrictions to begin in June not May, as it was currently May 1.

Change the boundaries for the upper Bay Sanctuary to the physical landmarks of the Maryland Cam buoy to Smith Point Light to the Great Wicomico Light and to return to the 30-foot water depths, as it established in 2002.

Mr. O'Reilly provided a map showing the four portions of the Bay. The Upper Western area of the Bay at Reedville was the area Ms. Smith was concerned about.

Mr. O'Reilly stated that the upper western portion usually had the lower crab harvest and in 1994 it was the lowest producing area either of crabs or the effort reflected here. Usually in the months of April and May it was the lowest. In 2010 there was an abundance increase which caused a spike, but there were less harvesters in the Upper Western area.

Mr. O'Reilly said that in the upper east it was the 2<sup>nd</sup> least amount of spring harvest, second to the upper west. In 2009-2010 it was noted that all of the areas harvest spiked.

Mr. O'Reilly said that in 2008, the May 1 sanctuary closure started. A chronological chart for the time period 2000-2010 for the changes in the regulation was provided. In July 1, 2000 the sanctuary was increased 661 square miles in order to conserve females and boost harvest. In 2002, the sanctuary was expanded to 927 square miles and this contributed towards 15% reduction exploitation plan and there were some savings. VIMS said that this line would protect 70% of the females destined to spawn. In July 2002 there was a special meeting held and the shallow depths of water, 2, 8, and 10 feet off of Reedville protested by local harvesters, and the Commission adopted an emergency regulation to provide greater depths of water, for crabbing, in this area. This modified boundary of 2002 has remained in place. The only change involved actions by the Commission in June 2010 to remove coordinates associated with physical markers, as Law Enforcement and Engineering-Surveying determined that the green flashing buoy at York Spit and a few other markers did not line up to the coordinates in the regulation.

Mr. O'Reilly said that Ms. Smith's 3<sup>rd</sup> request concerned communication with the crabbers and watermen. It would be too costly to get this information sent out due to the recent economic downturn. There were plans for setting up a 1-800 number to provide information to the public about regulations.

Mr. O'Reilly stated that he had indicated to Ms. Smith that no change would be made at today's hearing as it was close to the end of the season. The crab stock status must be considered and 2010 was the first time that the stock abundance had been greater than 600 million crabs since 1997. The last time the stocks equaled this was back in 1993 for the abundance of spawning age crabs. The recent abundance of recruits in 2010 shows them to be prolific, which means a lot of crabs in the fall. Staff wants to see whether this strong abundance happens again before recommending any changes.

Mr. O'Reilly said staff recommended looking at the next survey results before changing the date to June or modifying the boundary line and also have the CMAC review it. There were five other phone calls from watermen who wanted to return to the June 1 date, but they did not recommend a change in the boundary line.

Commissioner Bowman asked about the text message received from Ken Smith. Mr. O'Reilly said Mr. Smith requested that CMAC hear Ms. Smith's case and Mr. Smith also made this request at the Shellfish Management Advisory Committee meeting.

Commissioner Bowman asked Ms. Smith to come forward and comment.

Cynthia Smith was present and her comments are a part of the verbatim record. Ms. Smith said her letter was sent in May 2010 and everyone in the area wants to do what is required by VMRC. She said the change (in the start of the closure of the sanctuary to May 1) was adopted in April 2008, and a notice was sent but they never received it. She stated in 2009 it was not enforced. She said 40 to 45 harvesters were not notified and they received citations in 2010. She said they pay \$190.00 for their commercial card and all the license fees, but they cannot get the information sent to them. She said the changes are important, but even the Watermen Associations did not know about it. She said the Commonwealth Attorney did not know about it, as there was no communication and it is a problem. She suggested that instead of the Daily Press and Richmond Times, the Commission should advertise the notices in the local newspaper which would help.

Ms. Smith said that the water warms up in May, when they catch the crabs and get a fair market price. She said the lower Bay was allowed a spring fishery, but not them and these families need an income. She said the temperature should be considered, too. She said there was no market in the fall, but there was in the spring.

Mr. O'Reilly said that the Upper Eastern portion requested May 15 which was taken to CMAC earlier this year, and the change back to June 1, for any area, would have to go to the CMAC.

