

MINUTES

Commission Meeting**March 24, 2009**

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

Steven G. Bowman	Commissioner
Ernest L. Bowden, Jr.)	
J. T. Holland)	
William E. Laine)	
John R. McConaugha)	Associate Members
Richard B. Robins, Jr.)	
J. Kyle Schick)	
John E. Tankard, III)	
Carl Josephson	Senior, Assistant Attorney General
Jack G. Travelstead	Chief, Fisheries Mgmt. Div.
John M. R. Bull	Director-Public Relations
Katherine Leonard	VMRC Recording Secretary
Jane McCroskey	Chief, Admin/Finance
Erik Barth	Head, MIS
Linda Farris	Bs. System Specialist, MIS
Rob O'Reilly	Deputy Chief, Fisheries Mgmt.
Jim Wesson	Head, Conservation/Replenishment
Alicia Nelson	Fisheries Mgmt. Specialist
Stephanie Iverson	Fisheries Mgmt., Manager, Sr.
Mike Johnson	Fisheries Mgmt. Specialist
Joe Cimino	Fisheries Mgmt. Specialist, Sr.
Laura Lee	Fisheries Mgmt. Specialist
Rick Lauderman	Chief, Law Enforcement
Warner Rhodes	Deputy Chief, Law Enforcement
Bill Hall	Marine Police Officer
Herbert Bell	Marine Police Officer

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

Virginia Institute of Marine Science (VIMS)

Lyle Varnell
Roger Mann

Other present included:

Mark Essert	Mike Harding	Ernie Harding III	Rebecca Francese
Bob Luebker	Mike Crist	Judith M. Rowe	Debra Shoger
Bruce Aitkenhead	Karen Duhring	Charles R. Emory, Jr.	Larry T. Rapier
Brian Cooke	Jim Gunn	Cecilia Sandifer	Chris Nolan
Wendy Desmond	Shawn Desmond	Joe Rieger	Brad Martin
Bill Mooney	Roger Harris	Maxi Martin	Jim Cahoon
Mike Unger	Marjorie Jackson	Scott Harper	Ellis W. James
Ken Smith	Douglas F. Jenkins	Ida Hall	James Hall
Frank Kearney	Chris Frye	Richard L. Lockhart	David Phamister
Charles Jones	Chris Moore	James R. Smith	Percy Blackburn
John L. Hamblin, Jr.	Joe Tannery	Joe Palmer	Matt Richmond
Gordon C. McPherson	Tommy Leggett	Jackie Harmon	Mike Wills
Mary E. Conner	Harry Stanisridger	Ricky N. Jenkins	Robert Jensen
Frances Porter	James W. Oker, Jr.	Mark Swingle	Doug Beckman
Todd Solomon	Biagio Frake	Willie Offield	Bill Geroux
Andrea Moran	Kenneth E. Anns	Billy Haynie	Erin Haynie
Cory Nealon	James Moore	John C. Ludford	Charlie Gregory
Mark Sanford	Robert Costello	Steve Kohler	Pam Bunting
Ed Ruark	John Wyatt	Warren N. Cooke, Jr.	Ann Augustine
Doris Llewellyn	Kevin Godsey	James Godsey	Terry K. Haydon
W. Emory Lewis			

and others.

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Commission Meeting

**15275
March 24, 2009**

Commissioner Bowman called the meeting to order at approximately 9:35 a.m. Associate Member Fox was absent and Associate Member Tankard arrived at the meeting later at approximately 9:42 a.m.

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

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MINUTES: Commissioner Bowman asked for a motion for the approval of the February 24, 2009 minutes, if there were no changes or corrections. **Associate Member Laine moved to approve the minutes. Associate Member Bowden seconded the motion. The motion carried, 6-0-1. The chair voted yes. Associate Member Schick abstained as he was absent from the last meeting.**

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APPROVAL OF AGENDA: Commissioner Bowman asked for any changes to the agenda.

Bob Grabb, Chief, Habitat Management asked for the approval of an addition to the agenda for Item 3 (Consent Items).

Blunt Management, L.L.C., #08-0275, requests after-the-fact authorization to retain an approximately 20-foot by 42-foot single story enclosure over an authorized deck and a 12.5-foot by 44-foot deck attached to the main restaurant adjacent to property at 11 Monroe Bay Avenue situated along Monroe Bay in Westmoreland County.

Associate Member Robins requested time during the public comment item to discuss a May public hearing for the regulatory measures for the deep water grouper species.

Commissioner Bowman explained that Item 24, Public Hearing, Virginia Seafood Council 2009 Study of *Crassostrea ariakensis* would be moved forward and heard after Item 12. He said this had been requested by staff because of their necessity for leaving early to attend another meeting.

Commissioner Bowman asked for comments from the Board.

Commissioner Bowman asked for a motion to approve the amended agenda. **Associate Member Robins moved to approve the agenda, as amended. Associate Member Holland seconded the motion. The motion carried, 7-0. The Chair voted yes.**

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Commission Meeting

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

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

Bob Grabb, Chief, Habitat Management Division, summarized the page two items, 2A through 2G, (7 items) for the Commission.

Commissioner Bowman stated that for Item 2F, Deep Creek Landing Marina had been destroyed by a storm and staff had worked with the applicant to resolve the matter and had done a great job.

Commissioner Bowman opened the public hearing. There were no public comments. The public hearing was closed. He asked for a motion from the Board.

Associate Member Holland moved to approve items 2A through 2G. Associate Member Robins seconded the motion. The motion carried, 7-0-1. The Chair voted yes. Associate Member Tankard was late arriving to the meeting, missing the presentation for Item 2, so he abstained from voting.

- 2A. **PERDUE GRAIN AND OILSEED, LLC, 09-0176**, requests authorization to install two additional breasting dolphins and construct a new 19-foot by 43-foot open-pile dock, timber catwalk, conveyor tower and belt system and a pedestrian footbridge to facilitate repairs/improvements to their existing grain-loading facility located on Hoskins Creek in the Town of Tappahannock. Recommend a royalty in the amount of \$5,872.00 for the encroachment of the project over 2,936 square feet of State-owned subaqueous land at a rate of \$2.00 per square foot.

Royalty Fees (encroachment 2,936 sq. ft. @ \$2.00/sq. ft.....	\$5,872.00
Permit Fee.....	\$ 100.00
Total Fees.....	\$5,972.00

- 2B. **VIRGINIA INSTITUTE OF MARINE SCIENCE, #09-0246**, requests authorization to deploy a 5-foot wide by 8-foot long scientific buoy designed to measure water quality located at 37° 43' 12.72" North Latitude and 76° 34' 0.78" West Longitude, approximately 7,500 feet northwest of the mouth of Greenvale Creek in Lancaster County. The buoy is proposed to be located on Public Ground Number 1 in Lancaster County. Staff recommends the buoy be marked in accordance with U.S. Coast Guard requirements.

Permit Fee.....	\$25.00
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2C. VIRGINIA INSTITUTE OF MARINE SCIENCE, #09-0164, requests authorization to deploy an underwater camera system between April 1 and October 31, 2009. The camera is proposed to be located on the substrate with the frame extending approximately three feet above the substrate. The camera structure is proposed to be marked by a surface buoy located at 37° 41' 24.792" North Latitude and 76° 33' 48.636" West Longitude in approximately 25 feet of water and approximately 7200 feet channelward of the Middlesex County shoreline between Weeks and LaGrange Creeks. The buoy is proposed to be located on Additional Public Ground. Staff recommends the buoy be marked in accordance with U.S. Coast Guard requirements.

Permit Fee.....	\$25.00
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2D. COLONNA'S SHIPYARD, #07-1291, requests authorization to dredge 65,300 cubic yards of State-owned subaqueous material to create maximum controlling depths of -35 feet at mean low water within an 86-foot wide by 400-foot basin channelward of Dry Dock 2, and -25 feet at mean low water within a 100-foot wide by approximately 1,100-foot long basin extending south into Pescara Creek, adjacent to their facility situated along the Eastern Branch of the Elizabeth River at 400 East Indian River Road in the City of Norfolk. The proposed project also includes four (4) 13-pile mooring dolphins installed along the western toe of the proposed dredge cut in Pescara Creek and up to 20,000 cubic yards of future dredging to maintain the proposed depths. Staff recommends inclusion of our standard dredging conditions and the assessment of a royalty in the amount of \$29,385.00 for the dredging of 65,300 cubic yards of State-owned subaqueous material at a rate of \$0.45 a cubic yard.

Royalty Fees (dredging 65,300 cu. yds. @ \$0.45/cu. yd.....	\$29,385.00
Permit Fee.....	\$ 100.00
Total Fees.....	\$29,485.00

2E. VULCAN CONSTRUCTION MATERIALS, INC., #07-0979, requests a modification to a previously authorized permit to now install one (1) 8-foot diameter steel fender with three (3) battered piles, approximately 62 feet upstream of an existing commercial pier at their Westminster Sales Yard situated along the Eastern Branch of the Elizabeth River in the City of Norfolk. Recommend the assessment of a royalty in the amount of \$700.00 for the encroachment of the

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fender and battered piles' encroachment over 350 square feet of State-owned subaqueous land at a rate of \$2.00 per square.

(Note: Permit Modification – No Permit Fee)

Royalty Fees (encroachment 350 sq. ft. @ \$2.00/sq. ft.....	\$700.00
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2F. DEEP CREEK LANDING MARINA, #09-0202, requests authorization to remove their storm damaged pier and roof and replace it with a 222-foot long by 8-foot wide and 21-foot 6-inch long by 4-foot wide main walkway, a 10-foot by 35-foot landing, a 25-foot by 35-foot platform, nine 4-foot by 15-foot finger piers, two 4-foot by 35-foot finger piers, and one 3-foot by 42-foot 6-inch finger pier adjacent to their property situated along Deep Creek in Newport News. All replacement piers will be floating and the previously existing roof will not be replaced. Staff recommends a royalty in the amount of \$1,391.00 for the 1,391 square foot difference in encroachment between the previously existing pier and the proposed replacement pier structures at a rate of \$1.00 per square foot.

Royalty Fees (encroach 1,391 sq. ft. @ \$1.00/sq. ft.....	\$1,391.00
Permit Fee.....	\$ 100.00
Total Fees.....	\$1,491.00

2G. LINWOOD HANBURY, ET AL, #07-1546, requests authorization to modify a previously issued permit to dredge an additional 75 cubic yards of State-owned subaqueous bottomland within an unnamed cove of Bennett Creek, a tributary to the Nansemond River, in the City of Suffolk, adjacent to numerous properties within the Bennetts Creek Harbor subdivision along Old Wharf Road. Recommend an additional royalty fee of \$33.75 for the additional dredging of 75 cubic yards at a rate of \$0.45 per cubic yard.

(Note: Permit Modification – No Permit Fee)

Royalty Fees (dredging 75 cu. yds. @ \$0.45/cu. yd.....	\$33.75
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3. CONSENT ITEMS: (After-the-fact permit applications with monetary civil charges and triple permit fees that have been agreed upon by both staff and the applicant and need final approval from the Commission's Board). There were no consent items.

BLUNT MANAGEMENT, L.L.C., #08-0275, requests after-the-fact authorization to retain an approximately 20-foot by 42-foot single story enclosure over an authorized deck and a 12.5-foot by 44-foot deck attached to the main restaurant adjacent to property at 11 Monroe Bay Avenue situated along Monroe Bay in Westmoreland County.

Robert W. Grabb, Chief, Habitat Management Division, explained that on December of 2007, staff received a call from the Westmoreland County wetlands staff reporting an alleged violation at the Happy Clam Restaurant at 11 Monroe Bay Avenue in the Town of Colonial Beach. The complaint stated that Blunt Management L.L.C. had enclosed a previously authorized deck (VMRC #02-1107) area without permits from the local Wetlands Board or the Commission.

Mr. Grabb said that in follow-up to this notification, on December 27, 2007 staff conducted an on-site visit with Mr. Ed Blunt to evaluate the activity. In addition to the enclosed structure, staff also determined that another deck addition had been installed without the proper permits. During the meeting Mr. Blunt explained that he had purchased the property in August of 2006 and that the 12.5-foot by 44-foot deck already existed.

Mr. Grabb stated that on February 12, 2008, VMRC received the after-the-fact Joint Permit Application (VMRC #08-0275) to retain the enclosure and the unauthorized 12.5-foot by 44-foot attached deck. In the letter that was received with the Joint Permit Application, Mr. Blunt explained that he thought that all the required permits were obtained by the builder from the wetlands staff and the Town of Colonial Beach.

Mr. Blunt stated in his letter that he had asked Colonial Beach staff and wetlands personnel if any other permits were needed because of the impervious cover, and he was told that since the permitted deck had been approved no permit was needed from the Commission or the Westmoreland Wetlands Board. This was in error, however, since enclosures and any addition would require both a wetland board and Commission permit if the structure spanned both wetlands and state-owned submerged lands, as is the case in this situation.

Mr. Grabb said that on April 21, 2008, the Westmoreland County Wetlands Board approved the after-the-fact request for encroachment over non-vegetated wetlands.

Mr. Grabb explained that staff had completed a full public interest review regarding the after-the-fact enclosure and the additional 12.5-foot by 44-foot deck. No opposition from the public or other State agencies was received. As such, staff recommended the Commission accept a consent agreement in-lieu of any further enforcement action, based on Mr. Blunt's offer to pay a triple permit fee (\$300.00) and a civil charge of \$1,200.00. Staff believed this charge was appropriate given the minimal environmental impact and moderate degree of non-compliance.

Associate Member Schick stated that in this case the applicant tried to get permits, hire a contractor and made inquiries with the local government. He said he was not told that he needed a VMRC permit. He said he was a victim of the system when he tried to do right. He said he could accept a motion without royalties and triple fees.

Commissioner Bowman asked if anyone, pro or con, was present and wished to speak. There were none. He then asked for a motion.

Associate Member Schick moved to approve the application with no triple permit fee, only a \$100.00 permit fee, and no civil charge. Associate Member Holland seconded the motion. The motion carried, 8-0. The Chair voted yes.

Permit Fee.....	\$100.00
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4. CLOSED MEETING FOR CONSULTATION WITH, OR BRIEFING BY, COUNSEL.

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

- Items 17, 18, and 19; pound net request applications
- Hollowell versus VMRC

Associate Member Tankard seconded the motion. The motion carried, 8-0. The Chair voted yes.

Associate Member Robins moved for the following:

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

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

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

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

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

AYES: Bowden, Bowman, Holland, Laine, McConaugha, Robins, Schick, and Tankard.

NAYS: NONE

ABSENT DURING VOTE: FOX

ABSENT DURING ALL OR PART OF CLOSED MEETING: FOX

Motion carried, 8-0. The Chair voted yes.

Katherine Leonard, Recording Secretary

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- 5. GWYNN'S ISLAND CONDOMINIUM UNIT OWNER'S ASSOCIATION, #08-0739**, requests authorization to remove an existing portion of their pierhead with seven (7) associated wet slips and to extend the existing pier and mooring poles 70 feet channelward and construct a 97-foot long by 5-foot wide pierhead with pilings and finger piers to create 12 slips for a total of 15 slips at their community pier situated along Milford Haven off Callis Wharf Road in Mathews County. The project is protested by the leaseholders of two nearby parcels of oyster planting ground. Continued from the February 24, 2009, meeting.

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

Mr. Neikirk explained that the project was located on the southern shoreline of Gwynn's Island along the Milford Haven, approximately one-half mile northeast of the Narrows Bridge. There were 27 condominium units located within three buildings situated on an 8.3 acre parcel.

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Mr. Neikirk further explained that in 1990 the Commission approved a permit, requested by the property developer, which authorized the construction of a 256-foot pier with no slips. The Commission actually required the pier to be extended 40 feet further than originally proposed to avoid an existing bed of submerged aquatic vegetation (SAV). That permit also included a condition prohibiting any overnight mooring and a special condition that required the removal of the pier in the event the Health Department imposed a seasonal condemnation around the facility.

Mr. Neikirk stated that in 1996 the Gwynn's Island Condominium Owners Association submitted an application requesting authorization to install 14 slips at their existing pier. That request was denied by the Commission. The Association subsequently appealed that decision to the Circuit Court of Mathews County. The Court ruled against the Commission and directed issuance of a permit authorizing 10 slips with several special conditions. The Health Department determined that these 10 slips would not require the imposition of a shellfish condemnation.

Mr. Neikirk said that the current proposal requested authorization to add an additional five slips to the existing pier. To facilitate these additional slips the applicants proposed to remove the eastern side of the "T-head" and to extend the pier and slips 45 feet channelward. The existing slips located on the east side of the pier would then be accessed by a new 97 foot long pierhead on the channelward side of the slips. The five (5) additional slips were proposed on the channelward side of the new pierhead. If approved the total number of slips at the pier would increase to fifteen (15).

Mr. Neikirk stated that in their report dated February 10, 2008, VIMS noted that wet slips and associated boating activities introduce petroleum products, toxicants, bacteria and garbage into the waterway. They added that although community piers may be recommended over a proliferation of single family private piers, increased adverse impacts may result when the number of slips exceeds the number that would normally exist if the area were developed as a single family residential community. To lessen the adverse impacts, VIMS recommended the number of slips be limited to the number of slips that would normally be allowed if the area were developed as a single family residential community.

Mr. Neikirk also stated that the Department of Conservation and Recreation did not anticipate that the project would adversely affect any of their programs although their Division of Chesapeake Bay Local Assistance noted the applicability of the Chesapeake Bay Act requirements that were regulated by the local government. The Department of Environmental Quality determined that a Water Protection Permit would not be required for this project. By letter dated July 18, 2008, the Health Department informed staff that the proposed project was in compliance with their "Sanitary Rules for Marinas and Boat Moorings." In a memo dated May 2, 2008, the Health Department's Division of Shellfish Sanitation stated that a seasonal closure would not be required provided the total number of slips at the pier did not exceed ten (10). In a follow-up email, dated July 15, 2008,

Mr. Keith Skiles (VDH – Division of Shellfish Sanitation), confirmed that a seasonal shellfish closure would be required around the pier if 15 slips were constructed. He noted that the area was currently classified as open for the direct marketing of shellfish. He also provided a map of the anticipated seasonal closure area. That area encompassed approximately 6.7 acres.

Mr. Neikirk said that the project would not directly encroach on any public or privately leased oyster planting ground. It appeared, however, that the anticipated seasonal closure would affect a portion of two private oyster leases. One of the leaseholders, Mr. Kevin Wade, had originally indicated that he had no objection to the project provided it did not encroach on his ground or result in a shellfish condemnation. When staff informed Mr. Wade that there would likely be a seasonal shellfish condemnation, he stated that he would have to object to the project. Ms. Rowe, the leaseholder of the other oyster planting ground that would be affected by the seasonal condemnation also objected to the proposal. Staff was always concerned when a project would adversely affect the classification of shellfish growing waters. In this particular case, the Commission even included a condition in their 1990 permit that required the removal of the pier in the event the Health Department imposed a seasonal condemnation around the facility. According to Mr. Wade, his leased ground is actively used.

Mr. Neikirk stated that staff did not believe the increased length of the pier would adversely affect navigation and the extension and all construction appeared to be channelward of the SAV bed.

Mr. Neikirk explained that in 1996, the Commission denied a request to add 14 slips to the pier. Although the Mathews Circuit Court found that the Commission erred when they denied the application, the Court only ordered the Commission to issue a permit for 10 slips, not the 14 that had been proposed originally.

Mr. Neikirk stated that after evaluating the merits of the project against the concerns expressed by those in opposition to the project, and after considering all of the factors contained in §28.2-1205(A) of the Code of Virginia, staff could not recommend approval of the application. Should the Commission determine that some additional construction was warranted at this pier, staff would recommend a royalty at the rate of \$1.50 per square foot based on the bold outline of the encroachment for any additional authorized construction.

Commissioner Bowman asked if the applicant or representative wished to speak.

Bill Mooney, Condo owner, was sworn in and his comments are a part of the verbatim record. Mr. Mooney said these were single family homes and when the County was asked they determined there could be 8 piers with 16 slips. He said they were requesting for 5 additional slips which was still under the 16. He said there were 27 condos with 10 slips. He said that others have 21 and 21 in Cobbs Creek. He said that there was very

shallow water on one side of the pier so to accommodate this they propose to take the pier outward seven feet.

Associate Member Schick asked if there was something written from the County. Mr. Mooney said that Gloucester Environmental prepared it all and should have forwarded a copy.

Commissioner Bowman asked staff if they had this information. Mr. Neikirk stated that it was not in the file. He said based on acreage, not linear feet you could put 8, but he could not see eight being located there. He said the biggest concern was the seasonal condemnation.

Commissioner Bowman asked if anyone in opposition wished to speak.

Judith M. Rowe, protestant, was sworn in and her comments are a part of the verbatim record. Ms. Rowe said that on February 9th they were advised that this was on the agenda. She said this would negatively impact her oyster lease (16 acres). She said that originally it was approved, but the additional structures she could not support. She said that watermen were looking for somewhere to work. She said in 2008 Rufus Ruark starting using the Callis Wharf and this lease would be perfect for his work. She said that Virginia needs to do all it can to save the industry as well as the Bay and she wanted the lease to be a part of the solution. She said if this were approved it would cause a seasonal condemnation to be established and currently this lease was not on the condemnation map. She said the County of Mathews wanted to preserve the waterfront for the industry. She said she was requesting that it be denied.

Commissioner Bowman asked for discussion or a motion.

Associate Member Robins stated that this was an improvement to the property, but would result in a detriment because of the seasonal closure. He referred to the Section 28.2-1205 which gives what the Commission must consider, which includes the impacts on other users of the State-owned bottoms.

Associate Member Robins moved to deny the project. Associate Member Laine seconded the motion. The motion carried, 8-0. The Chair voted yes.

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6. **MR. AND MRS. ERNEST S. HARDING JR., #08-0711**, request authorization to construct a 4-slip community pier at their property situated along Lower Machodoc Creek in Westmoreland County. The project is protested by several adjacent and nearby property owners. Continued from the January 27, 2009 meeting.

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

Mr. Bacon explained that the applicant's property was located approximately one mile southeast of the confluence of the Lower Machodoc Creek and the Potomac River. The lot in question was a marginal, non-buildable lot approximately 20-feet wide with only 30 linear feet of water frontage on the creek itself. Lower Machodoc Creek was approximately 4,500 feet wide at the proposed pier location and the water depth was approximately minus three (-3) feet at mean low water. The proposed community/multi-use pier was purportedly designed to serve the property owner and applicant (Mr. Harding), as well as three of the six non-riparian upland lots in a six lot Harding Subdivision that was situated inland behind the existing waterfront lot. None of the lots were waterfront lots and currently there were no houses in the Harding Subdivision. There were numerous other private piers along the adjacent and nearby shoreline that served the bona fide waterfront properties. Mr. Harding was a commercial waterman and used his brother's facility at Coles Point to moor his commercial boat. His brother's property was approximately one mile from the proposed community pier.

Mr. Bacon said that Mr. Harding originally submitted a Joint Permit Application on April 16, 2008, seeking permission to construct a community fishing pier at the location. That fishing pier was designed to serve all six of the lots in the subdivision. Based on their review of the application, the Virginia Department of Health issued a letter indicating that the project was acceptable provided no boats were moored to the pier at any given time.

Mr. Bacon stated that in response to the VHD comments, and because Mr. Harding apparently hoped to provide the moorings as an inducement for sale of the lots, Mr. Harding called staff and stated that he wanted to moor boats on the pier and that he wished to install boatlifts on the pier for three of the upland non-riparian lot owners, as well as, himself. He then submitted revised drawings on August 25, 2008, that changed the use from a community access/fishing pier to a multi-use pier with an L-head and containing four boatlifts. While the L-end was later eliminated to reduce the overall footprint of the pier, given the concerns over an encroachment into the neighbor's riparian area, the four boat lifts were retained in the plan.

Mr. Bacon said that the project was protested by several adjacent and nearby property owners that reside along Machodoc Creek. They had expressed concerns over the size and length of the pier when compared to the size and width of the parcel, and felt that the boats would encroach onto their riparian rights while ingressing and egressing if not while moored. The area was already severely congested, provided no available parking for the people utilizing the pier, and did not identify anyone or an association that would be responsible for policing the area to ensure that trash and other issues were addressed from the nearby residents. According to county staff there had been no easements or legal documents recorded that restrict the use to three individual lots in the Harding subdivision, and there was no guarantee that in the future that Mr. Harding would not

request to expand the community pier to service all six non-waterfront lots in the Harding Subdivision.

Mr. Bacon explained that the Virginia Institute of Marine Science had indicated that the individual and cumulative adverse environmental impacts resulting from the community pier could be reduced. In their opinion, the number of slips should be reduced to the minimum required to service the existing buildable waterfront lots in order to minimize the encroachment over subaqueous bottom. In this case there were no buildable waterfront lots so it would be recommended that no wet slips be allowed at this community pier.

Mr. Bacon said that in response to the modified request, however, the Department of Health had recommended that the permit application be approved with several significant restrictions. To qualify for a waiver of the sanitary facility requirements, the restrictions stipulated that the users of the pier must live within 1,000 feet from the shore end of the pier, that they be members or residents of the Harding Subdivision or their bona fide houseguests, that boats with installed toilets with overboard discharges or holding tanks be prohibited from mooring at the pier and that no overnight occupancy was allowed. Since there were no residential structures or any residents of the Harding Subdivision at present and with no Association or entity to police or oversee compliance with the Health Department requirements, it was unclear how this would be enforced.

Mr. Bacon stated that the Department of Environmental Quality, Virginia Department Game and Inland Fisheries and the Department of Recreation and Conservation had no objections to the proposed project. The Westmoreland County Wetlands Board did not review the project because the pier itself was a private, non-commercial open-pile pier that fell within the exception provided by Section 28.2-1302 of the Code of Virginia. The county staff reported that the project was unanimously approved by the County's Board of Supervisors, but was protested by one of the adjacent property owners.

Mr. Bacon said that when reviewing community-use pier structures, staff typically attempts to ascertain the number of private piers that could be accommodated along the shoreline of the entire parcel as a way of determining what might be an appropriate number of slips. In this case, however, the entire parcel is only 30 feet in width and is not even really a part of a larger overall waterfront residential development. Were the lot to be a community parcel owned by an Association comprised of the individual lot owners, we would still be wrestling with the question of slips versus access.

Mr. Bacon explained that staff generally supported the community pier approach as a way of providing increased access by upland property owners to the waters of the Commonwealth. Usually, that single access point was in-lieu of numerous individual private piers in an attempt to provide a central point of water access for communities with riparian lots. In this case, however, the development was not of a waterfront subdivision. The applicant was already a riparian owner himself, and the three boat slips were

apparently being offered solely as an inducement for sale of an interior lot in the Harding Subdivision.

Mr. Bacon said that in light of the foregoing, after evaluating the merits of the entire project against the concerns expressed by those in opposition to the project, after considering all of the factors contained in Section 28.2-1205(A) of the Code of Virginia and since the lot in question was only 20 feet wide and with no ability to support the requested improvements, staff recommended that the community pier be denied. In this case, it appeared that the parcel may only be appropriate for a community pier for access.

Commissioner Bowman asked if the applicant or representative wished to speak.

John Daniel, attorney for the applicant, was present and his comments are a part of the verbatim record. Mr. Daniel explained that Mr. Harding was a working waterman and his wife traveled to Dahlgren to work to provide for the family. He stated he was not a land baron, but was rich with pride and heritage. He said the Granny's Bar property had historically been owned by the family. He said parcels were sold off when economic needed arose, but they always kept access to the water. He said it was the Grandmother that obtained the property prior to 1947 and the Hardings had subdivided it into 6 lots and 3 are sold. He said a fourth had been reserved for their granddaughter with access to the creek. He said that others in the area had slips and actually more than was needed. He said there was no plans to seek any additional structures and the Commission could condition the permit on that fact. He said the Health Department had agreed to the 100-foot pier with the condition that there be no overnight occupancy and no discharge. He explained that the applicant visits the property daily and was willing to police. He said there would not be any slips offered for any future sales as they were hoping to keep and not have to sell it.

Mr. Daniel stated that the individual in opposition already had what he wanted. He said in accordance with Section 28.2-1205 the permit should be granted as this was comparable to other uses in this area. He further noted that there were no environmental impacts to the water or SAV. He said they were requesting approval.

Commissioner Bowman asked for questions.

Associate Member Schick asked if Mr. Harding was willing to sign a letter taking responsibility for all concerns of maintenance and compliance. Mr. Daniel responded yes, he was present at the property daily. He said of the others in the area only 2 were full time residents and the others had these as second homes. He said he was more than willing.

Associate Member Tankard said that considering past actions of the Commission consistency would be no pier. Mr. Daniel said that staff did not recommend no pier, but a pier with 2 slips and a riparian owner exemption. He said that numerous adjacent

properties had not one slip but 2. He stated this was a request for 4 slips for multiple properties which was consistent with Code of Virginia, Section 28.2-1205.

Commissioner Bowman asked for those in opposition who wish to speak.

Cecilia Sandifer was sworn in and her comments are a part of the verbatim record. Ms. Sandifer explained that they owned the property next to the 20-foot access road. She said the access road was only 18 inches from her property. She stated that it had not been kept up by Mr. Harding, but by her husband and Mr. Lubkert. She said the Board must consider if they would want a pier with four slips by their home.

Commissioner Bowman asked if they had done any research before purchasing the property and whether they were aware of the access road and how it could be used. Ms. Sandifer said they did research the benefit of being in the Machodoc and Waterview area and then found out about the road being owned by Mr. Harding. She said they had to reconfigure the garage, as it was now.

Bob Lubkert, protestant, was sworn in and request denial of the application. He stated staff had covered a lot of his comments. He said the 100-foot pier at the end of the road just opens a can of worms so that others could seek the same. He said that this upsets zoning as the proposal is not a community pier. He said Mr. Harding owns it as well as the access road. He said that owning it seems to make it more of a commercial activity, a marketing plan to enhance the sales of the lots still being sold. He said Mr. Harding had promised these amenities and now wanted the Commission to bail him out. He said this was known as the Machodoc Creek residential subdivision and the 20-foot area was originally access for the subdivision. He said in 1994 the records showed that it belonged to Mr. Harding as it was surveyed by records on file, not physically surveyed. He said from 1947 to 1994 the 20-foot access road was used by him and Mr. Sandifer. He said after 20 years that access was denied by Mr. Harding and Mr. Sandifer had to build a driveway of his own. He said the width of the pier was 6-feet and the outriggers 12-foot even for a total of 30 feet and the waterfront was 31 feet wide. He said the problem was the 20-foot road cannot serve the 100-foot pier. He said the proposal has grown to sell the lots. He said he was requesting denial of the proposal.

Commissioner Bowman asked for questions.

Associate Member Schick asked if the access was similar to others in the county, such as Coles Pt. He asked also if this was private or public. Mr. Lubkert said it was privately owned.