Ms. Smith said there was the discrepancy on the boundaries and the Commission had agreed on the boundary suggested by staff and VIMS in 2002. No one told them about the change that was made to it. She said no one has GPS and they need physical markers to know the boundaries. She said they do not oppose the sanctuary, and she could debate the figures given. She explained that in 2010 they crabbed in the river not the Bay, which is where the statistics come from. She said they need fairness in the regulations and May 15 did not help them. She said they need two solid weeks in May and she asked they consider changing the boundaries to physical markers. She said they had asked Law Enforcement to come and help them, but they did not.

Commissioner Bowman said this was good dialogue and he instructed that John Bull, who is responsible for public relations, to work with the smaller newspapers. He said it was published within days on the website. He said he was pleased that the matter had been brought to the attention of the Commission.

Associate Member Plumlee asked what the citation was for. Ms. Smith answered for fishing in the Sanctuary in 20-foot water depth. She reiterated that they did not know

about the changes. She said they lost time for crabbing which resulted in the loss of a lot of money in 2010.

Associate Member Robins said he appreciated their concerns, and CMAC should discuss these concerns, as well as the concerns for communications of regulatory changes. He asked staff if more information would be available if they were to meet on this matter in January. Jack Travelstead said after the first of the year the new stock assessment would be available, as it was important to have this information. He said he would asked for an analysis on the capacity as far as the number of watermen that could safely harvest while maintaining the target level and how much excess harvest was there in the Bay. He said at the present time there were approximately 300 on a waiting list and would be coming back into the fishery next April.

Mr. Travelstead explained that there were two other requests as Tangier watermen want to have the upper 1/3 of the sanctuary open until May 15. He stated the southern crabbers want the same. He said there was also the annual issue of opening the crab dredge fishery. He said the survey information would help with any decisions.

**Associate Member Robins moved to take these issues to CMAC for their review. Commissioner Bowman instructed Mr. Bull to attend the meeting. Associate Member Holland seconded the motion. The motion carried, 9-0.**

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- 13. PUBLIC HEARING:** Consideration of amendments to Chapters 4VAC20-920-10 et seq. "Pertaining to Landing Licenses" and 4VAC20-620-10 et seq. "Pertaining to Summer Flounder", to provide an allocation of commercial offshore (federal waters) summer flounder quota to qualifying Virginia commercial hook-and-line licensees.

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

Mr. Gillingham stated the Commission established the Summer Flounder Endorsement License (SFEL) in 1996. To qualify for a SFEL a fisherman must have landed and sold at least 500 pounds of summer flounder in Virginia in at least one year during the period of 1993 through 1995. Fisherman were also required to have a current federal summer flounder moratorium permit.

Mr. Gillingham said that the Commission had received a request from a commercial hook-and-line fisherman (Jim Dawson) that indicated a desire to adjust access of the offshore portion of Virginia's summer flounder quota.

Mr. Gillingham explained that the staff was recommending a 200-pound possession limit for harvest year round until such time as NMFS has determined and announced that the quota has been caught up. FMAC supported the staff recommendation. Charts were reviewed in regards to the amount of catch, number of trips and the number of harvesters reporting.

Mr. Gillingham said there was a new release from the Atlantic States Marine Fisheries Commission dated August 20, 2010 and also the Summer Flounder Assessment for 2010 dated June 23, 2010 in the Commission's packets. Both of these reports indicated the summer flounder stock was growing and quotas would increase in the coming year (2011)

Mr. Gillingham provided a revised copy of the 4VAC 20-920-10, et seq., "Pertaining to Landing Licenses" and a revised copy of 4VAC 20-620-10, et seq., "Pertaining to Summer Flounder", where the definition for land or landing in 4 VAC 20-620-10 was amended so that it was the same as that in 4VAC 20-920-10. He noted also that in 920 there were a few other errors such as Subsection H became I. He said the staff recommended a 200 pound vessel possession limit. The vessel limit would eliminate of permit stacking by holding the vessel to a maximum possession limit of 200 pounds regardless of how many permit holders might be onboard.