Debra Shoger, protestant, was sworn in and her comments are a part of the verbatim record. Ms. Shoger explained she was not on the access road as the others. She said it was private land and pier, but was being used as an incentive to sell the other lots. Commissioner Bowman asked how this was known. Mr. Shoger stated it was not

documented, but hearsay. She said Mr. Harding had agreed to keep and maintain and would sign the document, but that does not get it done necessarily. She said her parents were not from the area historically like the Hardings, but her parents worked and saved so they could buy this property. She said they were good stewards and maintained the property. She said she hoped a decision would be made that would benefit the Commonwealth for the long-term.

Mr. Daniel in his rebuttal said that whether the research was good or not, the neighbor bought 15 inches from the Harding property and had access and used it daily. He said they should have known it was not there for their use and was not shown in the deed. He said they built as if it was their property and they are now upset because they cannot and had to make changes in their access. He said the 20-foot road was actually 32-foot. He said the project had been designed by Bayshore Engineers to fit. He said regarding the comments about being commercial, it was not and was to be used for personal use and access to the water. Mr. Lubkert's property adjoined the Hardings' and his seawall was in disrepair and allows water to destroy his seawall. He said it was not about the history of the Harding family, but it was about who has access. He said the Commission could condition the permit to say no vehicular traffic and no boat ramp to launch a boat. He said it would be a pedestrian path and others could use it the same way.

Commissioner Bowman asked for a motion.

Associate Member Schick stated the pier can be constructed as a private pier, the question was the number of slips. He said two or more users were sometimes allowed, which was not inconsistent with a community pier. He said most people associate this with a condo development and this was a multi-use pier. He said this was a congested area, but it was developed that way and all the others had a piers, so he should also.

Associate Member Schick moved to accept the application, but to allow no vehicular access. Associate Member Holland seconded the motion. He asked that it be amended to limit it to 4 slips assigned to 4 lots. Associate Member Schick agreed with the amendment.

Associate Member Tankard referred to 28.2-1205(A) of the Code and said that there was a need to consider the adjoining owners and be consistent in decisions on this type of activity, as there was not a lot here. He said he agreed with staff recommendation to deny the project. Associate Member Robins stated he agreed with the other members, that Mr. Harding does have the right to wharf out. He said the pier was okay, but there was a question as to the boat lifts and the impacts on other property owners. He said he had a policy concern and with setting a precedent. He said usually there was a limit of 2 slips per lot developed on the shoreline, but here it was not a buildable lot.

Associate Member Robins said they had departed from policy in extraordinary circumstances and if this project is supported he would encourage the maker of the

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motion to add a justification to preserve the policy and, if approved, it does not establish precedent, but is based on the circumstances of the history and a plan of access. Associate Member Schick said he would accept the amendment, as it was a different and not a simple development, but a multi-use pier and the regulation called it a community pier.

Associate Member Tankard stated that historical ownership was not in the Code to give the right of this to past owners and the motion had no merit.

Commissioner Bowman called for a roll call vote on the motion:

Bowden	yes	Fox	absent	Holland	yes	Laine	no
McConaugha	no	Robins	yes	Schick	yes	Tankard	no
Chairman	yes						

The motion carried, 5-3. Associate Members McConaugha, Laine, and Tankard voted no. The Chair voted yes.

* * * * *

7. **MOON OF NORFOLK CONVEYANCE.** Consideration by the Commission of the appropriate terms, conditions, and just compensation for the conveyance of 108,466 square feet (2.49 acres) of previously filled State-owned subaqueous lands in Norfolk as authorized by Chapter 884, Acts of Assembly 2006, as limited by Chapter 879, Acts of Assembly 2007. Continued from the February 24, 2009 meeting.

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

Mr. Grabb explained that during the 2006 legislative session, the General Assembly authorized the conveyance of certain filled and unfilled State-owned subaqueous lands lying along the Elizabeth River in Norfolk to Moon of Norfolk LLC (hereafter "Moon"), their successors and assigns. That conveyance totaled 148,046 square feet (approximately 3.40 acres). Governor Kaine subsequently proposed an amendment that called for the conveyance to be "upon such terms and conditions of the sale and conveyance, and the payment of fair market value considerations as are deemed proper by the Marine Resources Commission." The Governor's recommendations were adopted by the legislature and enacted as Chapter 884 Acts 2006.

Mr. Grabb said that subsequently, several key lawmakers began to reconsider the implications and propriety of conveying unfilled subaqueous public trust lands to private parties. As a result of those concerns, the budget negotiators included a provision in the 2006 Appropriation Act (§4-5.11) that prohibited the sale or conveyance of any

subaqueous land lying below mean low water unless that land had been filled prior to January 1, 2006. In 2007, the law was again amended. Chapter 862 Acts 2007 re-enacted Chapter 884 and changed the compensation provisions for compensation from fair market value to a new formula to be applied by the Commission. The metes and bounds descriptions of the parcel contained in Chapter 884, however, remained unchanged.

Mr. Grabb stated that in 2007, the Legislature also enacted and the Governor approved (Chapter 879 Acts 2007) a new Statute (§28.2-1200.1), which prohibited the fee simple conveyance of state-owned bottomlands. It made an exception, however, for lands that had been "lawfully filled" as that term is defined in §28.2-1200.1(B) of the Code. The 2007 Appropriations Act, Chapter 847 Acts 2007, also contained the same specific language that prohibited the conveyance of any of the unfilled lands described in Chapter 884.

Mr. Grabb said that the guidance that Governor Kaine recommended, and the Legislature approved, specified how the Commission was to determine the amount of compensation due for the property interest being conveyed. That formula was given as an amount equivalent to 25% of the assessed value of the parcel, exclusive of any buildings or other improvements.

Mr. Grabb explained that furthermore, the assessed value was established as the average of the local real estate tax assessments for the most recent 10 years available for the specified parcel. In the event that no such assessments were available, then the assessed value was calculated as the percentage, by square footage or acreage, that the specified parcel represented of the larger parcel for which an assessment was available.

Mr. Grabb said that the Governor and Legislature also provided the Commission with the ability to accept something less than 25% when unique circumstances existed. Any such determination to accept something less, however, must be justified in writing. The Commission first used these new procedures when you approved the terms, conditions and compensation that the December Partners, LLC was assessed for the conveyance of 0.749 acres (32,631 square feet) of previously filled State-owned subaqueous lands in Norfolk at your December 2007 meeting. The Commission also used these procedures and the 25% compensation rate last month when you approved the conveyances of filled lands in Hampton to Iola L. Lawson and S & S Marine Supply, Inc.

Mr. Grabb stated that the property described in the Acts of Assembly (Ch 884 Acts 2006 and Ch 862 Acts 2007) contained both filled and unfilled State-owned subaqueous bottoms. Although no State or Federal permit or authorization for the fill had been found, staff was willing to accept that the parcel was "lawfully filled" prior to January 1, 2006.

Mr. Grabb said that based on an August 7, 2006, plat of the property that Moon initially provided, the upland part of the property was divided into two parcels. The apparent upland portion of the property, i.e. that portion lying landward of the estimated 1871

mean low water mark, was comprised of 31,022 square feet (0.712 acres +/-). The filled area that can be conveyed under Code equaled 108,466 square feet (0.51 acres +/-). In other words, the filled area based on this plat constituted 77.76% of the land component of the platted parcel.

Mr. Grabb said that a more recent plat provided by Moon, dated March 16, 2008, however, now divided the "property" into four parcels. Area 1 was still that portion lying landward of the estimated 1871 mean low water mark. Area 4 was the portion of the platted parcel that continued to be subaqueous and which staff considered to be State-owned public trust lands, which cannot be conveyed under current law. The filled property to be conveyed was actually represented by Areas 2 and 3.

Mr. Grabb explained that recently, staff had been provided with a copy of an 1898 Virginia Supreme Court case (Norfolk versus Nottingham, 96 Va. 34, 20 S.E. 444). In that case the Court discusses buildable lots lying in the area between Front and Water Streets. Since the General Assembly had previously conveyed the intertidal area, i.e. that area lying between the mean high and mean low water mark to private individuals (Chapter 87.1 Acts 1819), it was reasonable to assume that most, if not all of that area was upland. Although Water Street might have been platted and referenced by the Court, however, there was no documentation or evidence that it was improved at the time. In fact, staff had obtained historic lithographs of the Norfolk waterfront from the Library of Congress (dated 1873, 1891 and 1892) as well as an 1892 nautical chart of Hampton Roads Harbor which appeared to show the contrary.

Mr. Grabb stated that since there was no way to definitively locate the mean low water mark, staff had agreed to a compromise line that basically ran from the head of the slip on the west side of the property to the head of the slip on the east. The property to the north of that line (Area 2) would be conveyed but without any required compensation. The area to the south of that line, i.e. Area 3, which staff firmly believed was clearly filled subaqueous land, would be conveyed and just compensation for the property interest being conveyed would be required.

Mr. Grabb said that according to the information provided by counsel for the grantee, the average of the local real estate tax assessments, based solely on the land value not including any of the buildings or other improvements, for the entire parcel over the last ten years equaled \$597,410.00. The filled subaqueous lands, i.e. Area 3, constituted 66.42 % of the total acreage or square footage of the "upland" portion, which for the purpose of calculations staff was considering the total Areas 1 and 2. Based on that approach, the average assessment attributable to the previously filled land was \$396,799.72. In order to determine the appropriate level of compensation, the Commission must then apply the 25% formula to this figure.

Mr. Grabb explained that based on the provisions of Section 28.2-1200.1.C of the Code of Virginia, the staff recommended compensation for the property being conveyed by the

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Commonwealth for the 108,466 square feet of previously filled lands equaled \$99,199.93. This figure differed slightly from the Subaqueous Land Ratio and Valuation that Moon's counsel had calculated. That difference was attributable to the inclusion of unfilled subaqueous lands in the assessment and valuation of the parcel, as a whole.

Mr. Grabb stated that according to Title 58.1, taxable real estate consisted of the land and improvements thereon which were not otherwise exempt. Since local governments were clearly without the authority to tax state property, i.e. property which lies below mean low water, staff considered the local assessments to reflect the value of the actual upland property, not the platted parcel depicted on a tax map. Furthermore, if Moon believed that the City had been erroneously or incorrectly assessing their property, they should pursue the appropriate relief or remedy from the City Assessor

Mr. Grabb explained that notwithstanding the foregoing, counsel for Moon would also attempt to set forth several factors that he believed constituted unique circumstances that would lead you to agree to a compensation rate less than the 25% set forth in Code. These circumstances were largely attributed to the length of time that Moon of Norfolk LLC, and its predecessor Moon Engineering, Inc., had owned the property in question. Moon Engineering apparently initially acquired the property in 1943. The Commission should also recall that the Secretary of Natural Resources, while acknowledging that the decision was ultimately the Commission's, had previously provided the Board with some thoughts on what he believed constituted unique circumstances.

Chris Noland, representing the applicant, was sworn in and his comments are a part of the verbatim record. Mr. Noland said they were requesting a 108,000 plus square feet conveyance. He said they had been working with staff for three years. He said the General Assembly was considering the Moon property trust and addressed these situations. He said they had thought that they owned the property and now the VMRC staff must come up with an agreement. He said the General Assembly had established an evaluation scheme with a provision to depart with unique circumstances and grants the Commission the authority to consider testimony. He said the Secretary of Natural had suggested some possible unique circumstances.

Mr. Noland explained that the parcel was filled prior to the 1900's and a photo taken prior to 1960's was proof of no illegal filling by the applicants, who had owned it since 1950's as Moon Engineering. He said the father had acquired all stocks and the heirs no longer wanted it and it was deeded to Moon Engineering, LLC. He explained that the description on the deed was a large rectangle and no delineation of current footprint was made. He explained further that it was late in 2005 that they found out that they did not own the property, as there had not been a notice of defect was on the title. He said Moon Engineering had not needed any title insurance at that time and they paid the real estate taxes, utilizing the area for 65 years. He noted that the assessment had been for 20% more land than actually owned based on 10 year assessment. He said a survey was not done until now to show actual acreage. He said the assessment had been \$99,000.00

minus the 20% should have been \$79,000.00. He said they used an 1873 slide to determine where the mean low water line was and that it was actually filled not excavated. He said they sent a letter to the Secretary of Natural Resources on March 15, 2009 for an answer to how to handle and he wrote back that 10 year average assessment was legal and it could not in any way be considered a unique circumstance. Letter read into the record. He said it further said that the Commission can make a decision using their discretion.

Mr. Nolan said that there was no recreational or natural resource value and no need to preserve it as it is filled. He said further the Commonwealth would not be digging it out to reverse it back to subaqueous bottom. He said there had been no notice of claim to the title by the State and they cannot take the State to court.

Mr. Nolan explained that they had no recourse from this decision, but ask for the 50% reduction and the \$99,000.00 be reduced to \$49,599.96.

Associate Member Tankard asked if the value of the property would change with 20% less land. Mr. Noland stated yes, less has to impact the value.

Associate Member Holland asked if they were pursuing the 20% discrepancy. Mr. Noland responded yes and they would be able to recover the maximum of three years of taxes paid. Associate Member Holland asked if the staff had considered the difference in mass for the 10 years. Mr. Noland stated originally they had calculated \$90,000.00. He said further that they want the title to the land to resolve this issue for now and in the future.

Associate Member Schick asked if the City had agreed. Mr. Noland said the assessment on less land mass percentage was agreed on July 1, 2009.

Commissioner Bowman asked about staff's position regarding the 20%. Mr. Grabb explained that initially the discussion considered unfilled land and understanding the General Assembly action dealing with upland property. He said staff was looking at the filled property, not taxed on subaqueous land, but assessed on the upland area. He said if they provide a new three year assessment and take that \$580,000.00 times 60% would be a reduction, but a small difference. He said it was up to the Commission as staff had considered the Public Trust.

Commissioner Bowman asked if the 10 year assessment was inflated too much. He asked when using the 25% rule the error is considered. Mr. Grabb said the acreage was not changed and for the 10 year assessment it was not known what changed.

Commissioner Bowman stated that the State should not be penalized by an error made by another by reduction of the error. He said he believed in consistency using the 25% rule and unless this situation arises the Commission does not want to inflate the reduction.

Mr. Noland said that staff recommended \$99,000.00 which is the difference between \$597,000 and \$478,000, corrected as they are requesting by .6642 by 25% would equal \$79,509.37.

Associate Member Schick said the true assessment needed to be determined before considering the 25% rule.

Commissioner Bowman suggested that a corrected assessment be sought and it would be no problem using that as a starting point to determine the reduction, then staff can make the calculation. Carl Josephson, Senior Assistant Attorney General and VMRC Counsel, asked if it was the entire 10 years. Commissioner Bowman stated yes.

Associate Member Tankard said he agreed and he moved to go ahead with the \$79,000.00 plus assessment. Mr. Josephson suggested that after staff found out what the assessment value was, they should bring the matter back to the Board for a decision. Associate Member Robins seconded the motion.

The Commission voted unanimously, 8-0, to approve the conveyance in the manner recommended by staff and as specified in Code. The Commission did, however, agree to adjust and reduce the compensation rate by approximately 20% to reflect the apparent over assessment by the City of Norfolk based on an incorrect estimate of the actual upland property involved. The final compensation figure will be determined by staff, when counsel for the grantee provides the new figures to be used in the calculations. Although the precise fee is not known, the amount is expected to be slightly more than \$79,000 for the conveyance of 108,466 square feet of previously filled state-owned subaqueous lands.

Conveyance Fees for 108,466 sq. ft.	Compensation amount to be determined upon receipt of revised tax assessment information to be provided by the grantee.
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- 8. FORT NORFOLK LLC CONVEYANCE.** Consideration by the Commission of the appropriate terms, conditions, and just compensation for the conveyance of 4,489 square feet (0.103 acres) of previously filled State-owned subaqueous lands in Norfolk as authorized by Chapter 673, Acts of Assembly 2008. Continued from the February 24, 2009 meeting.

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

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Mr. Grabb explained that during the 2008 legislative session, the General Assembly authorized, and the Governor approved, the conveyance of certain previously filled subaqueous lands lying along the Elizabeth River in Norfolk, to Fort Norfolk, L.L.C. (hereafter Fort Norfolk), its successors and assigns. The Act (Chapter 673 Acts 2008) calls for the subject conveyance to be "upon such terms and conditions deemed proper by the Commission pursuant to §28.2-1200.1 of the Code of Virginia." The purpose of this hearing is to set and approve the terms, conditions and compensation amounts due for that conveyance.

Mr. Grabb said that in 2007, the legislature enacted and the Governor approved (Chapter 879 Acts 2007) a new statute (§28.2-1200.1) which prohibited the fee simple conveyance of state-owned bottomlands. It made an exception, however, for lands that had been "lawfully filled" as that term is defined in §28.2-1200.1(B) of the Code. Section 28.2-1200.1 also contains specific guidance on how the Commission is to determine the amount of compensation due for the property interest being conveyed. The formula provided for the property interest being conveyed was given as an amount equivalent to 25% of the assessed value of the parcel, exclusive of any buildings or other improvements.

Mr. Grabb further stated that the assessed value was established as the average of the local real estate tax assessments for the most recent 10 years available for the specified parcel. In the event that no such assessments were available, then the assessed value was calculated as the percentage, by square footage or acreage, that the specified parcel represented of the larger parcel for which an assessment was available.

Mr. Grabb said that the Governor and legislature also provided the Commission with the ability to accept something less than 25% when unique circumstances exist. Any such determination to accept something less, however, must be justified in writing.

Mr. Grabb stated that the Commission first used these new procedures when it approved the terms, conditions and compensation that December Partners LLC was assessed for the conveyance of 0.749 acres (32,631 square feet) of previously filled State-owned subaqueous lands in Norfolk. The Commission also used these procedures and the 25% compensation rate last month when it approved the conveyances of filled lands in Hampton to Iola L. Lawson and S & S Marine Supply, Inc.

Mr. Grabb said that the property described in Chapter 673 Acts 2008 contained only previously filled subaqueous lands. Although no State or Federal permit or authorization for the fill had been found, staff was willing to accept that the parcel was "lawfully" filled prior to January 1, 2006.

Mr. Grabb explained that based on a July 11, 2008, plat of the property that Fort Norfolk had provided the platted property could be divided into four parcels. The apparent upland portion of the property, i.e. that portion lying landward of the 1871 platted mean low

water mark, consisted of two parcels (Area #2 and Area #4 totaling 14,826 square feet or 0.340 acres) and part of a third (Area #3 estimated at 1,200 square feet). Area 3 in its entirety was not included because it was estimated that approximately 1,611 square feet of the area lies below the water. The area that could be conveyed under Code, i.e. Area #1, equals 4,489 square feet (or 0.103 acres +/-). Based on the foregoing, staff estimated that the filled area constituted 21.88% of the land component of the entire parcel.

Mr. Grabb stated that according to the information provided by counsel for the grantee, the average of the local real estate tax assessments, based solely on the land value, not including any buildings or other improvements, for the entire parcel over the last ten years equaled \$97,026.00. Since the filled subaqueous lands constituted 21.88% of the total acreage or square footage of the "land" portion of the parcel, the average assessment attributed to the previously filled land was \$21,230.79. In order to determine the appropriate level of compensation, the Commission then would apply the 25% formula to this figure.

Mr. Grabb said that therefore, based on the provisions of Section 28.2-1200.1.C of the Code of Virginia, staff recommended compensation for the 4,489 square feet of previously filled lands owned by Commonwealth equaled \$5,307.70. Mr. Grabb explained that staff's figure differed slightly from the Subaqueous Land Ratio and Valuation that Fort Norfolk's counsel had calculated. That difference was attributed to the inclusion of the unfilled subaqueous lands in Area #3 in the assessment and valuation of the parcel, as a whole.

Mr. Grabb further explained that according to Title 58.1, taxable real estate consisted of the land and improvements thereon which are not otherwise exempt. Since local governments were clearly without the authority to tax State property, i.e. property which lies below mean low water, staff considered the local assessments to reflect the value of the actual upland property, not the platted parcel depicted on a tax map. Furthermore, if Fort Norfolk believed that the City had been inaccurately or incorrectly assessing their property, they should pursue the appropriate relief or remedy from the City Assessor

Mr. Grabb said that Fort Norfolk had apparently only acquired this property in 2004. In addition, the calculated cost of compensation based on the formula provided in Code did not appear to be exorbitant. Furthermore, counsel had not put forth any unique circumstances that he believed would either warrant a credit for his clients or would lead the Board to agree to a compensation rate less than the 25% set forth in Code. The Commission should recall, however, that the Secretary of Natural Resources, while acknowledging that the decision was ultimately the Commission's, had previously provided the Board with some thoughts on what he believed constituted unique circumstances.

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Chris Nolan, representing Fort Norfolk, LLC, was present and his comments are a part of the verbatim record. Mr. Nolan said they did not offer any dispute as to the staff recommended conveyance fees as there was no unique circumstances.

Commissioner Bowman asked for a motion from the Board.

Associate Member Holland moved to accept the staff recommendation. Associate Member McConaugha seconded the motion. The motion carried, 8-0.

Conveyance Fees for 4,489 sq. ft.....	\$5,307.70
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The Commission took a lunch break at approximately 12:15 p.m. The meeting was reconvened at approximately 12:48 p.m.

- 9. **ELIZABETH RIVER PROJECT, #08-2238**, requests authorization to dredge 800 cubic yards of PAH-contaminated sediment and create 1.3 acres of intertidal, vegetated wetlands, 3.5 acres of one-dimensional oyster reef habitat and 3.5 acres of clean sand benthic habitat as part of an environmental enhancement project in the Southern Branch of the Elizabeth River at Money Point in Chesapeake. All contaminated sediments removed will be transferred to and disposed of at an upland landfill site in Charles City County.

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

Mr. Woodward explained that the project was located in the Southern Branch of the Elizabeth River, in a highly industrialized section, between the Rt. 17/460 (Military Highway) Gilmerton Bridge to the south and the recently closed Rt. 337 Jordon Bridge to the north. Money Point was home to the Elizabeth River Terminals, Kinder Morgan, Hess Corporation and of other industrial manufacturing and petro-chemical storage and distribution businesses in the South Norfolk section of Chesapeake. The subject application is Phase 1 of a contaminated sediment removal/remediation and habitat enhancement project, to be undertaken by the Elizabeth River Project (ERP). Project design was the result of input from of the ERP Watershed Action Team, a group of more than 100 river stakeholders, including scientific experts, government officials, business interests and private citizens.

Mr. Woodward said that polycyclic aromatic hydrocarbon (PAH) contamination at the site was generally the result of the former Eppinger & Russell creosote plant on the adjacent upland, and from two spills that occurred at the plant, in 1963 when a large fire

spilled 130,000 gallons of creosote and in 1967 when tanks ruptured depositing 20,000 to 30,000 gallons of creosote into the river. The majority of the funding for this project was coming from the Elizabeth River Restoration Trust, using monies obtained from the mitigation funds associated with the construction of the APM Terminals, approximately 8 miles downstream on the main stem of the Elizabeth River. The application reflected the preferred option of five alternatives developed by the Watershed Action Team. Phase 2 would address a larger area of PAH-contaminated sediments to the immediate north of this project.

Mr. Woodward stated that the Watershed Action Team, representing the U.S. Environmental Protection Agency (EPA), U. S. Army Corps of Engineers (COE), National Oceanographic and Atmospheric Administration (NOAA), U. S. Fish and Wildlife Service (FWS), staff from VMRC, DEQ, DCR, and scientists from ODU, VIMS, and NSU, selected the option being applied for as the most cost-effective and environmentally beneficial option for cleaning up the site. The proposal called for removal of the most heavily contaminated sediments (PAH > 45 ppm) in one “hot-spot” and covering the remainder of the less contaminated sediments with a combination of: (1) clean sand fill in the outermost, deepest part of the site (approximately 3.5 acres); (2) clean sand fill overlain with oyster shell in the transitional, shallower area (approx. 3.5 acres); and (3) clean sand fill behind a riprap marsh sill structure, to be planted with *Spartina alterniflora* to create an intertidal salt marsh over the inshore, subtidal, State-owned bottom at the site (approx.1.3 acres). The marsh would tie-in to a recently permitted a marsh creation project on the adjacent upland at the Elizabeth River Terminals property (VMRC #07-2123).

Mr. Woodward said that upon receipt of the completed Joint Permit Application (JPA), the required public notice was placed in the Virginian Pilot and the JPA was forwarded to all interested parties for their review and comment. Staff had not received any opposition from our advisory agencies, nor had any objections been received from the general public, as a result of the public interest review.

Mr. Woodward said that the Virginia Institute of Marine Science had indicated that complete removal of all contaminated sediments from the river would be their preference. Short of that, they agreed that the selected alternative for the southern portion of the site was appropriate for the contamination levels present and stated that the net result of the project would be a beneficial increase in the quality and quantity of wetland and subaqueous habitat. VIMS recommended minimizing impacts during construction and long-term monitoring and maintenance as required to ensure that project objectives were met.

Mr. Woodward stated that the Chesapeake Wetlands Board approved the portion of the project within their jurisdiction at their January 21, 2009, public hearing.

Mr. Woodward also stated that the U. S. Army Corps of Engineers had determined that the project satisfied the requirements of the Corps Nationwide Permit 27 (Habitat Enhancement) on January 13, 2009.

Mr. Woodward explained that the Virginia Department of Environmental Quality did not require a Virginia Water Protection Permit (VWP) for projects that qualify for Corps Nationwide Permits. This was confirmed by letter dated December 19, 2009.

Mr. Woodward said that staff had been involved with this project since its inception and was represented on the Watershed Action Team. While staff did not object to the proposal, staff did agree with VIMS that complete removal of all contaminated sediments from the public's submerged bottom lands in the Elizabeth River was the ultimate preferred alternative. However, given the fiscal and logistical constraints of that approach, staff would support the chosen alternative, as being the best use of available funds in this habitat improvement project. Staff had concerns over the conversion of public, State-owned subtidal bottom into upland, i.e. intertidal marsh, and felt an agreement was needed that stated that the ERP would be responsible for monitoring and maintaining the proposed marsh, but that the Commonwealth would retain title to the underlying fee-simple lands beneath the created marsh. ERP appeared to have addressed these concerns by letter dated February 25, 2009. In that letter they agreed to assume responsibility for any ongoing maintenance of the site and acknowledged that ownership of the underlying submerged lands would remain with the Commonwealth. Staff would recommend that the ERP letter become a part of the VMRC permit. In addition, while staff normally recommends a royalty for the conversion of subtidal bottom to intertidal marsh for shoreline stabilization projects ("living shorelines"), this marsh creation is not for erosion protection, but rather for covering contaminated sediments. Given the fact, staff believed the ultimate result of isolating these sediments from the living marine environment was a sufficient trade-off for loss of the subtidal habitat involved. Therefore staff was not recommending a royalty for the 1.3 acres of marsh creation in this instance.

Mr. Woodward stated that staff recommended approval of the project, as proposed, with the standard dredge conditions, and with a royalty in the amount of \$160.00 for the dredging of 800 cubic yards of State-owned subaqueous bottom. This was at the lowest rate, \$0.20 per cubic yard, permissible by Code rather than our standard recommended rate of \$0.45 per cubic yard since the material was contaminated and would be removed voluntarily from the marine environment. Staff also recommended that ERP would be required to monitor and maintain, the intertidal marsh created over State-owned bottom in perpetuity, and that the ownership of the submerged lands of the Commonwealth lying under the created marsh remained with the Commonwealth, using the current mean low water line established in the permit drawings and plans as the boundary line between private and public property.

Commissioner Bowman asked if the applicant or representative wished to speak.

Marjorie M. Jackson, Executive Director for the Elizabeth River Project, was sworn and her comments are a part of the verbatim record. Ms. Jackson stated that staff had covered the issue and they wanted to conserve the Elizabeth River.

Joe Reiger, representing the Elizabeth River Project, was sworn in and his comments are a part of the verbatim record. Mr. Reiger explained that caps would be successful as a real world remedy for this particular area, since the area was low contamination.

Commissioner Bowman asked for anyone in opposition who wished to speak. There were none.

Associate Member McConaugha moved to accept the staff recommendation. Associate Member Schick seconded the motion. The motion carried, 8-0.

Royalty Fees (dredging 800 cu. yds. @ \$0.20/cu. yd.).....	\$160.00
Permit Fee.....	\$100.00
Total Fees.....	\$260.00

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10. MILTON POINT, LC, #08-2199, request authorization to install three stone breakwaters with beach nourishment and plantings, two of the breakwaters being 160 feet in length and one breakwater being 130 feet long, and to install up to 150 feet of rip rap revetment at the applicant's property situated along the James River at 18485 and 18493 Morgarts Beach Road in Isle of Wight County. Both dunes and beaches, and subaqueous permits are required.

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 James River in the Morgarts Beach area of Isle of Wight County. The property was the site of a former FFA facility that was now privately owned. The James River was over five miles wide at this location with a considerable fetch to both the northeast and southeast. Properties to the south had been hardened with rip rap revetments and properties to the north of the area had similar breakwater structures in place.

Mr. Stagg said that the applicant sought authorization to install three breakwaters, two being 160 feet in length and the third being 130 feet in length. Additionally, beach nourishment is proposed using up to 10,000 cubic yards of clean beach fill and planting of approximately 17,775 square feet with both *Spartina Patens* and American Beach Grass. Material from the bank grading will be used in conjunction with the nourishment. The

applicant also proposes to install up to 150 linear feet of stone rip rap revetment at the southern end of the project to tie into the existing rip rap on the adjoining property. Both the breakwaters and rip rap will consist of VA type 1 stone and armor granite (1,000-2,500 lb).

Mr. Stagg said that the shoreline was currently unprotected and contained a steep 20-35 vertical eroding bluff and an unvegetated sandy beach. The upland consisted of grass and numerous structures, including a pool. The subtidal lands here constitute Baylor Ground up to the mean low water line. Staff did not believe the inshore shallow water area of the Baylor Ground where this project was proposed, contained any shellfish resources.

Mr. Stagg stated that the project would impact approximately 20,350 square feet of jurisdictional beach. Isle of Wight County had not yet adopted the beaches and dunes ordinance which was made available to them by virtue of recent Code changes that became effective July 1, 2008. As a result, the Commission was charged with acting as the local dunes and beaches board pursuant to the Chapter 14, Subtitle III, of Title 28.2 of the Code.

Mr. Stagg explained that the remainder of the project required the Commission's authorization for the encroachment over 50,450 square feet of State-owned subaqueous land pursuant to Chapter 12, Subtitle III, of Title 28.2 of the Code. Additionally, §28.2-556 of the Code was involved since any area needed for an appropriate shoreline erosion structure was to be removed from the Baylor Survey.

Mr. Stagg said that the Virginia Institute of Marine Science (VIMS), in their Shoreline Permit Application Report, dated January 28, 2009, advised that although the project involved significant subaqueous and beach impacts along 750 linear feet of shoreline, these impacts were justified given the site conditions. The report further noted that the combination of bank grading, headland breakwaters and the creation of beach was the preferred approach for stabilizing high bank erosion, that other breakwater systems in the vicinity have been effective and that the landward extent of grading was maximized in light of the upland structures and nearby roadway. VIMS also noted that the project appeared to meet the criteria for erosion control devices within the Baylor Survey. VIMS did not recommend any time-of-year restrictions.