Mr. Gillingham stated that staff recommended the adoption of the proposed amendments to 4VAC 20-920-40(A), to establish a Restricted Summer Flounder Endorsement License (RSFEL) and its qualifying criteria and 4VAC 20-620-40(A & D), to establish a vessel possession limit and landing period for the RSFEL.

Commissioner Bowman asked for questions of staff.

Associate Member Robins said he was concerned that with one person being qualified there would be an expansion of the fishery. Mr. Gillingham explained that with the limited amount it might mean one or two others. He added that a large vessel probably would not be interested.

Commissioner Bowman opened the public hearing.

Jim Dawson, fisherman, was present and his comments are a part of the verbatim record. Mr. Dawson said he was concerned with the 93-95 time frame used and he was never notified of this. He said he possesses a license and he would appreciate more follow through. He said that none would go over the 200 pounds and it was issue with the inshore and offshore fishery, he was just concerned with the fishermen who would cheat. He said the 200 pounds with the offshore larger fish were easy to catch. He said the 200 pounds was a good number across the board.

Greg Smith, fisherman, was present and his comments are a part of the verbatim record. Mr. Smith said that the 200 pound limit could be caught in 3 days and with 3 days out of



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30 days the limit of 200 pounds penalizes them as other days were not all that good. He said to limit all is a penalty, but it was okay if it was applied to only offshore.

Chris Ludford, fisherman, was present and his comments are a part of the verbatim record. Mr. Ludford said he agreed with the 200 pound limit in the federal waters, but not the inshore fishery.

Kelly Place, fisherman, was present and his comments are a part of the verbatim record. Mr. Place said that the 200 pounds only for federal waters would keep it from becoming a directed fishery.

Commissioner Bowman closed the public hearing. He said the matter was before the Commission for discussion or action.

**Associate Member Bowden said that the FMAC had agreed that the right way to go was with staff recommendation. He moved to accept the staff recommendation with the offshore fishery have special conditions. Associate Member Robins seconded the motion. The motion carried, 9-0.**

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**14. PUBLIC HEARING:** Consideration of increasing the current 14-inch minimum size limit of Summer Flounder harvested and possessed by commercial hook and line fishermen. 4 VAC 20-620-10 et seq. "Pertaining to Summer Flounder".

Lewis Gillingham, Head, Saltwater Fishing Tournament, gave the present with slides. His comments are a part of the verbatim record.

Mr. Gillingham said that prior to 1993, any person could harvest marine species and offer them for sale, as long as the appropriate gear license was purchased from the Commission. Beginning in 1993, any person desiring to harvest and sell marine species must first purchase a Harvesters Registration Card, which allowed the individual to sell their harvest and purchase the appropriate gear license(s). In 1993 the CHL was also established and the fishermen were held to the recreational season, size, and possession limits but they could sell their catch if they possessed a Harvesters Registration Card. By 1996, the Commission limited the number of CHL to 200. In return, for most species, where that species was managed by a commercial quota, CHL holders would be under the commercial fishery quota. Therefore, for those species the commercial season, size, and possession limits would apply to a CHL holder.

Mr. Gillingham explained that in Virginia the landings of summer flounder by Commercial Hook and Line occurred predominately from Mid-April through early fall and a similar pattern was observed in the recreational fishery. Conversely, commercial landing from the offshore summer flounder fishery occurred primarily in February and

March and then again in late November and December. Therefore, summer flounder caught by CHL were available for sale at a time when very few summer flounder were being caught by the offshore fleet. He noted there was a steady increase of harvest by CHL of summer flounder since 1993 and in 2010 it was 63,000 pounds. All states have a difference in management strategies that seem to be working.

Mr. Gillingham said the consideration of increasing the current 14-inch minimum size limit of summer flounder harvested and possessed by commercial hook and line fishermen was the result of a request made by Associate Member Robins at the last meeting. The FMAC met on November 15, 2010 and agreed that no change was needed. He reviewed a table of other States' strategies to manage the fishery. Delaware and Maryland have the same size limit for the Recreational and Commercial fisheries. He said that North Carolina had a similar size limit.

Mr. Gillingham said that staff recommended that no action be taken.

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

John Barr, Eastern Shore fisherman, was present and his comments are a part of the verbatim record. Mr. Barr stated he was on the Recreational Advisory Board, but for this hearing he was speaking for himself. He said he had friends that had no problem with the changes heard, but he was concerned about the effect of increasing the minimum size limit for CHL from 14 inches. He said the commercial hook and line would be over if the change in the size limit was made. He said there were 200 licenses granted and they depended on the income especially with the bad economic times now. He said the Law Enforcement know the commercial hook and line fishermen in their area and any complaints can be handled. He said a precedent would be set if the changes were made that anyone can call and cause it to happen. He said changes should be made based on science and for the protection of the resource and not from the public perception.

Chris Ludford, CHL fisherman, was present and his comments are a part of the verbatim record. Mr. Ludford said that FMAC and staff recommend no change. He said there was a cap on license of 200 made in 2000. He said the regulation would be detrimental to the commercial hook and line fishery and it only consists of retirees who have no other fishery. He said that Scott Byer was the buyer who bought the entire CHL catch. He said that some of the attendees at this hearing had traveled a long distance. He thanked them for coming. He said some of the commercial hook and line fishermen do have licenses for gill nets.

Kelly Place, CHL fisherman, was present and his comments are a part of the verbatim record. Mr. Place said that originally it was thought that this license should be handled like a commercial license with the same rules, but instead it has been treated like it was recreational with commercial restrictions. He said that after 1993 anyone could get a

CHL with the CFRL and it became even more restrictive and they were allowed to sell their catch.

Mr. Place explained that the quota was calculated by NMFS based on the 14 inch size limit because of the trawl fishery and this size was a part of how the quota was allocated.

Mr. Place said that the CHL was caught in all of the recreational restrictions and a standard was needed so they would be treated as a commercial fishery. He stated he supported the staff recommendation to keep the size limit to 14 inches as it was key to this being a high value fishery. He said restaurants paid \$10 per pound in the rough unlike other species. He stated the Commission should not hold to the double standards.

Greg Sutter, fisherman, was present and his comments are a part of the verbatim record. Mr. Sutter said there was a need to educate recreational fishermen on the requirements for extra fees and stiffer reporting requirements for the CHL holders.

Jim Dawson, CHL fisherman, was present and his comments are a part of the verbatim record. Mr. Dawson asked that a committee be formed prior to any action being taken. Commissioner Bowman stated that FMAC was for that purpose and that meeting had been held.

Arron Bumgarner, CHL fisherman, was present and his comments are a part of the verbatim record. Mr. Bumgarner said that this was an environmentally friendly fishery and he asked that the size limit be kept to the 14 inches. He said the recreational fishery did not account for the fish they clean and hide in the bow.

Commissioner Bowman closed the public hearing and asked for comments by the Board.

Associate Member Bowden said that from Virginia's quota a portion had been carved out for inshore landings and to keep it in the local economy. He said there was a reserve of 300,000 pounds and he hoped this would increase as the stocks improved. He said there were two means of management where the Commission establishes a closed season to payback the overage and the recreational fishery would not have a closed season with a higher minimum size limit open year round. He said a 12-day spring season and 14-day winter season would be hurt with a larger size limit and the spawners would be caught. He said if the size were lower it would protect them.

He noted that the income from the CHL stayed in the State. He said this fishery provided a better product at a time when there was a better price. He stated that in January 2010 there was a long discussion and an agreement had been reached between the recreational and commercial fisheries. He explained that it had been brought up at last month's meeting because of pressure from the recreational fishery. He said this would be setting a double standard and CHL would be treated unfairly and illegally. He said that FMAC

recommended no change and to leave it as it was. He said that it could be looked at again in the future.

He said that these fishermen did not need to miss days of work by bringing up this issue several times a year. He noted that the stock assessment had shown that the current restrictions were accomplishing the results required.

Associate Member Robins said he was concerned with expanding the fishery. He said that this discussion had been informative. He said the 14-inch size limit was a result of the trawl fishery and comments had been received. He said that 90% of the catch falls within the 14 to 18 inch size and to level the size limit would hurt the CHL. He said he supported both FMAC's and staff's recommendation. He noted that the projection of stocks should result in a lessening of restrictions for a vibrant fishery.