Mr. Stagg stated that the Department of Environmental Quality had indicated that a Virginia Water Protection Permit would not be required. The Department of Conservation and Recreation found the project acceptable. The Department of Game and Inland Fisheries recommended a time-of-year restriction for all instream work from February 15 through June 30 of any given year to protect anadromous fish species. The Virginia Department of Health had indicated they had no objections to the project. No other agencies had commented on the proposal and the project had received no protests.

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Mr. Stagg said that this shoreline was currently experiencing moderate to severe erosion rates. Nearby properties had been similarly stabilized and VIMS supported the proposed shoreline treatment. The applicant’s agent had modified the bank grading landward to the greatest extent possible in light of the current structures that existed onsite. In light of that, staff believed the conversion of subtidal habitat to beach habitat was appropriate in this instance.

Mr. Stagg said that the beach portion of this project should not affect anadromous fish migration and the area of beach fill and the breakwater structures would be placed within a very shallow nearshore area that also should not adversely affect fish migration. Therefore, staff did not recommend any time-of-year restriction permit condition.

Mr. Stagg explained that after evaluating the merits of the project, and after considering all of the factors contained in §28.2-1402(10)(B) , §28.2-1205(A) and §28.2-556 of the Code of Virginia, staff recommended approval of the project, as submitted. If approved, the Engineering/Surveying Department would make the appropriate adjustment to the Baylor survey once the project had been completed.

Commissioner Bowman asked if there was any opposition to the project?

Mr. Stagg stated that Chris Frye, representing the applicant, was present. He also said that there was no one in opposition.

Commissioner Bowman asked for discussion.

Associate Member Robins stated that the erosion in the area was severe and it was a well constructed plan. He moved to accept the staff recommendation. Associate Member Tankard seconded the motion. The motion carried, 8-0.

Royalty Fees (encroachment 46,000 sq. ft. @ \$0.05/sq. ft.).....	\$2,300.00
Permit Fees.....	\$ 100.00
Total Fees.....	\$2,400.00

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24. VIRGINIA SEAFOOD COUNCIL: Request to modify their 2009/2010 field trials with the Asian oyster.

Frances Porter, representing the Virginia Seafood Council, was present and her comments are a part of the verbatim record.

Mrs. Porter explained that because of the amount of opposition the previous month and the fact that they had exhausted their efforts to negotiate with the State and Federal

officials, they were withdrawing the proposal and no public hearing would be necessary. She further explained that Virginia would never see this oyster and the industry would never be restored. She stated that the imports that now come from the Gulf States had been recalled. She stated further that the cow nosed rays and disease would impact the shellfish by the end of the summer.

Associate Member Bowden stated that he had heard Roger Mann comment numerous times that the native oysters would never reach the goal and now apparently he had changed his mind. He said he was disappointed with the way the Federal and State officials had treated us. He also said he was disappointed with the Senator for Eastern Shore for this decision.

No further action was required.

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11. **MR. AND MRS. SHAWN DESMOND, #08-1477**, request after-the-fact authorization to retain 150 linear feet of replacement vinyl bulkhead installed four feet channel-ward of the original deteriorated timber bulkhead adjacent to their property at 1119 Potomac Drive, situated along Aquia Creek in Stafford County.

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

Mr. Bacon explained that Mr. and Mrs. Desmond's property was located on Aquia Creek in a residential neighborhood approximately seven miles upriver of the confluence of Aquia Creek and the Potomac River. At the time of the violation, most of the deteriorated bulkhead had already been removed. The part that was still in place had failed and there was considerable erosion behind it. The mean low water and mean high water were both on the face of the bulkhead. The channel was approximately 80-feet across, and the majority of the channel shoreline was hardened.

Mr. Bacon stated that staff first became aware of the violation after receiving a phone call from the Stafford County Wetlands Board staff regarding what they believed was unauthorized work at the applicant's property on July 10, 2008. An investigation was conducted in conjunction with Stafford County staff. At that time, the contractor was found to be constructing a vinyl bulkhead that was as much as four (4) feet channelward of the footprint of the original timber bulkhead. Due to the close proximity of the house to the shoreline, the deteriorated state of the old structure, and in an effort to minimize further erosion of sediment into the creek, staff along with Stafford County, advised Mr. Brad Martin (contractor) that he could complete the bulkhead but that an after-the-fact permit application would need to be submitted.

Mr. Bacon said that a Notice to Comply was sent to Mr. Desmond on July 17, 2008. That notice directed removal of the unauthorized structures within 30 days of his receipt of the notice, or the submittal of an after-the-fact application seeking authorization to retain all or portions of the unauthorized structure within 15 days of his receipt of the Notice to Comply. On August 5, 2008, staff received the Desmonds' after-the-fact permit application requesting authorization to retain the unauthorized bulkhead in the alignment constructed by his contractor, Mr. Brad Martin. No information was provided to explain why Mr. Desmond authorized Mr. Martin to construct the vinyl bulkhead or why neither he nor Mr. Martin applied for all the required permits for the construction of the bulkhead. During the onsite meeting, however, Mrs. Desmond explained that the original bulkhead had failed and that they were replacing it with a new vinyl bulkhead. She stated that her husband was dealing with the contractor and she did not know if he had secured the required permits. After talking to the contractor about the required permits, Mr. Martin told staff that he thought that Mr. Desmond had the required permits. After talking to Mr. Desmond on the phone, he told staff that he thought that Mr. Martin had obtained all the required permits. As constructed, the bulkhead and backfill had resulted in a loss of over 600 square feet of State-owned subaqueous bottom.

Mr. Bacon told the Commission that Mr. Desmond had been very cooperative with staff and was eager to resolve the matter with the Commission. Many homeowners assumed that when a contractor was hired to construct something for them that it was the contractor's obligation to obtain all the required permits. This was normally not the case unless it was so specified in the contract. In the absence of that agreement, staff informed Mr. Desmond that procuring the necessary permits and authorizations for marine construction was ultimately the responsibility of the property owner.

Mr. Bacon said that in this instance, staff would not have recommended approval of an alignment four (4) feet channelward of the deteriorated structure. Staff would have recommended two (2) feet. As such, should the Commission elect to approve and grant an after-the-fact permit, staff would recommend triple permit fees, triple royalties and an appropriate civil charge, given a moderate environmental impact and moderate degree of non-compliance.

Mr. Bacon explained that with respect to Mr. Martin, however, staff believed that there was no excuse for a licensed marine contractor to undertake work without the required permits. In fact, prior to this incident staff had previously discovered Mr. Martin working without submitting a joint permit application for the required authorization to install a replacement timber bulkhead at 19 Sunrise View Lane in Stafford County. In that case Mr. Martin chose to remove the pilings he had installed which alleviated the need for any further action. In addition, since this incident occurred, Mr. Martin was found installing mooring piles at 19 Sunrise View Lane and 15 Sunrise View Lane, both properties were in Stafford County along Aquia Creek. In each case the County issued a stop work order to the property owners. In response to that, Mr. Martin removed the pilings and the violations were resolved. More recently on February 17, 2009, an anonymous phone call

was received informing staff that Mr. Martin was installing a bulkhead upstream of Aquia Bay Marina. On March 3, 2009, staff met with the property owner, Mr. Milleson, on-site at 52 Shady Lane. At that time, Mr. Milleson confirmed that Mr. Brad Martin had constructed the timber bulkhead. Stafford County was investigating the matter and would follow-up with the appropriate measures to correct the possible violation.

Mr. Bacon stated that given Mr. Martin's apparent involvement as the contractor in this case, as well as a number of other incidents where he had worked without proper permits or authorization, staff believed that he should also be assessed a civil charge based on a moderate environmental impact and major degree of non-compliance. In the absence of his agreement to a civil charge, the Commission may want to forward this matter to the Commonwealth's Attorney for prosecution as a criminal violation of § 28.2-1203 of the Code of Virginia. Also, the Commission may want to file a formal complaint with the Virginia Board of Contractors regarding Mr. Martin's role in this matter as well as his other incidences of working without proper authorization described above.

Shawn Desmond, applicant was sworn in and his comments are a part of the verbatim record. Mr. Desmond said that the County was informed when a competitor reported them to the County. He said the damage was caused by a storm. He said the application was for four feet channelward and the shoreline was 150 feet. He said the pictures by staff only show what had occurred for the construction of the bulkhead. He provided a hand out of a plat. He said there were surveys before and after and the bulkhead was in the same place as before. He submitted photographs of the bulkhead before and after.

Wendy Desmond, applicant was sworn in and her comments are a part of the verbatim record. Mrs. Desmond explained that they wanted to dredge in Aquia Creek and wanted to show what was happening.

Mr. Desmond explained that they did not want to commit a violation.

Associate Member Robins asked him to explain his lack of a permit.

Mr. Desmond explained that he thought the contractor would get the permits and then he heard that no permit was necessary since he was not channelward.

Associate Member Schick asked if he started by getting in contact with the county. Mr. Desmond said it was a no permit necessary. Associate Member Schick asked him how he found out it was no permit necessary, from the contractor or who? Mr. Desmond stated he was not improving the bulkhead, just repairing it. Associate Member Schick asked if he called the contractor first. Mr. Desmond said he called a number, but contracted with the cheapest. Associate Member Schick asked him if any of the contacted contractors mention the need for a permit to him. Mr. Desmond responded, no.

Bradley H. Martin, contractor, was sworn in and his comments are a part of the verbatim record. Mr. Martin explained that there was no filter paper there now and he thought they had the permits. He stated he stopped when he was told permits were needed, stopped immediately. He said they were told by the staff to continue with the bulkhead, because of the erosion problem.

Commissioner Bowman asked Mr. Martin if he had done any projects where he got the permit. Mr. Martin stated not since this incident happened.

Associate Member Robins asked Mr. Martin if he had ever seen the permit the applicant got. Mr. Martin stated that in the contract it states they get the permit.

Commissioner Bowman stated that contractors must do these projects within the law. He said that others sometimes do without figuring ahead for the cost of the violation.

Associate Member Schick asked if this was a no permit necessary status there was anything to post. Mr. Grabb explained that when they apply, a no permit letter is issued and then they get the building permit. He said they cannot get the building permit without a no permit letter. Associate Member Schick asked if the bulkhead were to be constructed landward was contacting VMRC was necessary. Mr. Grabb explained it was required by Code for maintenance or repair to notify VMRC so that it can be determined whether it was being placed at the base of the existing bulkhead. He explained that Mr. Bacon had called him to find out whether to let him continue in order to stabilize the shoreline. Associate Member Schick said that they need to notify VMRC before starting any work. Mr. Grabb said they need to apply so staff can then determine whether it is a no permit necessary, unless it is located in a man-made canal, then no permit would be needed.

Commissioner Bowman stated that there was credibility here that this was a misunderstanding and Mr. Martin had not been before the Commission before. He asked for action by the Board.

After some further discussion, Associate Member Robins said that it was at the Commission's discretion how much the civil charge should be. He said after listening to the property owners and after seeing the photos provided by them, he said he agreed with the assessment of civil charges. He said it was low impact and low non-compliance. He moved to approve the after-the-fact permit application and the assessment of a civil charge for both the applicant and the contractor at \$600.00 each. Associate Member Bowden seconded the motion. The motion carried, 8-0. The Chair voted yes.

Permit Fee.....	\$100.00
Civil Charge for the Applicant.....	\$600.00
Total Fees.....	\$700.00

Civil Charge for the Contractor.....	\$600.00
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12. PUBLIC COMMENTS:

Robert Jensen representing the Rappahannock River Preservation Society said the withdrawal of the Virginia Seafood Council Ariakensis Field Trials proposal for 2009 was a great thing to do. His comments are a part of the verbatim record.

Doug Jenkins explained he needed a permit to replace a pier to get back into business and would like to work on it this spring and summer. Commissioner Bowman suggested that Mr. Grabb should handle the case. Mr. Jenkins’ comments are a part of the verbatim record.

Ken Smith suggested that more attention be paid to the efforts by Mr. Jensen to restore habitat. He said the agencies need to look at this work and the Nature Conservancy needed to take money and move forward with Mr. Jensen’s work.

Mr. Smith stated that he wished the watermen could be more involved with Habitat issues. He said he hears the after-the-fact applications and the criteria for the contractors, but this continues to happen over and over. He said \$600.00 was not enough for breaking the rules.

Mr. Smith’s comments are a part of the verbatim record.

Associate Member Bowden suggested that the ocean striped bass fishery be opened during the month of January since fishing in February and March is now restricted by federal rules prohibiting the use of gill nets with meshes greater than seven inches. He recommended that the issue be discussed by the Finfish Management Advisory Committee.

Commissioner Bowman said he felt that doing this would only open pandora’s box but that he did not object to going forward.

Associate Member Robins suggested that the matter of the Snapper-Grouper Fishery should be brought up in April to request a public hearing to be held in May. He said this action at the State level would be to collect data, because the data currently being used showed no catch and other data did show catch. He suggested this be placed on the April

agenda to request a May public hearing to discuss the collection of data, commercial vessel limits, and recreational catch limits, as well as other issues. He said a letter should be sent to the Mid-Atlantic Fisheries Management Council.

Commissioner Bowman asked Mr. Travelstead to respond. Jack Travelstead, Chief, Fisheries Management, said that staff was aware of the situation as Associate Member Robins had kept them up to date. He stated that Virginia fishermen will be very interested in this issue and staff agreed with Associate Member Robins' suggestion.

Associate Member Robins also stated that the CMAC was concerned with false reporting in the crab fishery and that appropriate audits should be conducted.

Commissioner Bowman said that the pot tagging program needed to be investigated further so that the actual activity would be obtained.

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13. PUBLIC HEARING: Proposed amendments to Regulation 4VAC20-270, "Pertaining to Crabbing" to reinstate the dates of the crabbing season as March 17 through November 30.

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

Mr. O'Reilly stated that he wanted to comment on what Associate Member Robins had said before. He said there were 402 crab pot licensees and 38 reported in 2008 and worked a minimal number of days. He said there was a need to look at the buyer's reports. He said that there were 261 peeler pot licensees and 13 reported in 2008 and only 4 were worth checking. He stated that it was not the number that staff and CMAC had expected.

Mr. O'Reilly said that with Regulation 270 the seasonal dates of March 17 to November 30 would be reinstated, and the 2008 reference changed to 2009. He said there was an automatic sunset for the early season closure for the taking of the female crabs.

Mr. O'Reilly referred to page two of the draft regulation and the changes to paragraph C. where the 2008 is struck out and the season of March 17 to November 30 would be set but not specific to a year. He said on page 5 it was the same thing and the year 2008 had also been struck out.

Mr. O'Reilly said that staff recommended adoption of the amendments as a part of the final regulation.

Commissioner Bowman opened the public hearing and there were no public comments, so the hearing was closed. He asked for a motion.

Associate Member Robins stated that he had heard from the full-time sector and they were asking for a full season on a year round basis. He said that CMAC also supported a lengthy season. He moved to accept the staff recommendation. Associate Member Tankard seconded the motion. The motion carried, 8-0.

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14. **PUBLIC HEARING:** Proposed amendments to Regulation 4VAC20-530, "Pertaining to American Shad" to allow for an American Shad bycatch fishery in 2009.

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 this item was similar to Item 13. He said the shad bycatch fishery was reviewed annually as required by ASMFC. He said this was being brought to the Commission late and could have been decided in 2008. He said on the first page of the draft regulation, in the Preamble, the 2008 was struck out and changed to 2009.

Mr. O'Reilly mentioned that staff had received comments from John Wyatt, one was dated March 5, 2009 and the other was undated. He said he felt that Mr. Wyatt had misinformation. He said that it was not true that the ASMFC had approved the by-catch proposal from Virginia to include the upper reaches in 2006 but the Commission had taken action and approved an emergency regulation at that time, at the request of industry. He referred to the map and said that the grey areas represented the upper spawning reaches. He said the Technical Committee of the ASMFC had not recommended it to the Management Board.