Commissioner Bowman requested a motion three times and there was no motion made.

No action taken.

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- 15. PUBLIC HEARING:** Consideration of modifications to the Virginia commercial hook-and-line (CHL) crew requirements and a proposal to define a "year", as a calendar year, to clarify participation and entry requirements. Chapter 4VAC20-995-10 et seq., "Pertaining to Commercial Hook-and-Line Fishing".

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

Mr. Grist explained that Regulation 4VAC 20-995-10, et seq., "Pertaining to Commercial Hook and Line Fishing" was discussed during FMAC meeting in late 2009 and early 2010. At their August 30<sup>th</sup> meeting, staff presented information summarizing the use of crew lists in 2009 and 2010:

2009 CHL licensees:

Crew lists submitted – 41  
Maximum number of crew members listed – 232  
Average size of a crew list – 24

2010 CHL licensees:

Crew lists submitted – 48  
Maximum number of crew members listed – 128  
Average size of a crew list – 19

Mr. Grist said at the FMAC meeting Jim Dawson stated he did not understand how anyone could legitimately pay anyone to work as a crew member on a CHL vessel and make an operating profit. He noted that the current regulation allowed one unlisted crew member and any crew list limit should be very low. Mr. Grist said that Chris Ludford stated that he had spoken with approximately 60 CHL licensees, and their consensus was that 15 crew members were enough.

Mr. Grist explained that FMAC discussed how allowing large crew member lists and twice annual updates present an opportunity for an individual to circumvent recreational bag limits, including operating an illegal charter boat operation. He stated that FMAC recommended limiting the size of the crew list to 15 individuals and allowing the list to be updated only once per year.

Mr. Grist stated that staff had received written comments from Harry Doertr in which he recommended a 10 to 15 member crew limit.

Mr. Grist said that in Section 20 of the Regulation 995 the phrase 'previous two years' in the qualifying criteria could be interpreted in more than one way. One could say it meant the previous two calendar years while it could also be interpreted to mean the most recent twenty-four month period, to date. He said staff was proposing to simplify the two-year criteria for both the lottery and transfer and say it should be based on the calendar year. He added that to prevent the inclusion of overdue data which is a violation of Regulation 610 or data that could not be verified, all seafood sales and harvest data for the qualifying period must be submitted to the Commission's mandatory reporting program and be no more than one month overdue.

Mr. Grist explained that staff recommended the adoption of the amendments to Regulation 4VAC 20-995-10, et seq.: 1) limit CHL licensees to a maximum crew list of 15 members; 2) update the crew list only once per year; and 3) use calendar years to determine eligibility for both the lottery and transfer.

Commissioner Bowman asked for questions of staff.

Commissioner Bowman asked what the total number was for those registered. Mr. Grist said he had no idea, he had not added them up. Commissioner Bowman asked if simplify if based on calendar. Mr. Grist said yes, that way it would not be up to the staff to make an interpretation.

Associate Member Fox asked if it would mean if there was no list they could not fish? Mr. Grist said it was not required to have a crew and there could be just one unregistered crew.

Commissioner Bowman opened the public hearing.

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Chris Ludford, CHL fisherman, was present and his comments are a part of the verbatim record. Mr. Ludford said that he had met with staff regarding Mr. Dawson’s request in January and he was open to the changing of the crew size. He said the Task Force had suggested a limit or have a cap. He said he agreed with the crew number being 15 and the once a year change. He said for the 2 year requirement it should be date of the application used, because if someone did not have a two year history it could not be transferred. He said changing from 24 months to calendar would work for the lottery, but not for the transfer. He stated that there were elderly watermen who would need to transfer and they could not with the calendar year. He stated he was against the calendar year switch.

Commissioner Bowman closed the public hearing and announced the matter was before the Commission.

Commissioner Bowman asked for action by the Commission.

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

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**16. PUBLIC HEARING:** Consideration of allowing gill net permittees to fish from the same vessel and restrict, or eliminate, the use of agents in the gill net fishery, except in cases of medical hardship. Chapter 4VAC20-1190-10 et seq., “Pertaining to Gill Net Control Date, Limited Entry and Transfers”.