Mr. O'Reilly stated that staff recommended the adoption of the amendments to the Regulation 4VAC 20-530-10, et seq., "Pertaining to American Shad."

Commissioner Bowman opened the public hearing.

John Wyatt was present and his comments are a part of the verbatim record. Mr. Wyatt explained that he was a 4th generation fisherman in the upper reaches. He said he was asking for a bycatch fishery in the upriver area. He said now if the fish were caught in the nets and died, they had to be thrown back, which was a waste. He said the ASMFC was not against it, only the staff was against it. He said it was not conservation, just waste. He said if the State asked, the ASMFC would approve it. He said the fishermen need to go to the ASMFC because they knew more about the fishery. He said they needed to be

the ones asked about it, because of their experience. He stated that common sense fishery management was needed in this matter.

Associate Member Bowden asked staff to comment. Mr. O'Reilly explained that in November 2005 the ASMFC approved the by-catch plan in place now. He said in 2006 the fishermen had asked for the adding of the spawning reaches, which was done by an emergency regulation by the Commission. He added that the Technical Committee of ASMFC did not approve the spawning reaches provision in 2006, for the 2007 American shad by-catch fishery. He said that staff could pursue this and see if it could be done.

Associate Member Bowden said that he wished fishermen were included in the ASMFC meetings. He said also that the meetings were held near Washington, DC and nobody wanted to go there to attend the meetings. He said he did attend the meetings and he felt that there were individuals on the boards that did not have the knowledge necessary, as he seemed to be the only one who knew about the species of fish being discussed. He stated that he felt that the State should take some steps to move forward on this matter. He said he agreed with Mr. Wyatt and he would be agreeable to make a motion for an emergency regulation.

Warren Cosby, upriver fisherman from New Kent, was present and his comments are a part of the verbatim record. He said another problem with the spawning reaches that were established was how the bridges were used for the boundary line for the spawning reaches, as it should be known that the shad need areas way up from the bridge to get to fresher water in order to reproduce. He said that a study was needed by the scientists at VIMS to determine the true spawning reaches instead of tying up the entire area at the bridge keeping them from fishing there. He said when this was taken to the ASMFC they were ready to open up these areas and did not because of one person and that was a fisherman from North Carolina who sells shad in Virginia and did not want to lose that market. He said he would like to see the Commission appoint someone to re-establish the true spawning reaches.

Ida Hall, commercial fisherman in the area, was present and her comments are a part of the verbatim record. Ms. Hall asked if there was a provision that allows for the data as it relates to the bycatch to be collected. She said this was done in the Potomac River and they were able to get the ASMFC to allow a fishery. She said then the Secretary of Natural Resources could go to the ASMFC and have this information. Commissioner Bowman asked staff to respond. Mr. O'Reilly stated that there were two responses to this and one was that to have a bycatch fishery there must be one of six species of like count, so if there are 10 fish per vessel then the bycatch would be 10. He said that VIMS did have a bycatch study and staff provides them a list of the potential permittees which they contact. He said they will take samples from them 2 days out of week and in rotation. He said the bycatch is a large issue with other states. The most recent Technical Committee conference was based on how much bycatch is in the pound net and how much shad was in the haul seine. He said if you listen to the other states they would like

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to know the accumulative effect of all bycatch of American Shad. He said that it has been an uphill battle just to get this bycatch fishery. He said it took a number of years and some on the FMAC know some proposals. He said that this is the one that passed and the ASMFC approved.

Associate Member Robins asked that if the Commission did not accept staff recommendation would Virginia be out-of-compliance. Mr. O'Reilly said yes, sooner or later ASMFC would meet and determine that Virginia was not in compliance, as they consider this plan. Associate Member Robins asked if the suggestion to get with VIMS and to determine the upper reaches something that could be done and try to develop some data on it. Mr. O'Reilly stated the tidal fresh water is the true spawning area and it had changed at times, but if there were to be an abundance you would see it even further upstream. He said staff could talk to VIMS and come up with some ideas.

Commissioner Bowman stated that the matter was before the Commission.

Associate Member Laine moved to adopt the staff recommendation. Associate Member Schick seconded the motion. He explained that he had attended these meetings of ASMFC at times as an alternate representative and he said it had been an uphill battle for staff to get what had been done. Associate Member Robins suggested an amendment to asked VIMS to make a determination on the actual spawning reaches. Commissioner Bowman said that this would be separate from this matter. The motion carried 8-0. The chair voted yes.

Commissioner Bowman noted that it would there was a directive for staff to get with VIMS and inquire whether they would be able do the study on the spawning reaches, as suggested by Associate Member Robins.

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- 15. PUBLIC HEARING:** Proposed amendments to Regulation 4VAC20-950, "Pertaining to Black Sea Bass" to raise the recreational fishery minimum size limit to 12 ½ inches.

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

Ms. Nelson explained that this was a public hearing on the Black Sea Bass. She said that the recreational black sea bass regulations are coastwide. She stated that currently, recreational black sea bass requirements include a year-round season, a 25-fish limit, and a 12-inch minimum size requirement.

Ms. Nelson further explained that the Atlantic States Marine Fisheries Commission announced an increase in the minimum size requirement for the recreational black sea

bass fishery from 12 inches to 12 ½ inches for 2009. She said their memorandum was a part of the packet.

Ms. Nelson said that the notice for this proposal had been sent out and there were no public comments received on this issue, to date. She said that staff recommended the amendments to the Regulation 4VAC 20-950-10 et seq., “Pertaining to Black Sea Bass” to increase the recreational size limit from 12 inches to 12 ½ inches. She noted the draft regulation was included in the packet showing this amendment.

Commissioner Bowman then opened the public hearing. There was no one wishing to speak on the matter and the public hearing was closed.

He asked for action by the Commission.

Associate Member Schick moved to accept the staff recommendation. Associate Member Holland seconded the motion. The motion carried, 8-0.

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16. PUBLIC HEARING: Proposed regulation to allow a special oyster relaying season in the Rappahannock River in April, 2009 on Russ Rock and Little Carter Rock.

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

Dr. Wesson explained that at the January 2009 Shellfish Management Advisory Committee meeting some of the watermen had requested that we open Russ Rock in the upper Rappahannock River for a short relay season in the spring. He explained utilizing a slide exactly where the oyster rocks were located. He said that this area had been closed for many years to harvest because of the pollution. He said that the Department of Shellfish Sanitation had indicated that this area will probably never be opened for harvesting.

Dr. Wesson stated that there was a significant quantity of oysters on these two small rocks and they would be valuable to the industry. He said that in order to make it as easy as possible for Law Enforcement and their manpower issues, those that are interested in relaying the shellfish have agreed to alternate days so that only one buyer will be working. He said that all of these oysters are to be offloaded at the Bowler’s Wharf. He said that 4 of the buyers will be transporting the shellfish by truck to the Northern Neck area and one that is in the middle area would like to uses cages to relay the shellfish.

Dr. Wesson said that staff had prepared a draft regulation for this relay season in the month of April. He said that staff recommended that the draft regulation 4VAC 20-1200-10, et seq., "Pertaining to the Special Relay Season in the Rappahannock River."

Commissioner Bowman asked for questions. Associate Member Schick asked how many officers would be necessary. Commissioner Bowman asked Lt. Colonel Warner Rhodes, Deputy Chief, Law Enforcement, to explain the process. Lt. Colonel Rhodes said they are supposed to be at all offloading points to sign off on the paper work, which establishes where they are. He said when they are offloaded there would have to be an official at each spot. Mr. Schick stated then that could mean 5 potential officers per day. Dr. Wesson stated that it would mean only 1 per day, as there will only be one planter working each day going to one site. Commissioner Bowman said that is only one to track. Associate Member asked how the process was. Dr. Wesson explained that have to be overboard for 15 days once the water temperature had reached 50°. Associate Member Schick asked if the season was only going to last four weeks. Someone responded one month. Lt. Col. Rhodes asked if that could not be shorten. Commissioner Bowman asked why? Lt. Col. Rhodes explained that crab season will be starting soon. Commissioner Bowman said that it could be worked out.

Commissioner Bowman opened the public hearing.

Douglas Jenkins, Sr., Twin River Watermen's Association, was present and his comments are a part of the verbatim record. Mr. Jenkins stated that he had heard that the Law Enforcement were present during the harvest, the onloading and offloading and when the shellfish were recovered and the flags removed.

Mr. Jenkins said that the plan was giving these shellfish to a couple of individuals and others should be allowed also. He said there are oysters present that do need harvesting but it was the wrong time of year. He said he was not at the SMAC meeting, but attending another meeting. He said he was against it as it was the wrong time because of crab season and other things and the fall would be better. He said in the fall dredgers should be used to move them to Morattico Bar to have the watermen catch them. He said the work should be given to industry for shucking oysters as the others were not worth as much. He said it was wrong to benefit a few and denying it to the public. He stated the Baylor was reserved for the public not to only a few.

Ken Smith, Virginia Watermen's Association, was present and his comments are a part of the verbatim record. Mr. Smith said he agreed with Mr. Jenkins. He said the Totuskey Creek sewage treatment was being improved and the campground had closed, which caused the line to be moved up. He said none of the watermen want these oysters taken for only a few.

Associate Member Bowden asked for comments from staff. Dr. Wesson stated that the line had moved a little bit, but the condemnation was coming from the marsh and the

Tappahannock sewage as well as animals, too. He said he spoke with Dr. Croonenbergh and he said he felt it would not change in his lifetime. He said it was a good price and it was wanted for the half-shell market. He said that there was the 2 ½-inch cull law and this was not a shucking oyster. He said this way they could maximize their profit and would not have to import.

Associate Member Bowden asked about the transplanting idea. Dr. Wesson stated that these shellfish were disease sensitive and the salinity was high. He said with the relaying they have to take them up in 15 days. He said because of the drought it was wise to take advantage because the disease could take them at any time.

Associate Member Schick asked if the watermen would be doing the harvesting. Dr. Wesson said the watermen would harvest them and the SMAC thought it was a good idea for the extra month.

Commissioner Bowman asked if Mr. Garrett had agreed to the utilizing of his facilities. Dr. Wesson responded yes.

Commissioner Bowman stated that the matter was before the Commission.

Associate Member Tankard moved to approve the relay season in April 2009. Associate Member Laine seconded the motion.

Associate Member Bowden stated that the one buyer a day does not mean that he had to buy from that waterman. He said the oysters were challenged for disease and would not last if moved to another area. He said he also agreed with Messrs. Jenkins and Smith, as he could see both sides.

Associate Member Schick said that his concerns could be worked out as manpower were to be taken from other species' season, but he thought more Marine Police Officers would be needed. He said if it can be worked out with Law Enforcement he did not see a problem.

Commissioner Bowman stated that it would be four Marine Police Officers, maybe five in the rotation. He said there were 65 Marine Police Officers and 25 were off each day and there was always a determination to be made as to where to go on any particular day.

The motion carried, 8-0. The chair voted yes.

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- 17. PUBLIC HEARING:** William Haynie request to license and locate a pound net in Chesapeake Bay near Hughlett Point.

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

Mr. Travelstead stated that Mr. Haynie was present at the meeting. He said there had been more comments received since the packets had been mailed. He said there was also a letter from the applicant.

Mr. Travelstead explained that there were 6 letters in favor and 14 letters in opposition.

Mr. Travelstead said the opposition centered on issues concerning the appearance of the net from shore, the resulting dead fish, the nets impacts on the recreational fishery, a precedence being set, detrimental to the natural resources and the environment, and the natural area preserve would be impacted.

Mr. Travelstead stated that the shoreline owner, Virginia Department of Conservation and Recreation had been contacted twice and had no comments. He said one comments was from a volunteer working at the Preserve, who said he knew Mr. Haynie would take care of the net, was a good fisherman and would fish accordingly.

Mr. Travelstead said that in regards to the SAV, the maps from VIMS show no SAV in the immediate area during 2005 to 2008, in either Dividing Creek or Ingram's Cove. He said the net was within the historical range, but no SAV had been there for a while nor is expected in the near future. He said there had been some confusion in the location, as to whether the net is in Dividing Creek or near the mouth, which was not the case. He said it would not interfere with navigation in and out of Dividing Creek. He said it was reviewed by staff and they support the placement of the net.

Commissioner Bowman asked for questions of staff. Associate Member Robins asked if the depth at the head of the net was deep, 5 feet to 6 feet. Mr. Travelstead stated he was not aware of the depth, but Mr. Haynie could answer the question.

William Haynie, applicant, was present and his comments are a part of the verbatim record. Mr. Haynie said that staff's comments had covered what he wanted to say. He said the handout maps were provided by the VMRC officer. He said it was 1 ½ miles away from Dividing Creek and there would not be any impact on traffic and at night time there were lights. He said there was no SAV in the area, the water was clear, and the bottom was sandy. He said that there were birds, such as pelicans, gulls, and osprey in the area, which the people enjoy watching from the preserve. He said he had never seen dead fish in his trap as he takes the fish out right a way in accordance with the Regulations. He stated it was not on the shoreline and was not a big operation. He said he uses a 21 foot skiff which would not impact the bottom. He presented a petition with 450 names in support of his proposal.

Commissioner Bowman asked for those in support to address the Board.

Rick Lockhart, Dividing Creek resident, was present and his comments are a part of the verbatim record. Mr. Lockhart said he was located at Hughlett Pt. He stated he had originally been opposed because of the lat-long indicating that it was at the point and fish were caught there. He said in the location proposed he was not opposed.

Ida Hall, waterman, was present and her comments are a part of the verbatim record. Ms. Hall explained that many nets had been fished by her family up to Hughlett Point. She said in 1964 she worked with her cousin on a pound net and after that worked every summer and learned a lot about fish and gained respect for those who work for their livelihood. She said the fish always are alive because the illegal size ones were released alive and never found dead on the shoreline. She said there was camaraderie between the recreational and commercial fishermen, as they respect each other. She said it does take a young person as it was a labor intensive job. She said that the recreational and commercial fishermen should unite to restore the resources and the environment. She said she urged VMRC to approve the request.

Ken Smith, Virginia Watermen's Association, was present and his comments are a part of the verbatim record. Mr. Smith said they support the pound net approval. He said actually they were in favor of all three and hoped they would all be approved.

Commissioner Bowman asked for anyone in opposition who wished to speak. There were none.

Commissioner Bowman asked for discussion or action.

Associate Member Tankard moved to approve the request. Associate Member Bowden seconded the motion. Associate Member Schick said that pound nets are in general not anymore negative to the resource than any other structure in the water. He stated that those that do this do a service for the community and he supported the request. Associate Member Robins stated that the location had been clarified and there was sufficient distance so it would not impede navigation and small enough not to cause any impact to the area. The motion carried, 8-0. The chair voted yes.

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18. **PUBLIC HEARING:** Dirk Sanford request to license and locate two pound nets in Chesapeake Bay near the Bay Bridge-Tunnel and Lynnhaven Inlet.
19. **PUBLIC HEARING:** Charles Gregory request to license and locate a pound net in Chesapeake Bay near the Bay Bridge-Tunnel and Lynnhaven Inlet.

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

Mr. Travelstead explained that Mr. Dirk Sanford proposed to locate two pound nets in the area between the Chesapeake Bay Bridge Tunnel and Lynnhaven Inlet. He utilized the staff slides to show where the nets were to be located. He said further that Mr. Charles Gregory the next item would be in the same area. He showed the Commission on staff's slide where that one was to be located. He reminded the Commission of earlier applications for nets to the east, towards Cape Henry by Mr. Sanford which had been denied.

Mr. Travelstead explained further that there was not a location in the Virginia Beach area for which you would not receive considerable negative public comments.