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

Mr. Grist said that at the August 30, 2010 FMAC meeting, staff presented a recommendation to address an original concern of the Gill Net Subcommittee that there is a need for harvesters to join together to work gear during a period of economic difficulties; resulting in both a cost savings and promoting efficiency.

Staff recommended the following amendments to be made to the Regulation 4VAC 20-1190-10, et seq.:

1. No limits on the number of individuals lawfully licensed to commercially gill net from any vessel.
2. Agents are limited to working for one gill net permittee only, no others.
  - a) For non-CFRL holders, one agent permit may be applied for with the information on which harvester they will be an agent for that year.

- b) For current-CFRL holders (options to be chosen from, not to include both):
  - i. Same criteria as 2(a) except they will surrender any gill net permits and licenses for the year if they are to be an agent for another CFRL holder, or
  - ii. Same criteria as 2(a) and they may work their own gill net gear.

Mr. Grist said that FMAC added an additional option for consideration to end the use of any agents in the gill net fishery, except in cases of medical hardship. In cases of medical hardship, staff could approve a temporary agent for removal of gear. The members reasoned that under the current gill net regulations, all CFRL holders are able to possess a gill net permit and licenses, and there is no need for the use of an agent.

Mr. Grist said that the restriction of the use of agents is not without precedent in Virginia. The striped bass fishery prohibits the use of agents, whereas the crab pot fishery requires registration of all agents.

Mr. Grist stated that the proposed had been advertised in accordance with Section 28.2-209 of the Code for a public hearing at this meeting. A copy of the public notice is a part of the evaluation.

Mr. Grist explained that staff recommended adopting amendments to Regulation 4VAC 20-1190-10, et seq., to allow gill net permittees to work together from the same vessel, to prohibit the use of agents in the gill net fishery, and to allow the Commissioner, or his designee, to grant a 5-day exception to the prohibition against the use of agents in the gill net fishery in documented cases of significant hardship due to health, retirement, or death of an immediate family member.

There were no questions of staff, therefore, the public hearing was opened.

Kelly Place, fisherman, was present and his comments are a part of the verbatim record. Mr. Place said he was disturbed by this action, but understood the rationale for getting rid of agents. He suggested that transfers needed to be for more than medical reasons and to consider the economic feasibility. He said if the licensee were not present, then the agent could continue to work alone. He suggested that they be allowed to work in the licensee's absence. He also suggested that the Commission be cautious to the extent they limit agents. He said the Commission should continue this until the next month as some of the fishermen are not aware of this issue.

Chris Ludford, fisherman, was present and his comments are a part of the verbatim record. Mr. Ludford said he understood from FMAC that there could be an agent of an immediate family member. He stated that this should not be circumvented. Mr. Grist referred the Commission to the section regarding family death.

Associate Member Plumlee stated that it was not about an agent but about a family member.

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Mr. Ludford said it was not to be for death, but for health reasons.

Associate Member Bowden said this was looked at in order to stop license stacking and establishing a Class A and Class B did accomplish it. He said there was not to be an agent and card holder on board at the same time. He said that several months ago at the FMAC meeting there was a misunderstanding as Mr. Weagley did not want to do away with agents just to limit the number to equal Class A. He said Law Enforcement enforced the size of the gill net. He said it was not urgent to decide on this at this meeting and suggested taking it back to FMAC to clear up the misunderstanding.

**Associate Member Bowden moved to table the matter. Associate Member Tankard seconded the motion. The motion carried, 9-0.**

Commissioner Bowman suggested sending it to the VMRC legal counsel for his review.

No action was taken.

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**17. DISCUSSION:** Proposed establishment of aquaculture opportunity zones, as prescribed by section 28.2-603 of the Code of Virginia; request for a January 2011 public hearing.

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

Mr. Travelstead explained that Section 28.2-603(B) of the Code was adopted during the 2010 Session of the General Assembly, which directs the Commission to establish commercial “shellfish aquaculture opportunity zones” off the shores of the Northern Neck, the Middle Peninsula, and Tangier Island. Establishment of these zones by regulation would provide cage aquaculture opportunities for those citizens who do not have ready access to leased oyster grounds. The new law also provides that users would be exempt from 1) the requirement of posting notices for the application of such leasing ground; 2) the costs and requirements to have the grounds surveyed; 3) the cost of preparation and recording of the plot; and, 4) the annual payment of rent. The ten-year duration of the lease also would not apply. The costs typically range from \$600.00 to \$1,100.00.

Staff suggested the following provisions to be advertised for public comment:

- 1) Any Virginia resident may apply for use of a portion of any opportunity zone.
- 2) Applications will be considered in the order they are received.
- 3) The application and use fee shall be \$100.00. A one-time fee.
- 4) No application shall be for more than five acres at any one site.



- 5) Marking of the assigned plot shall be in accordance with Regulation 4VAC 20-335-10, et seq.
- 6) Use of the assigned plot shall be restricted to one hour before sunrise and to one hour after sunset.
- 7) Approved applications shall not be transferred without the written consent of the Commissioner.
- 8) Approval of any zone may be revoked at any time by the Commissioner upon the failure of the user to comply with the terms of the regulation.
- 9) All structures which are not maintained in good repair shall be completely removed within five business days after written notification by the Commissioner.
- 10) The public shall not be excluded from any space not physically occupied by the aquaculture cages.
- 11) Cages shall be constructed of non-toxic material and no single cage shall exceed 70 cubic feet in volume.
- 12) Cages may be placed individually on the bottom, placed in racks or sacked on top of another.
- 13) Cages shall be placed in a manner that allows for ease of access, maintenance, and removal and shall not exceed 250 cages per acre within the permittee area.
- 14) No cage or structure shall be marked by more than one buoy, which shall not exceed 15 inches in its longest dimension.
- 15) Floating cages are not permitted.

Mr. Travelstead stated that a committee of staff established these areas. The slides showed sites off of Tangier, in the Rappahannock River and the Mobjack Bay tributaries. There was interest by the Planning District for Mathews County to enhance in their area water-borne industry with aquaculture. The list of aquaculture zones would not be the final one as other areas of interest could be added later.

Mr. Travelstead said that the public comments received so far were very concerned about user conflicts.

Mr. Travelstead said that item 6 should be changed to say "sunrise to sunset". He said staff recommended advertising all of the items and to hear it in January, 2011.

Commissioner Bowman asked for questions of staff.

Associate Member Holland asked if it included any Baylor grounds. Mr. Travelstead stated it included only unassigned bottom.

Associate Member Fox said that there was no interest expressed at the SMAC meeting, but the Commission was hoping to find some innovative ways to perform aquaculture and if approved, maybe there would be.

Commissioner Bowman said that staff had been working on the Aquaculture Opportunity Zones since it was passed by the General Assembly.

Mr. Travelstead noted that a lot of crabbers were being trained in the oyster aquaculture projects and there was interest on Tangier.

Commissioner Bowman asked for a motion by the Board.

**Associate Member Fox moved to advertised for the public hearing in January, 2011. Associate Member Plumlee seconded the motion. The motion carried, 8-0. Associate Member Laine was absent during this presentation and vote. The Chair voted yes.**

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**18. OYSTER STANDING STOCK REPORT:** Update of harvest activities and current estimates of standing stock, for public oyster grounds; request for a January 2011 public hearing to consider the amending of Regulation 4VAC 20-720-10, et seq., Pertaining to Oyster Harvest Restrictions, to reduce the bushel catch limit for the commercial registered fisherman licensee for Rotational Area 4 in the Rappahannock River for the month of February.

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

Dr. Wesson explained that it was SMAC who wanted to open all the areas at the same time and most of the areas were closing at the end of December, 2010.

Dr. Wesson stated that aerial flights were made to observe the oyster activity in the various areas. The big areas for activity were where oysters had been highlighted for the Commission in September. Once the areas were worked down then some of the watermen moved to other areas.

Dr. Wesson said that the catch in the Rappahannock River was down from 10 bushels to 6 bushels as the stocks can not support that number of boats. The data will be available for the December Commission meeting.

Dr. Wesson said some of the SMAC members requested other areas, but seemed to accept that this had been a fairly good year in the Rappahannock River. He provided a harvested chart of the Mobjack Bay area showing the 2006 spatset and how most of it was caught the next year.