Mr. Travelstead stated that because of the previous denials, staff had suggested a meeting in the hopes that staff could provide him with some assistance in finding a more acceptable location. He said he was not sure if that was done, but that was for the Commission to decide. He said when the evaluation was written, eleven letters had been received and all were in opposition to Mr. Sanford's proposal and they were received from a number of property owners on the shore, Civic Associations, Neighborhood Associations, and the like. He said the letters given out by staff were an additional 41 letters, seven of which were in favor and 34 were in opposition.

Mr. Travelstead explained the concerns of the opposition, as follows: represent an adverse impact to recreational users of these waters, may cause safety concerns for small vessel users, result in dead fish fouling the beaches, and increase potential harm to marine life. He said in a letter from Mr. Swingle the Virginia Aquarium had also expressed opposition to the nets because they posed an additional threat to the bottlenose dolphin and sea turtles. He said Mr. Swingle had suggested that if they were approved that modified leaders be used in the nets to decrease the impacts on these species. He noted for the Commission that there was a Federal rule requiring modified leaders be used to the west and north of the Chesapeake Bay Bridge Tunnel northward to the Mobjack Bay. He described these modified leaders for the Commission and said that they allow turtles and dolphins to escape the nets. He stated that they appear to be fairly effective.

Mr. Travelstead explained that when staff met with Mr. Sanford and Mr. Gregory they had identified these as good fishing ground and staff had recommended to them to stay as far off shore as possible but to stay within a line from the small boat channel of the CBBT to the marked channel into Lynnhaven Inlet. He said this would not impact boat traffic and the boats could traverse in a straight line from those two points. He said beyond this would cause staff to have concerns regarding navigation and within 500 yards of the beach they would impact small boats, such as kayaking, etc. along the shore. He explained that the previous applications for pound nets were within this 500 feet and now

that distance had been triple. He said even with all this, there were still concerns with the recreational activity being impacted.

Mr. Travelstead said the applicants, in order to lessen the impact on the dolphins and turtles, have somewhat agreed to using the modified leaders. He said if the Commission were inclined to approve these applications, staff suggested discussing with them the using these modified leaders. He also said that this might alleviate there being further discussion by the Federal officials regarding the use of these modified leaders. He said that if there was no reaction from the Federal level, then staff may bring a regulation to the Board for consideration requiring that all pound nets utilize the modified leaders. He said staff did not have anything today, but were waiting to see the results of the Take Reduction Team does, which staff would bring back to the Commission.

Commissioner Bowman suggested that Items 18 and 19 be heard at the same time. He stated it was up to the Commission. Mr. Travelstead explained that there had been no additional public comments in Charles Gregory's packet and the handouts are for all three nets.

Commissioner Bowman asked if Mr. Sanford wished to speak.

Dirk Sanford, applicant was present and his comments are a part of the verbatim record. Mr. Sanford explained that the change made the nets further offshore and made the net appear to be in the channel.

Associate Member Tankard asked him about the modified leaders. Mr. Sanford said that it was a good idea, but he was not sure if it actually worked. He said he was all for it, if it worked as it makes everything simpler. He said he was willing to try it on one net to see if it helps.

Charles Gregory, applicant, was present and his comments are a part of the verbatim record. Mr. Gregory said that he spoke with staff to work out a solution and this was the area decided upon. He said the modified leaders were not required, but if the Commission decided to require them, he felt that all nets should be required to have them.

Commissioner Bowman asked if someone in support wished to speak.

Joe Palmer, fisherman, was present and his comments are a part of the verbatim record. Mr. Palmer stated that historically nets had been present in the area and therefore set a precedent. He said the homeowners were new to the area and the ones that did not want them there. He stated that everyone was against the nets until these same people needed bait. He said he had seen dead dolphins before they had hit the leaders. He said he requested support of the nets.

Ken Smith, President of the Virginia Watermen's Association was present and his comments are a part of the verbatim record. Mr. Smith said that the Association supports all three nets.

Chris Ludford was present and his comments are a part of the verbatim record. Mr. Ludford requested that the Commission grant both applications. He said he supported the Take Reduction Team for dolphins as he was a member. He said in the ten meetings he had attended Virginia gear was never mentioned in the dolphin reduction. He said there had been an occurrence in North Carolina because of the concentration of gill nets. He said he had never heard of mortality occurring with pound nets only after they were already dead. He said the pound nets provide safety because when vessels come upon them they must slow down and the only accidents that have occurred are when the individual operating the vessel was intoxicated. He said he had known the individuals for twenty years. He requested that the Commission grant the nets.

Mark Sanford, crab potter, was present and his comments are a part of the verbatim record. Mr. Sanford said he hoped they would be approved as they provide him with employment.

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

Mike Wills, neighborhood representation, was present and his comments are a part of the verbatim record. Mr. Wills explained that this was inappropriate because Shore Drive was densely populated. He said it was a recreational mecca in summertime and the nets were an impediment for the boats as they were a navigation hazard. He said on the east side there were so many nets they can hardly navigate. He said he was not against watermen, but only opposed to the nets as they are not compatible to the area. He said a precedent would be set and more would come to the area and then it would be like the east side.

Bob Castellow, representative for the Chesapeake Civic League, was present and his comments are a part of the verbatim record. Mr. Castellow stated he loved fishermen and watermen. He had had a navy career and when he was stationed away from the water he just loved when he could return to it. He said that there are a lot residential activities in the area. He said he submitted a letter dated March 9, 2009 and asked if the staff was recommending approval when those on the east side had been denied. He said the civic league was concerned about the mammals and sea turtles and he did not know how much the leaders would help.

Mark Swingle, representing the Virginia Aquarium, was present and his comments are a part of the verbatim record. Mr. Swingle said they would welcome the leaders being required. He said they were still in the experimental stage, but does see it as a solution. He said they were opposed to the gear in the similar location.

Associate Member McConaugha asked about the population density in the area. Mr. Swingle stated that there were 1,000's in the summer on the coast of Virginia. Associate Member McConaugha asked if healthy dolphins interact with the nets.

Doug Beckman, Norfolk Resident, was present and his comments are a part of the verbatim record. Mr. Beckman said he volunteers at the Aquarium and worked with Mr. Swingle. He said the number of takes was a conservative number. He said the PBR's had other goals such as zero rate mortality.

Todd Solomon, representing the Shore Drive Coalition, was present and his comments are a part of the verbatim record. Mr. Solomon stated that there were 7 to 8,000 homes in the area and all were opposed to the nets on the eastern side and now they were opposed to these on the western side. He said they were not opposed to the commercial fishery, but these were not the right tools for the area. He said this was the most densely populated area. He said there was a need to exclude all nets. He said also he understood that those existing would be "grandfathered".

Steve Kohler, was present and his comments are a part of the verbatim record. Mr. Kohler said the new sites were better, but the boats would still be impacted. He said it was an impact to the dolphins and other resources. He said more nets would mean more mortalities and the modified leader had not been proven to work. He said the Marine Resources should preserve the resources for now and the future. He said there was increased recreational activity in the area. He asked that the requests be denied.

Dirk Sanford in his response pointed out that only in high tide can the sand bars be crossed and at low tide the boats must go out further than the nets to pass this area. He said most of the beaches were private and $\frac{3}{4}$ to a mile of beach had been acquired by the City and there was limited parking. He said the beaches were only used by residents. He said he was willing to work with Mr. Swingle and VIMS with the new modified leaders.

Charles Gregory in his response said that areas within the beach running power vessels must observe the "no wake" area because of the swimmers.

Commissioner Bowman said that in a letter from Delegate Joe Bouchard, regarding the two applications for the new pound net locations, it said he was concerned with the endangering of the dolphins and turtles. He said it said also that there was increased recreational activity in the area and the pound nets were not compatible. He said the letter also referred to the Navy Training Installations in the area.

Commissioner Bowman asked for discussion or action by the Board.

Associate Member Bowden said that he was on the first Take Reduction Team and was more familiar with the dolphin situation then most here except for Mr. Swingle. He said that the team had estimated that there were 2,500 dolphins in the area, but others have

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said that there are 10 times that amount. He said the PBR was set in order to reach the maximum potential. He explained that the fishery economics must also be considered. He said that Virginia overall is well below the PBR, but maybe not in Virginia Beach as this was a wintering spot for the dolphins. He said the high density development also has an impact on the dolphins, such as the light, which interferes with them resting because they must breathe they cannot go to the bottom. He said he never pound netted, but his father did in the 20's, so it was not new to him. He said that everybody wants to live on the water, which impacts the water quality. He said pound nets do not impact the environment.

Associate Member Bowden said that in order to test the leaders in the nets, there must be a control net to be able to judge the success. He said he was not against modified leaders if they were required now. He said he would like to see the pound nets approved, but to require the modified leaders.

Associate Member Tankard referred to the Public Trust Doctrine, which he read from...other reasonable uses of State water. He said historically the fisheries have been there. He said there was no impact to the wetlands, no impact to the highland, and no impact to SAV. He said he would support approval with modified leaders.

Associate Member McConaugha stated he hated to see any dolphins caught and killed. He said the modified leaders might reduce this and he supported approval with modified leaders.

Associate Member Schick said that the nets are to be far offshore to not impact recreational activity. He said it was most of the time inexperienced driving and drinking that cause problems. He said in regards to the dense population, there was the right to work in this location. He said someone is always saying, put it in somebody's backyard. He said there was an obligation to preserve for all to use, not to zone. He said he would support approval.

Associate Member Robins said he was excusing himself from voting.

Associate Member Laine said he was concerned with the proliferation of pound nets in densely populated spots. He said he did not think that 2 or 3 more would have much effect, but there was need to decide when enough was enough. He said he was not opposed to the 3 nets proposed, but it was close to being enough is enough.

Associate Member Bowden moved to approve the applications for pound nets, but with the modified leaders. Associate Member Schick seconded the motion. Commissioner Bowman said he had considered this long and hard. He said when some move somewhere they do not expect change, but changes does occur. He said there were concerns with regards to hazards to navigation, whether it was a car or boat you have to drive responsibly. He said he understood how the residents want

everything to remain the same, but watermen have lived in Virginia as a resident the same way. The motion carried, 6-0-2. Associate Members Laine and Robins both abstained. The chair voted yes.

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21. REQUEST FOR PUBLIC HEARING: To establish closing dates of crab sanctuary as May1 through September 15th.

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

Mr. Travelstead explained that last year the Commission adopted regulations to revise the dates of closure for the Virginia Blue Crab Sanctuary from June 1 to September 15 to May 1 to September 15.

Mr. Travelstead said that in the 2009 legislative session, the General Assembly adopted Senate Bill 1111, which amends 28.2-709 to allow the Commission, by regulation, to establish dates of closure of the “original” sanctuary. He said the Governor signed it on March 24 and the area was now closed.

Mr. Travelstead said that staff recommends the adoption of the emergency regulation closing the “original” crab sanctuary from May 1 through September 15. He said a public hearing would be held in April to consider making this permanent.

Mr. Travelstead said that some of the CMAC members were interested in this area being closed year-round. He explained that this issue could be discussed further during the April public hearing.

Associate Member Robins said that the CMAC members wanted it closed year-round, the Lynnhaven watermen wanted it closed later than May 1, and the staff recommendation would be more cohesive. He moved to accept the staff recommendation. Associate Member Tankard seconded the motion. The motion carried, 8-0. The chair voted yes.

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20. DISCUSSION: To establish 2009 regulations for the commercial harvest of blue crabs; request for public hearing.

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

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Mr. O'Reilly stated that this was a request for a public hearing. He said that there had been a lot of information given to the Commission since the Blue Crab Regulatory Review Board met. He said there is some information that the Commission did still need to hear to make a decision next month for 2009, based on the results that are expected either early April or at least before the next meeting. He said last time was right around April 15. He said in the packet he had outlined all of the measures of 2008 and the target reduction 34% was met, but there is still some delinquent data to come in but there had been about a 37% reduction on the harvest of female crabs from the Chesapeake area. He said that the Board may have heard and it was discussed at the CMAC meeting that the regulations had not done it all. He said there were market forces and there had been reports of crabs being dumped because of no markets. He said the question was also, will the labor pool be the same in 2009 as in 2008 and he responded probably not. He said in looking at the winter dredge survey there had been 120 million crabs in 2008 and the question would be what will be the results of 2009 and that will not be known until the winter dredge survey comes out in April. He said the target was for 200 million crabs. He said the harvest was low in 2007-2008 with 16.8 million pounds of crabs from the Chesapeake Area.

Mr. O'Reilly stated that Maryland had a different method to estimate harvest and they had determined a 24% reduction on female crab harvest. He said the reason for Virginia to establish the 34% reduction was to bring the exploitation rate down to the target 46%, which must be considered. He said in 2008 it was the lowest harvest. He said the starting abundance and exploitation rate were used to determine the harvest.

Mr. O'Reilly said that Ms. Fegley had done some calculations for the mean of age 1+ crab abundance and for 1998 – 2006 and the mean was 146 million, which covered a range of time. He said this would be discussed at the next meeting.

Mr. O'Reilly stated that staff will need to assist the Commission to interpret the abundance and exploitation rate.

Mr. O'Reilly stated that in the packets there is a plan and where staff started was 16.3 million pounds of females for a 34% reduction from that amount.

Mr. O'Reilly said that there was something from CMAC and all along there had been a clamor for higher pot limits. He said, for now, there was a 30% reduction in pots for 2009, for both the crab pots and peeler pots. He said CMAC felt that this should be changed to 15% the crab pots which was the 2008 reduction, for such reasons as competition with other states and another reason was they viewed the current pot limit as acceptable back when there was going to be a pot tagging system. He said some thought the pot tagging would result in the ability to transfer pots and build their rigs. He said these were legitimate reasons, but staff thought it was a step forward to have the pot reductions and there has been nothing changed about overcapacity. He said the wait list did not remove capacity in the fishery, but it did remove dormant licenses. He said even

with all the review he thought everyone would say there was overcapacity. He explained that staff did not think reestablishing the pot limits would be a wise move at this time.

Mr. O'Reilly said that agent culpability, which CMAC spoke about on a number of occasions. He said staff would also like to see agents held accountable for their actions. He said because right now an agent could have multiple infractions and it would not have any effect. He said the agent would get the ticket but that did not prevent him from going forward and getting another violation. He said CMAC and staff agreed that if the agent should get 2 violations in a 12-month time period he should not be able to act as a agent for at least a year, and if 2 more violations occur by the agent the licensee would be held accountable as well.

Mr. O'Reilly said that even though a closed season was established, CMAC and staff still believe that closed seasons are necessary as well as bushel limits or a combination of them. He said staff will be offering these types of measures for the April 2009 public hearing. He said that staff was recommending a bushel limit by pot category, but Law Enforcement had not supported this measure in the past, but staff would work with them to make it work if they are necessary. He said CMAC at their meeting questioned the need to bring up bushel limits when the past season was not until October. He said they were told by staff that bushel limits could be used at other times and in combination with other measures.

Mr. O'Reilly said staff was recommending that the Commission advertise for bushel limits, season closures as well as a combination of closed seasons and bushel limits. He said staff also recommended the advertisement of licensee and agent culpability.

Associate Member Tankard said staff was talking about culpability he wondered why we would give them a second opportunity. He said he thought it should be more stringent and take away more than one opportunity. He asked if the Commission could advertise that. Mr. O'Reilly explained that there had been the 3 violations for a one year period and then it was changed to 2 violations, last year and he thought the idea now was in keeping with the change last year. He said CMAC was very interested in seeing that the agents do see more culpability.

Commissioner Bowman stated that if it were to be advertised more restrictive then the Commission could always go less.

Associate Member Bowden said he was going in the opposite direction of Mr. Tankard and he thought the Commission needed to advertise for 15% to 30% on pot reductions from 2007 levels. He said Maryland had done a dismal job and never restricted licenses and we had a limit of 70 pots and Marylanders can have 400. He said also, that when you consider the seriousness of a violation, one size does not fit all.

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Associate Member Robins said that Mr. Tankard wanted to tighten the regulations and CMAC wanted to make it equitable standards, because if a licensee had 2 violations in one year they come before the board, but the agent was not held to the same standard.

Commissioner Bowman asked about the agency culpability for 2 violations and whether the licensee can be brought before the board. He asked if Counsel had been asked for an opinion.

Mr. Travelstead said that CMAC was wondering if a legal agent should be in violation and get a summons could the licensee get a summons as well. He said in that case there must be proof of a conspiracy by the parties involved. He said the second part of the question was whether a violation by the agent could cause the licensee to be brought in for revocation of his license. He said Counsel had responded yes, but the regulation would have to be amended to set up a procedure.

Associate Member Robins said that this year the target was met for the conservation requirements, with the existing 2008 gear restriction and a buy back program, this might help to reduce capacity which he felt would strengthen the long term-management of the fishery. He said another measure to consider would be the reduction of the hard crab pots to 15-20% (from 2007 levels) in addition to the 30% already suggested. He said in regards to the culpability issue that there needed to be added that in the case of a revocation hearing the agent would be summonsed to the hearing when there were 2 violations within a 12-month period.

Commissioner Bowman stated that a license cannot be revoked without a hearing.

Associate Member Robins explained that CMAC least preferred the restoring of the length of the season, but staff wanted this to leave for discussion. He said he could not support that. He moved to advertise the eight items with the two amendments, Item 4, 15 to 20% reduction in pots per license and Item 7, requirement for the summons of appearance of the agent in a license revocation hearing by an agent, if he had 2 violations within a 12-month period.

Mr. O'Reilly said what staff had proposed was maintenance of the 2008 regulations (except the fall closure), with the exception of the culpability issue and the bushels limits and seasons closures or combinations of the two. He said except for those two items everything else was already in the regulation. He said the two amendments by Mr. Robins would have to be advertised, but Mr. Robins had said the word license and the agents did not have a license but rather a permit issued to them for agency. Commissioner Bowman said that Section 28.2-232 said ...license or right to fish...so he thought that was covered.

Associate Member Robins withdrew the previous motion and made a new one. He moved to advertise the staff recommendations together with a provision to reduce

hard crab pots to 15 to 20% (of the 2007 levels) per license and to advertise measures to deal with an agent’s culpability. The motion was seconded by Associate Member McConaugha. The motion carried, 8-0.

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22. APPEALS: Individual Appeals to Place Certain Crab Pot And Peeler Pot Licenses on a Waiting List.

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

Mr. Travelstead explained that the first 11 appeals were because of medical reasons. He said that 4 were recommended for approval, but conditional pending receipt of a medical confirmation.

Staff Recommendation for Approval:

Henry T. Bunting Louis V. DeMarco Louis N. Haynie Edwin W. Ruark
George W. Smith Larry F. Taylor Biago J. Frake, Jr.

Associate Member Robins moved to approve staff recommendations. Associate Member Tankard seconded the motion. The motion carried, 8-0. The chair voted yes.

Staff Recommendation for Conditional approval:

Gordon C. McPherson Curtis W. Simmons Raymond M. Jenkins, Jr.
Kenneth E. Annis

Associate Member Robins moved to approve staff recommendations. Associate Member Tankard seconded the motion. The motion carried, 8-0. The chair voted yes.

Mr. Travelstead explained that the next individual just incorrectly reported gear and that had been resolved. He stated that staff recommended approval.

Incorrectly reported gear type:

John L. Hamblin

Associate Member Tankard moved to approve the staff recommendation. Associate Member Holland seconded the motion. The motion carried, 8-0. The chair voted yes.

Mr. Travelstead explained that the following individuals had not reported any harvest. He said the following individuals were recommended for approval. He explained that William F. Nelson was at the last meeting and in his case he had an agent that was using his license and he had thought was reporting the harvest. He said that the agent had not reported, but that Mr. Nelson had provided harvest information, though it was not much, nor did staff know how accurate it was, but it was accepted and now staff was recommending approval. He said since then the agent had acquired a license of his own and staff would be keeping an eye on him and his reporting.

William F. Nelson

Commissioner Bowman asked for a motion from the Board.

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

Mr. Travelstead stated that the next three were recommended by staff for approval.

Desmond J. Owens Ricky N. Jenkins William L. Carney

Commissioner Bowman asked for a motion.

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

Mr. Travelstead explained that the following were recommended by staff for denial.

Terry K. Hayden

Mr. Travelstead explained that Mr. Hayden had been a watermen since the 1950's. He said that Mr. Hayden in 2003 had his plant destroyed by Hurricane Isabel and he had not been able to afford to get back into the business and now that he can he no longer has a license.

Associate Member Robins asked if he had reported harvest prior to 2004. Mr. Travelstead stated he had reported every year until the hurricane.

Commissioner Bowman stated that they had to make hard decisions, but must be consistent with the regulations.

Associate Member Robins stated that even if there were to consider his personal difficulties there was a resource problem and he did have the option of obtaining a

license by a transfer as a hundred were allowed per year. He moved to accept the staff recommendation for denial. Associate Member Tankard seconded the motion. The motion carried, 8-0. The chair voted yes.

W. Emory Lewis

Mr. Lewis explained that he was from Reedville and said that he had not reported harvest as he only gave the crabs to friends and family. He said he had kept his license for when he decided to retire. He said he did not have any catch reports, but he did have letters from friends and family who he had given the crabs.

Associate Member Tankard stated that he did sympathize, but he moved to deny the request. Associate Member Holland seconded the motion. The motion carried, 8-0. The chair voted yes.

Keith D. Lilliston

Associate Member Tankard moved to deny. Associate Member Schick seconded the motion. The motion carried, 8-0. The chair voted yes.

Daryl L. Lilliston

Associate Member Schick moved to deny. Associate Member Holland seconded the motion. The motion carried, 8-0. The chair voted yes.

John F. Balderson

Associate Member Tankard moved to deny. Associate Member Holland seconded the motion. The motion carried, 8-0. The chair voted yes.

Charles Buchanan

Associate Member Holland moved to accept the staff recommendation. Associate Member Tankard seconded the motion. The motion carried, 8-0. The chair voted yes.

Maurice M. Somers

Associate Member Holland moved to accept the staff recommendation. Associate Member Tankard seconded the motion. The motion carried, 8-0. The chair voted yes.

Emmett E. Sanford

Associate Member Holland moved to accept the staff recommendation. Associate Member Tankard seconded the motion. The motion carried, 8-0. The chair voted yes.

Kevin Godsey

Mr. Godsey explained that this was 100% of his income and he had been impacted by the Hurricane and he had last May sold 50 pots not knowing that these crab regulations would be impacted him and he would lose his license.

Commissioner Bowman said that staff would need further time to see new information.

Associate Member Robins moved to continue the matter. Associate Member Tankard seconded the motion. The motion carried, 8-0. The chair voted yes.

Associate Member Holland suggested that the staff be given authority to approve if they are satisfied with the new information. Associate Member Robins moved to approve conditioned on staff being satisfied with what they find. Associate Member Holland seconded the motion. The motion carried, 8-0. The chair voted yes.

Emmett E. Sanford

Mark Sanford, son, was present and his comments are a part of the verbatim record. Mr. Sanford explained that they did not realize this was coming up today and it had already been voted on. He said his father was in a nursing home and there had been activity on the license.

Associate Member Tankard moved to continue the matter. Associate Member Laine seconded the motion. The motion carried, 8-0. The chair voted yes.

Maxie Martin

Mr. Travelstead stated that Mr. Martin's information had not been submitted on time for today and was scheduled to be heard at the April meeting.

Mr. Martin stated he had been told last month to be here today.

Commissioner Bowman asked if staff had done an evaluation. Mr. Travelstead said no. Commissioner Bowman suggested that the same be done for Mr. Martin as done for Kevin Godsey and continue it based upon a satisfactory review by staff. Mr. Travelstead stated it was up to the Commission.

Associate Member Holland moved to approve conditioned on staff being satisfied with what they find. Associate Member Tankard seconded the motion. The motion carried, 8-0. The chair voted yes.

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23. VIOLATIONS: Individual Cases of Violation of the Striped Bass Quota Rules.

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

Mr. Johnson explained that during the November 26, 2009 Commission meeting Regulation 4VAC 20-252-10, et seq., was amended, converting the Individual Transferable Quota (ITQ) program for striped bass from a per fish (tag-cased) ITQ program to a weight-based ITQ program.

Mr. Johnson said that page 15 of the Regulation explains the penalties for individual striped bass harvest quota overages.

Mr. Johnson explained that the first individual was in violation of the regulation and this was a first offense. He said that staff recommended a one year deduction of the overage from the individual harvest quota, which occurred in 2008, in accordance with the established matrix.

William Reid

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

Mr. Johnson said the following was a case of individuals whose overages were up to three percent and this was a first offense. He said staff recommended the sending of warning letters, noting this constitutes their first offense.

<u>James West</u>	<u>William Bailey</u>	<u>Lowry Hudgins</u>	<u>Joseph Palmer</u>
<u>Paul Morris</u>	<u>George Winder</u>	<u>Jeffery Crockett</u>	<u>Richard Green</u>
<u>Roy Fenwick</u>	<u>Kurt Oest</u>	<u>Stanley Jester</u>	<u>John Wyatt</u>
<u>William Boothe</u>	<u>Albert Marshall</u>	<u>Charlie Whiting</u>	<u>Phillip Williams</u>
<u>Phyllis Williams</u>	<u>Ryland Hazelwood</u>	<u>Frederick Rogers</u>	<u>Vernon Merritt</u>
<u>Joseph Beck</u>	<u>Francis Gaskins</u>	<u>David Walker</u>	

John Wyatt, upriver waterman, was present and his comments are a part of the verbatim record. Mr. Wyatt stated that he had pushed for this system so as to be fair and it does work. He said he was only 1/10 of one percent and the average fish he caught was 10

pounds. He said it was difficult when you are estimating to get it exactly right. He said that there cannot be a zero tolerance and he thought the FMAC discussed allowing something.

Commissioner Bowman noted that he had been at the meeting all day or more of it to state his case.

Associate Member Bowden explained that FMAC had suggested the three percent or less for Baywide or Ocean quota and a warning letter was the intention of FMAC. He said looking at it now he did not think it was worth the postage to send a letter.

Commissioner Bowman stated that the rules were the rules and the staff should not be blamed.

Associate Member Robins said this was not a punitive case and a tolerance could be established but it must be incorporated in the beginning.

Mr. Wyatt stated that next year he would be considered a repeat offender.

Associate Member Bowden said that the FMAC needed to look at this and Commissioner Bowman agreed.

Mr. Johnson explained that this was just staff recommendation and the Commission could do something different.

Commissioner Bowman asked for a motion.

Associate Member Tankard moved to accept the staff recommendation. Associate Member Laine seconded the motion. The motion carried, 8-0. The chair voted yes.

Mr. Johnson explained that the following individual's (transferor) striped bass quota for the 2008 had been over. He said he is subject to Section 155.A.1. (page 15) of Regulation 4VAC 20-252-10, et seq. for the first offense. He said that staff recommended a warning letter be issued noting that this constituted a first offense. He further explained that the original individual with the permanent striped bass quota who transferred it to the one who exceeded the temporary individual striped bass quota was held responsible for the overage (Regulation 4VAC 20-252-160).

Adron Williams

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

Mr. Johnson explained that the following (4) individuals had exceeded their individual striped bass quotas for the 2008 season. He said they are subject to Section 155.B.2. (page 15) of Regulation 4VAC 20-252-10, et seq. for their second offense within five years. He explained that staff recommended a one-year deduction of the overage for each individual's commercial harvest quota. He stated that Mr. Fisher had sent a letter indicating he accepted the penalty.

James Fisher

Douglas Jenkins, Twin River Watermen's Association, was present and his comments are a part of the verbatim record. Mr. Jenkins stated that Mr. Fisher was a member of his watermen's association. He said Mr. Fisher had had medical problems. He said that his income was derived 100% from the fishery. He said Mr. Fisher used nets in both the Potomac and Virginia. He said he felt that Mr. Fisher should not be penalized because of his health problems. He stated Mr. Fisher had asked him to come to the hearing and speak on his behalf.

Associate Member Robins stated there were guidelines established and accountability of the overage was required and any overage was required to be paid back. He moved to accept the staff recommendation. Associate Member Tankard seconded the motion. The motion carried, 8-0. The chair voted yes.

Mr. Johnson asked if this included the other three individuals. Commissioner Bowman asked for a motion.

Willie Offield
James Moore
Justin Williams

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

Jack Stallings

Mr. Johnson explained that the following individual (transferor) had exceeded their individual striped bass quota for 2008 for striped bass. He said this individual is subject to Section 155.B.1 of Regulation 4VAC 20-252-10, et seq. for their second offense within five years. He said staff recommended a one year deduction of the overage from the individual harvest quota. He said he had not received a return receipt back on this individual notification letter.

Commissioner Bowman suggested that Mr. Stallings be served with a letter by the MPO regarding the hearing at April meeting. He asked Lt. Col. Rhodes to take care of this notification.

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- 24. **VIRGINIA SEAFOOD COUNCIL:** Request to modify their 2009/2010 field trials with the Asian oyster. (Item moved forward to the morning session and heard after Item 10.)

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25. REPEAT OFFENDERS:

Lt. Col. Warner Rhodes, Deputy Chief, Law Enforcement, gave the presentation. His comments are a part of the verbatim record.

James R. Smith

Lt. Col. Rhodes explained that James R. Smith had been summoned December 23rd for uncultured oysters and his license and permit had been confiscated in accordance with the regulation. He said Mr. Smith had had one conviction for taking oysters from the Wreck Shoal Sanctuary on November 25th. He said he was present at the last meeting, but had left before his case was heard. He stated that the Commission at the last meeting approved the suspension of his license until he did appear.

Commissioner Bowman stated that the staff recommendation was for 12 months probation.

Associate Member Holland moved to accept the staff recommendation. Associate Member Tankard seconded the motion. The motion carried, 8-0. The chair voted yes.

James W. Akers, Jr.

Mr. Akers was sworn in and his testimony is a part of the verbatim record.

Lt. Col. Rhodes explained that there were two violations for crabs and he was convicted by the court. He said there were no prior violations.

Commissioner Bowman asked if these were done on a separate day. Mr. Akers stated he tried to get the crabs out.

Commissioner Bowman stated that staff recommendation was for 12 months probation.

Associate Member Holland moved to accept the staff recommendation. Associate Member Laine seconded the motion. Associate Member Tankard stated that if this was knowingly done he could not support the motion. The motion carried, 7-1. Associate Member Tankard voted no. The chair voted yes.

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Items 18 and 19:

Jack Travelstead, Chief, Fisheries Management said that Mr. Sanford and Mr. Gregory had asked for clarification in regards to the modified leaders. He went on to explain that the Federal Rule requires these modified leaders be used only from May 1 through July 15 when the dolphins are most active in the area.

Commissioner Bowman stated that he thought that the Commission's action was intended to mirror the Federal Rule.

Associate Member Bowden asked Mr. Sanford if he wanted to be able to change the leader.

Dirk Sanford said that he would, yes, not sure he actually would though. He asked if it would be the same modified leader and for the same time.

Commissioner Bowman stated that he felt that the Commission's intent was not to be more stringent with additional restrictions.

No further action was taken.

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There was no further business and the meeting was adjourned at approximately 5:39 p.m. The next regular meeting will be Tuesday, April 28, 2009.

Steven G. Bowman, Commissioner

Katherine Leonard, Recording Secretary