Commissioner Bowman asked how much impact would occur if the hand scrape line was extended to be worked further up the James River for two months.

Dr. Wesson said hand tonging is done in shallow areas and the hand scrape is easier than the larger dredge, but it is still destructive. He explained the hand scrape line was set for a reason as these two areas are different. He said the spatset is better in the hand tong area and the Commission had already decreased the size of the sanctuary area. He said the hand scrape is a more efficient gear and is where you get into problems.

Dr. Wesson stated that the SMAC had agreed to lower the bushels limit to six bushels per licensee in Area 4 when it reopens in February 2011. He suggested that the Commission advertise for a January 2011 public hearing before the area reopens.

Commissioner Bowman stated the matter was before the Commission.

**Associate Member Plumlee moved to accept the staff recommendation to advertise for a January public hearing. Associate Member Fox seconded the motion. The motion carried, 9-0. Associate Member Laine had returned to the meeting and the Chair voted yes.**

Mr. Travelstead explained that SMAC had made complaints about the Law Enforcement Divisions' lack of enforcement in the James River.

Commissioner Bowman asked Law Enforcement staff to comment. Lt. Col. Warner Rhodes, Deputy Chief, Law Enforcement, was present and his comments are a part of the verbatim record.

Lt. Col. Rhodes explained that there had been 14 summons issued in the James River for unculled oysters, two that did not have a license, and one for starting too early. He stated that all Marine Police Officers were checking the oysters in the James River.

Associate Member Fox explained that SMAC members are saying that unculled oysters have been seen from the James River. He noted that Ken Smith reported small oysters being bought and they want the Law Enforcement Division to make efforts to stop it.

Commissioner Bowman said they are trying to do it, but to just respond to one issue they are short in the number of Marine Police Officer to take care of it all.

Associate Member Fox stated that if action was taken now, it would send a message to others.

Mr. Travelstead stated that it will help enforcement in the area when the permanent markers are done.

**19. APPROVAL OF EXPENDITURES:** From the Virginia Saltwater Recreational Fishing Development Fund and Marine Fishing Improvement Fund to cover agency computer expenses.

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

Mr. Travelstead explained that since FY2007/08, the Marine Resources Commission annual general fund budget has been reduced by a total of \$3,939,498. During that same time period the costs associated with the agency's computer infrastructure services provided by VITA are about \$350,000, per year. Our general fund budget allocated for these costs is only \$70,000, and all previous efforts to acquire additional general funds through the state budget process have been unsuccessful. This combination of events means that the agency must now rely on expenditures from the commercial and recreational fishing license funds to meet these costs.

The costs which must be met through the license funds during this fiscal year are \$98,085. The breakdown of these costs are as follows:

- a) \$27,744 – Commercial Licensing Department
- b) \$24,012 – Mandatory Harvest Reporting Program
- c) \$9,004 – Statistics Program
- d) \$11,325 – Saltwater Fishing Tournament and Recreational Fishing Advisory Board
- e) \$26,000 – Fishery Management Division; Planning; Stock Assessment

Mr. Travelstead said that the costs outlined should be distributed to the appropriate license fund. For example, the costs of \$24,012 associated with the Mandatory Harvest Reporting Program should be borne by the commercial license fund, while the charges from the Saltwater Recreational Fishing Tournament should be met by the recreational license fund. With that strategy in mind then the charges for **a – c**, above should be met by the Marine Fishing Improvement Fund and the charges associated with **d**, above, should go to the Virginia Saltwater Recreational Fishing Development Fund. And finally, the charges for **e**, above, should be split equally between the two funds.

Mr. Travelstead stated that staff recommended approval of expenditures of \$73,760 from the commercial license fund and \$24,325 from the recreational license fund to cover the costs of computer infrastructure services provided by VITA.

Commissioner Bowman said as these were not general funds, they had to be approved by the Board.

Commissioner Bowman asked for action by the Board.

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

**Commission Meeting**

**16179  
November 23, 2010**

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There was no further business and the meeting was adjourned at approximately 3:59 p. m.  
The next regular meeting will be held Tuesday, December 21, 2010.

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Steven G. Bowman, Commissioner

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Katherine Leonard, Recording Secretary